No. 24-781

IN THE

Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,
Petitioner,
v.
MATTHEW PLATKIN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NEW JERSEY,
Respondent.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Suite 1000
Arlington, VA 22203
(571) 329-2227
ccrawford@afphq.org

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society.

In particular, AFPF has an interest in this case because bypassing the robust protections of *AFPF v. Bonta* threatens the rights of individuals to associate freely for whatever reason they wish—whether temporarily to achieve a single goal, indefinitely for a discrete but ongoing interest, or long-term with broadly aligned organizations. Civil society requires that Americans be open to associating at will and changing association nimbly to solve issues or simply to express themselves—and our Constitution protects that freedom. Donors to a heterodox blend of organizations may support only a portion of those organizations' activities or share just a single goal. Threats to expose nonprofits' donors place the ability to support diverse projects and opinions at risk by implying broad commonality among unrelated donors, chilling participation to only those circumstances in

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF timely notified counsel for all parties of its intent to file this brief.

which all participants are aware of each other and willing to shoulder the multifarious views of other participants. Driving civil society further into tribalism will harm us all.

SUMMARY OF ARGUMENT

The ways of attempting to circumvent First Amendment protections are limited only by the ingenuity of politicians and lawyers. The eternal vigilance on which our liberty rests requires us to be on guard against any such attempts.[2]

Sometimes, the peril comes from the nuanced interplay between state and federal law, but the chill to First Amendment rights remains the same. This case presents the threat to nonprofit-pregnancy-center donors from an investigatory subpoena that may evade review in federal court, leaving the pregnancy center and its donors without First Amendment protection and leapfrogging *AFPF v. Bonta* 594 U.S. 595 (2021) ("*AFPF*") and the exacting scrutiny that applies to donor disclosure schemes.

The subpoena here was allegedly issued for the donors' own protection—even though not a single one of nearly 5,000 donations reached by the subpoena triggered a complaint. Pet. at 8 citing Pet. App. 110a. If allowed to stand, exempting broad investigatory demands for donor identification from constitutional review until after associational rights have been irreparably damaged would gut *AFPF* and freedom of

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[2] John Philpot Curran, Dublin, 1790 ("The condition upon which God hath given liberty to man is eternal vigilance,"). *See,* Anna Burkes, *Eternal Vigilance*, Thomas Jefferson's Monticello (Sept. 7, 2010) available at: https://www.monticello.org/exhibits-events/blog/eternal-vigilance/.

association for non-profits that may be disfavored by some state's politicians. And, although the process employed here is different from the one in *AFPF*, the chilling effect is the same.

In addition to exposing donors to politically-motivated blowback, for donors who may support the charity's mission, but not police the viewpoints of other donors, surprise disclosure and conflation with the views of strangers imposes a high price for exercising their right to associate with the charity.

In *AFPF*, the Court held that exacting scrutiny requires narrow tailoring, or a "means-end fit" between a disclosure mandate and the sufficiently important governmental interest the mandate claims to uphold. *AFPF*, 594 U.S. at 611, 614. In *AFPF*, exacting scrutiny was applied to the California Attorney General's mandate for blanket disclosure of donors to charitable organizations. *Id*. at 611. But *AFPF* was not limited to narrow categories of charities or particular formats of disclosure; nor did it include loopholes allowing the government exceptions from the First Amendment that, if publicly known, would chill association, and if not known, would subject donors to startling disclosure and implied association with unrelated messages and parties.

The *AFPF* means-end fit seems to be challenging lower courts with some regularity, exposing charitable donors to unconstitutional risk. The way *AFPF* was bypassed here exposes a serious loophole in First Amendment protection where a motivated attorney general can impose an investigatory demand on a charity to threaten disclosure of unwilling donors without satisfying the exacting scrutiny that should limit such attempts.

