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 OF *AMICUS CURIAE* PEOPLE UNITED FOR PRIVACY FOUNDATION IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether a state's invasion of the First Amendment right to private association is presumptively unconstitutional.

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## INTEREST OF *AMICUS CURIAE*[1]

The People United for Privacy Foundation (PUFPF) is a nonprofit, nonpartisan organization that advocates for the right of individual Americans to come together in support of shared values. PUFPF believes that all Americans have the right to support causes they believe in without fear of harassment or intimidation. To that end, it works to advance the constitutional right to privately associate without government permission or supervision.

PUFPF provides information and resources to policy makers, media, and the public about the close and necessary relationship between citizen privacy and the freedoms of speech and association. Pursuant to that interest, PUFPF submits comments on proposed legislation and rules concerning any government action—particularly but not limited to state legislation—that threatens to chill nonprofit advocacy by unlawfully unmasking organizations' members and financial supporters.

PUFPF believes the actions taken by New Jersey in this case, if left uncorrected, will chill the advocacy work of nonprofits nationwide. Accordingly, it submits this brief in support of Petitioner and in defense of the First Amendment rights of nonprofit organizations and their donors.

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[1] Pursuant to Rule 37.6, counsel for *Amicus Curiae* certifies that no party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than *Amicus Curiae* contributed money to fund the brief's preparation or submission.

## SUMMARY OF THE ARGUMENT

Nearly a half century ago, this Court announced the "general principles" that govern state demands for private donor information. *Buckley v. Valeo,* 424 U.S. 1, 64 (1976) (per curiam). Having "repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court insisted that "the subordinating interests of the State must survive exacting scrutiny." *Id.* (citations omitted).

As this case demonstrates, that sweeping pronouncement, recognizing hard-won lessons from the civil rights movement, has failed to take root. In the decades since, the courts have struggled to meaningfully protect the right of individual Americans to join together and engage in "effective advocacy," *id.* at 65 (quoting *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958)), without undue risk of having their participation unmasked by hostile, or idly curious, government actors.

The Court should take this opportunity to clarify the law. State efforts to intrude upon the privacy of an organization's individual members and financial supporters are constitutionally suspect and must be justified, in each instance, under exacting scrutiny.

## ARGUMENT

### I. Compulsory demands for an organization's donor information are presumptively unconstitutional and must survive exacting scrutiny.

Only four years ago, a controlling plurality of this Court explained that "First Amendment challenges

to compelled disclosure" of donor information are subject to "exacting scrutiny." *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 607 (2021) (plurality op.) ("*AFPF*").[2] In reviewing California's "dragnet for sensitive donor information," *id.* at 614, the Court clarified that exacting scrutiny requires "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." *Id.* at 611 (quotation marks and internal citations omitted). And the plurality explained that the rigors of exacting scrutiny are necessary because of the "deterrent effect" on First Amendment liberties "that arises as an inevitable result of the government's conduct in requiring disclosure." *Id.* at 607 (quoting *Buckley*, 424 U.S. at 65).

Under that analysis, the state bears the burden of showing its need to identify an organization's donors or members. The Court nowhere suggested that groups resisting a state demand for this constitutionally sensitive information must first demonstrate that their supporters will be chilled. Indeed, the dissenters in *AFPF* complained that "the Court abandon[ed] the requirement that plaintiffs demonstrate that they are chilled" and castigated the majority for "presum[ing]… that all disclosure requirements impose associational burdens." *Id.* at 629 (Sotomayor, J., dissenting).

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[2] Justice Thomas would have gone further and applied strict scrutiny. 594 U.S. at 619 (Thomas, J., concurring in the judgment).

Nevertheless, the lower courts have failed to apply exacting scrutiny each time the government threatens to invade the "privacy of association and belief guaranteed by the First Amendment." *Buckley,* 424 U.S. at 64 (*citing Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963)). This is a dangerous threat to First Amendment rights. Requiring organizations to demonstrate specific risk to their donors, rather than forcing the government to carry its burden, will inevitably chill civic participation. After all, no donor can predict the future; the favored organization today may be the dissident tomorrow.

The Constitution does not condition the freedom of association on individuals' willingness to future-proof themselves against changing political winds. Nor does it require donors to risk even harmless disclosure because of official curiosity. This Court should emphasize that demands for membership or donor information are presumptively unconstitutional, and subject to exacting scrutiny, in all cases.

### A. Lower courts are defanging an exacting scrutiny that was supposed