This case represents the far extreme, bypassing *AFPF* altogether; but even where *AFPF* is applied, the means-ends requirement of narrow tailoring is sowing confusion. In *Gaspee Project v. Mederos,* for example, the First Circuit blessed a disclosure scheme that replaced a means-end test with an elaborate set of parameters regarding who would be affected by the scheme. 13 F.4th 79, 82, 88–9 (1st Cir. 2021). Rather than focusing on *why* they would be affected, *Gaspee* essentially substituted narrow application for narrow tailoring. *Id*. Since *Gaspee* was decided, it has become a go-to precedent for those wishing to evade this Court's direction to use *AFPF* in donor disclosure cases, spreading misapplication across circuits.

The approach here adds insult to the constitutional injury, by subjecting donors to disclosure "for their own protection" because the Attorney General appears to disfavor the charity to which they have given. This is not the First Amendment protection envisioned by *AFPF* and is contrary to this Court's approach to the Speech Clause of the First Amendment which rejects speech regulations that "seek to keep people in the dark for what the government perceives to be their own good." *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

If allowed to stand, this approach would add another tool to the toolbox of those seeking to undermine donor privacy by procedural maneuvering.

ARGUMENT

I. UNDER *AMERICANS FOR PROSPERITY FOUNDATION V. BONTA*, COURTS MUST APPLY EXACTING SCRUTINY TO DONOR DISCLOSURE.

AFPF v. Bonta controls the New Jersey Attorney General's investigatory demand for donor disclosure, yet the procedural turnings of this case threaten to evade faithful application of its holding. Like the "blanket demand for Schedule Bs" in *AFPF*, the demand for disclosure of First Choice's donors is subject to exacting scrutiny. *AFPF*, 594 U.S. at 611. Even if the disclosure is purportedly confidential, the associational chill identified in *AFPF* applies. *Id.* at 616 ("Our cases have said that disclosure requirements can chill association even if there is no disclosure to the general public.") (cleaned up). "Exacting scrutiny is triggered by 'state action which may have the effect of curtailing the freedom to associate,' and by the 'possible deterrent effect' of disclosure." *Id.* (quoting *NAACP v. Alabama*, 357 U.S., 449, 460–461 (1958). *See also Talley v. California*, 362 U.S. 60, 65 (1960) ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance").

Like in *AFPF*, the Attorney General here asserts an interest in preventing fraud, specifically whether donors have misunderstood that they donated to a pregnancy center rather than an abortion provider. And like in *AFPF*, it "goes without saying that there is a substantial governmental interest in protecting the public from fraud." *AFPF* at 612 (cleaned up). But the informational demand here fails the means-end test in the same way *AFPF* failed the means-end test by seeking information on nearly 5,000 donations

with no identified causality between a list of donations and the Attorney General's hypothesis that somewhere there might be a confused donor.[3]

The Attorney General tries to distinguish *AFPF* on the basis that the mechanism used here to compel disclosure is a subpoena rather than a regulation, followed by a demand letter. Opp. at 28. That is true, but irrelevant. The effect on donors and the chill to their associational rights is the same regardless of which lever the government pulls to expose them, and the precedential foundation for *AFPF* includes both regulations and investigatory demands.

The Attorney General argues that *AFPF* can be distinguished from this case. Opp. at 28–29. But whether the Attorney General could satisfy *AFPF* is a distinct question from whether it must be applied. The answer to the second question is yes. The concerns that informed this Court's holding in *AFPF* are present here, chilling the First Amendment rights of donors in the face of government demands to know who is supporting a charity and why.

A. *AFPF* Held that Exacting Scrutiny is the Proper Standard for Compelled Disclosure of Donor Information.

AFPF was a facial challenge to a regulation requiring charities operating in California to register with the Attorney General's office and disclose major donors by filing Schedule B of their IRS Form 990 with

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[3] App.100a–10a; Br. of Def-Appellee at 6–8, *First Choice Women's Res. Ctrs., Inc. v. Att'y Gen. N.J.*, 2024 WL 5088105 (3d Cir. Dec. 12, 2024) (No. 24-3124), Doc.43 (Attorney General's concern was that a donor might mistakenly believe First Choice was a pro-abortion organization.).

the state. *AFPF*, 594 U.S. at 601–02. The disclosure requirement was not related to any specific activity, speech, or issue, but solely for annual registration renewal. *Id*. at 602. The case came before the Court with the contours of the applicable standard of review unsettled. *Id*. at 607. While the lower courts had nominally applied exacting scrutiny, there was disagreement over whether narrow tailoring was required. *Id*. at 605.

Americans for Prosperity Foundation, a public charity that was subject to the regulation, challenged the blanket donor disclosure requirement on the basis that it burdened the First Amendment associational rights of its donors and that exacting scrutiny required more than the lenient standard applied by the Ninth Circuit. *Id*. at 602–03.

This Court held that, at the least, exacting scrutiny applies to compelled disclosure requirements and that narrow tailoring is a necessary element of that standard. *Id*. at 607. Exacting scrutiny thus lies between strict scrutiny, with its least restrictive means test, and the "substantial relation" standard noted in *Doe v. Reed*, 561 U.S. 186, 196 (2010), to require narrow tailoring, but not least restrictive means. *Id*. at 608.

B. *AFPF* Relied Heavily on Precedent Protecting Disfavored Viewpoints.

The precedential bases for applying exacting scrutiny to donor disclosure came largely from cases protecting political speech and association disfavored by the government, such as *NAACP v. Alabama ex rel. Patterson*, because "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as other

forms of governmental action" *AFPF*, 594 U.S. at 606 (citing 357 U.S. at 462). This Court also made clear that "it is immaterial to the level of scrutiny whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny." *Id.* at 608 (cleaned up).[4] And the government cannot bypass constitutional protection by defining labels for new categories of speech to exclude them from the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels"). Importantly, the precedent underlying *AFPF* was not limited to regulations but also derived from investigatory demands. *Gibson*, 372 U.S. 539, (legislative committee subpoena); and

[4] *See Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963) ("an adequate foundation for inquiry must be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities or seriously interfere with similarly protected associational rights."); *Button*, 371 U.S. at 438 ("Broad prophylactic rules in the area of free expression are suspect."); *Bates v. Little Rock*, 361 U.S. 516, 527 (1960) (the municipalities have failed to demonstrate a controlling justification for the deterrence of free association which compulsory disclosure of the membership lists would cause"); *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 245 (1957) ("when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas" compulsory process must be carefully circumscribed.).

Sweezy, 354 U.S. at 242 (summons to testify before the Attorney General).

Thus, exacting scrutiny squarely applies to donor disclosure regimes, regardless of the process used, including where, as here, the charity promotes a viewpoint apparently contrary to the state's.

C. Narrow Application is Not a Substitute for the Means-Ends Requirement of Narrow Tailoring.

Under *AFPF*, "exacting scrutiny requires that there be a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and that the disclosure requirement be narrowly tailored to the interest it promotes." *AFPF*, 594 U.S. at 611 (cleaned up). Thus, "even a legitimate and substantial" government interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id*. at 609 (citing *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

The narrow tailoring element is critical in cases involving burdens on the First Amendment, even if the burden is indirect "because "First Amendment freedoms need breathing space to survive." *AFPF*, 594 U.S. at 609 (quoting *Button*, 371 U.S. at 433). This requires satisfying two factors: 1) a proper scope of application; and 2) a means-ends fit between the method employed and the goal. In *McCutcheon v. Federal Election Commission*, a plurality of the Court explained that "[i]n the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose

scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective." 572 U.S. 185, 218 (2014) (cleaned up).

In *AFPF*, blanket donor disclosure failed narrow tailoring because it was overbroad and lacked "tailoring to the State's investigative goals." *AFPF*, 594 U.S. at 615. Here, the subpoena has the same lack of connection between the demand and the alleged investigatory interest; but that obvious flaw is obscured by the patina of law enforcement and reducing the scope of the demand to "only two websites." Opp. At 8 citing Pet. App. 4a. But that does not satisfy a necessary characteristic of tailoring: a means-end fit between the demand for disclosure and the governmental interest the demand purports to address. If anything, a targeted demand without a close means-end fit is more dangerous, because it allows the Attorney General to direct the burden of disclosure toward disfavored charities and create the misimpression that the request is narrow. *But narrow application is not the same as narrow tailoring.* And, where narrow application is discretionary rather than based in regulation, a means-end fit is even more crucial to protecting associational freedom from viewpoint bias.

The peril of substituting narrow application for the scope and means-end requirements of tailoring is already evident in how narrow tailoring has diverged from *AFPF* in recent cases.

Gaspee Project v. Mederos, for example, which was decided after *AFPF*, nominally embraced *AFPF* but misapplied the narrow tailoring element. 13 F.4th 79, 85 (1st Cir. 2021). *Gaspee* dealt with disclosure of

funding sources for independent expenditures[5] and electioneering communications.[6] 13 F.4th 79, 82 (1st Cir. 2021). The Act in *Gaspee* required filing with the State Board of Elections a report disclosing all organization donors over $1,000, but it also imposed an on-communication disclaimer identifying the five largest donors from the preceding year.[7] *Id*. at 83. The asserted government interest in *Gaspee* was in an "informed electorate" which it held to be "sufficiently important to support reasonable disclosure and disclaimer regulations." 13 F.4th at 86. But under *AFPF* it is not enough to invoke tautologies such as demanding information for the purpose of being informed.[8] Something more is needed.

Instead of relying on a purpose-based rationale, *Gaspee* resorted to a plethora of characteristics unrelated to a means-end relationship between the

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[5] An "'independent expenditure' . . . 'expressly advocates the election or defeat of a clearly identified candidate, or the passage or defeat of a referendum.'" *Gaspee,* 13 F.4th at 82–3.

[6] An "'electioneering communication' . . . identifies a candidate or referendum'" and "is made within sixty days of a general election or referendum or within thirty days of a primary election." *Id*. at 83.

[7] Donors could opt out of the disclosure requirement by electing that donations not be used for funding of independent expenditures or electioneering communications. *Id*. at 82.

[8] *AFPF* did not address disclaimers nor any other form of compelled speech and *Buckley*, likewise, involved disclosure but not disclaimers. *Citizens United*, which addressed mandatory disclaimers was decided under the pre-*AFPF* annunciation of exacting scrutiny and thus required only "a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 366 (2010).

government's goal and the First Amendment burden imposed. Instead, *Gaspee* focused on time and size limitations—which affect the pool of speakers and messages subject to the law but fail to explain why the law should be applied at all. 13 F.4th at 88–9. Much like a law that applies only to redheads or early risers without any explanation of how narrowing the pool of targets produces the desired end, this type of analysis substitutes an exercise in narrow *application* for narrow *tailoring*. But infringing the rights of a small group is still infringement. And limiting a law based on characteristics that do not satisfy the means-ends requirement raises concerns that the law may be unconstitutionally underinclusive. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) ("The ordinances are underinclusive for those ends. . . . The underinclusion is substantial, not inconsequential."); *Brown v. Ent. Merchants Ass'n,* 564 U.S. 786, 802 (2011) ("The consequence is that its regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.").

Having "tailored" the law to irrelevant characteristics, *Gaspee* went a step further—blessing, rather than condemning as it should, the statutory demand that donors silence themselves by opting out of constitutionally protected messaging to avoid being outed by the organizations to which they donate. 13 F.4th at 89. Donors could avoid exposure under the law by either limiting the size of their donations or by opting out of allowing their donations to be used for the restricted forms of speech. *Id*. Reliance on self-

censorship to excuse an unconstitutional law creates a moral hazard by allowing constitutional protections to be bypassed by shifting the burden to the speaker. Nothing in *AFPF* endorses that approach.

Thus while *Gaspee* purported to adopt the exacting scrutiny standard from *AFPF*, its analysis misapprehended what it means for a law to be "narrowly tailored to achieve the desired objective," 594 U.S. at 609, and created precedent in the First Circuit replacing the means-end test of narrow tailoring with a narrow application test that evades causation by focusing on *who* rather than *why*.

Gaspee's distorted framework has been used to uphold or distinguish disclosure regimes. The opt-out characteristic has gained traction despite having no bearing on the requisite means-end fit and the misdirection of shifting the burden of unconstitutional laws onto the donor. That framing error works a particular mischief in cases like this one because a donor cannot opt-out of an investigatory subpoena issued to the recipient after the contribution has been made; and any prospective opt-out made in fear that a disfavored charity may be investigated locks in the unconstitutional chill without the government having to do anything.

More recent cases show how the application of narrow tailoring has diverged from *AFPF*.

In *Dinner Table Action v. Schneider*, the issue was a Maine law that in relevant part required any person, party committee, or PAC making any "independent expenditure" in excess of $250 during any one candidate's election, to disclose the total contributions from each contributor regardless of the amount of the contribution. No. 24-430, 2025 WL 1939946, at *5 (D.

Me. July 15, 2025) (cleaned up). Dinner Table Action claimed that its smaller dollar contributors would not continue to contribute if their identities were subject to disclosure. *Id*. The court relied on *Gaspee* to guide its application of narrow tailoring on two points. First, it compared the $1,000 expenditure limit from *Gaspee* to the $250 expenditure limit in the Maine law. *Id*. at 5. Second, it compared the *Gaspee* opt-out provision to the absence of such an opt-out provision under the Maine law. *Id*. at 6. The court thus found that the Maine disclosure requirement swept so broadly that it provided "no meaningful opportunity for anonymous contributions," thus could not be "described as narrowly tailored to Maine's informational interest." *Id*. at 6. While this holding represented a win for Dinner Table Action and its donors, the narrow tailoring analysis replicated the *Gaspee* errors by: 1) relying on how many people the law applied to rather than on whether there was a causal relationship between those people and the government's alleged interest, *i.e.* narrow application, not narrow tailoring; and 2) relying on whether the contributor could avoid the unconstitutional burden by opting out of giving.

Similarly, in *Wyoming Gun Owners v. Gray*, Wyoming had a campaign finance scheme that required organizations that spend over $1,000 on an "electioneering communication" to disclose contributions and expenditures related to that communication. 83 F.4th 1224, 1229 (10th Cir. 2023). Wyoming Gun Owners, a non-profit gun rights advocacy group, challenged the constitutionality of the disclosure scheme. *Id*.

The court considered "whether Wyoming narrowly tailored the law" to the state's anticorruption and

informational interests and held that it did not, in part because the vague language regarding to whom the statute applied required over-disclosing contributions to avoid missing anyone. *Id*. at 1244, 1247. The court suggested the vagueness issue could potentially be resolved if the law required earmarking specific contributions for electioneering. *Id*. at 1248. That approach would at least make the Wyoming law consistent with a Colorado law the court had previously upheld as satisfying narrow tailoring, because it required "that organizations need only disclose those donors who have specifically earmarked their contributions for electioneering purposes." *Id*. at 1248 (citing *Independence Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016). That approach, the court opined, would not be in tension with the *Gaspee* opt-out approach. *Id*. at 1249.

Wyoming Gun Owners is thus another case that could be considered a win for narrow tailoring. But like *Gaspee*, much of the analysis turned on whether donors could opt-in or opt-out of disclosure rather than whether the state had justified why donors with certain characteristics or behaviors could be compelled to disclose their identities. The opt-out/opt-in test, to the extent it has gained traction as relevant to the narrow tailoring analysis, must be justified by a link to the purpose of the disclosure and not simply provide a way to expand or contract the number of people to whom the disclosure applies.

A Colorado case, by contrast, showed the correct approach to the means-end test when it reviewed a state law that required an "issue committee" to disclose the name of the "natural person who is the registered agent" of the entity paying for the any

communication supporting or opposing a ballot issue. *No on EE - A Bad Deal for Colorado, Issue Comm. v. Beall*, 558 P.3d 671, 673 (Colo. Aug. 4, 2025). No on EE, which was an issue committee, challenged the registered-agent provision of the law. *Id.* at 675–76.

Applying exacting scrutiny, the court explained that it was required to "consider whether the government has demonstrated its need for the disclosure requirement in light of any less intrusive alternatives," *Id.* at 676–77 (cleaned up), and thus examined whether the links that were claimed to exist between the disclosure and the state's informational interest made sense, holding,

> There can be no serious argument that requiring an issue committee to disclose the name of its registered agent serves the governmental interest in informing the public about an issue committee's sources of funding. There is no requirement in Colorado law that the registered agent be a donor to an issue committee, much less a significant donor. Thus, to the extent the state would assert such an interest in this context, there would be a "dramatic mismatch . . . between the interest [the state] seeks to promote and the disclosure regime that [it] has implemented in service of that end."

No on EE, 558 P.3d at 678 (citing *AFPF*, 594 U.S. at 612). Accordingly, because "the defendants don't even try to explain how knowing the name of the registered agent—as opposed to some other person with a closer connection to the issue committee—will actually

assist voters" and "the mere possibility that disclosure of the registered agent's name might, in some cases, provide relevant information to someone can't be sufficient if 'exacting scrutiny' is to mean anything." *Id*. at 679. The court held the requisite link between the informational interest of the state and the name of the registered agent was lacking. It thus followed "that the registered agent disclosure requirement . . . violates issue committees' free speech rights under the First Amendment." *Id*. at 680.

Because "exacting scrutiny is triggered by state action which may have the effect of curtailing the freedom to associate, and by the possible deterrent effect of disclosure," *AFPF*, 594 U.S. at 616 (cleaned up), narrow tailoring must be rigorously applied lest exacting scrutiny be exacting in name only.

D. The Burden of Disclosure Must be Commensurate to the State's Need for the Information.

The burden imposed by a state's disclosure demand must be commensurate with the burden placed on the target. *AFPF*, 594 U.S. at 609 (citing *Shelton*, 364 U.S. at 488; *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961)). This Court has been clear that "[w]hen it comes to 'a person's beliefs and associations,' [b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution." *AFPF*, 594 U.S. at 610 *quoting* (*Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion)). "Such scrutiny, we have held, is appropriate given the 'deterrent effect on the exercise of First Amendment rights' that arises as an 'inevitable result of the government's conduct in requiring disclosure.'"

AFPF 594 U.S. at 607 (citing *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (*per curium*)). "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007).

This analysis is required even when the claimed injury is chill of constitutional rights. *AFPF*, 594 U.S. at 609 (citing *Button*, 371 U.S. at 433) ("Narrow tailoring is crucial where First Amendment activity is chilled."). Thus, the lower court here got it wrong by rejecting chill as an injury sufficient to trigger review: "but this Court finds that constitutional injury can only occur here if there is an actual or imminent threat of forced compliance by the state court, which, to date, there has not been." App. 42a, n 22. The burden here was imposed when the Attorney General made the demand for donor disclosure without identifying an interest that disclosure of *this group of donors* would aid him in curing. Injury to First Amendment rights of anonymous donors does not wait until the state court threatens contempt.

Unlike a subpoena for private records, where the private party may argue to the court that cost, privilege, or other burdens that would not attach unless the subpoena is enforced, should excuse disclosure, here the chill on association attaches as soon as the threat becomes known. And it attaches more broadly than would be the case if only the target of the subpoena had an interest in confidentiality, in part because the donors must depend on First Choice to defend not only its own rights but their rights as well—while being commanded by the trial court to negotiate away those rights.

The threat that donor anonymity may be lost whenever an Attorney General issues an investigatory demand with no link to any known injury, once established as a lawful practice, would reach beyond resolution or negotiation of the subpoena at issue here. Once the bell blessing this practice has been rung, it cannot be unrung.

Moreover, it is no answer to say that the broad collection of donor information has been narrowed by the Attorney General's exercise of discretion to target only those entities with which he apparently disagrees. If anything, discretionary investigation of donors with no predicate of harm, aggravates the constitutional violation by imposing viewpoint discrimination,[9] striking at the very heart of the First Amendment. *AFPF* 594 U.S. at 606 ("Protected association furthers a wide variety of political, social, economic, educational, religious, and cultural ends, and is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.") (cleaned up). Had any donor alleged non-speculative harm, then the Attorney General presumably could have narrowed his demand to burden only donor information relating to the injury alleged and may be on firmer ground than he currently is.

But generalized donor disclosure in search of an injury imposes a burden that cannot be tied to

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[9] "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id*. at 829.

necessity and thus violates narrow tailoring. Where, as here, the government has not even tried to tie the burden to the need, narrow tailoring cannot be satisfied. As the Tenth Circuit explained in *Wyoming Gun Owners*, identifying the need for the burden is critical.

> Perhaps the Secretary's fix would seem more reasonable if these burdens were inevitable. After all, the lodestar of the narrow-tailoring inquiry is the necessity of the burdens. *Bonta*, 141 S. Ct. at 2385. If the government seriously undertook to address the problems it faces with less intrusive tools readily available to it, we cannot demand it try a bit harder. . . . But less intrusive tools—tools that would not compound WyGO's initial statutory burden—were readily available, and the Secretary offers no reason why Wyoming could not have used them

Wyoming Gun Owners, 83 F.4th at 1248 (cleaned up).

Instead, the Attorney General and the court below attempt to shift responsibility for narrowing the demand onto the victim by making the target negotiate its scope before asserting the constitutional injury. Pet. at 18 citing App. 4a ("the parties have been ordered by the state court to negotiate to narrow the subpoena's scope."). But that will not do either, both because the form of the demand is not relevant to the constitutional injury, *AFPF* 594 U.S. at 605–06 ("Government infringement of this freedom can take a number of forms."), and because victims of unconstitutional demands do not bear the burden of curing their own injury—that burden must be born by

the government. *Wyoming Gun Owners v. Gray*, 83 F.4th at 1248 (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001) ("the government must still justify the burden that exists.).

II. THIS CASE DEMONSTRATES THE RISK TO FREE ASSOCIATION BY PROCEDURAL MANEUVERING TO CIRCUMVENT *AFPF V. BONTA*.

This case demonstrates the risk to constitutionally-protected association that is created from demoting constitutional review until after other procedures have run their course. *Cf. Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 180 (2023) (recognizing preeminence of federal court constitutional review over preferences for agency efficiency). For example, the district court opined, relative to the alleged injury from removing donor information from publicly-available videos,[10] "Plaintiff can alter the video back to its original form. Therefore, the harm is, by definition, reparable." App. 52a. Unless altering the video also includes time-travel to recoup the time lost, the injury is locked in. Moreover, this approach misstates bedrock First Amendment law, which recognizes the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976).

Similarly, the Chancery Court's holding that "service of the subpoena itself was not unconstitutional based on the statutory investigatory

[10] See App. 51a –52a "Plaintiff's final contention submits that the Subpoena's issuance impacted Plaintiff's speech where it had to alter YouTube videos to protect clients from harassment as a result of its issuance."

powers granted to plaintiffs by the Legislature," App. 63a, also misses the point. Whether state law authorizes a district attorney to issue subpoenas has no bearing on whether the subpoena imposes unconstitutional burdens. But these types of misdirection will harm associational rights by miring a charity in procedures that should not be imposed when the request itself is unconstitutional—even if the procedures are supposedly "mild." *AFPF*, 594 U.S. at 611 ("Nor does our decision in *Reed* suggest that narrow tailoring is required only for laws that impose severe burdens.").

The burden here is not mild. The New Jersey Attorney General's investigative power, which the New Jersey Supreme Court has characterized as the "power of inquisition", allows the Attorney General to "investigate merely on the suspicion that the law is being violated, or even just because [he] wants assurance that it is not." *In re Addonizio*, 248 A.2d 531, 539 (N.J. 1968). This is essentially the same justification employed in *AFPF*. This Court rejected that approach. *AFPF*, 594 U.S. at 597 ("In reality, California's interest is less in investigating fraud and more in ease of administration. But 'the prime objective of the First Amendment is not efficiency.'") (citing *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

Regardless of how the state court proceedings eventually turn out, proceedings in which constitutional concerns play second fiddle to state police powers put donors on notice that if they are disfavored by the state, then they can expect to be subject to persistent risk of disclosure. The chill to association and expression that *AFPF v. Bonta* was meant to avoid is inescapable.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd. Suite 1000
Arlington, VA 22203
(571) 329-2227
ccrawford@afphq.org

Counsel for Amicus Curiae

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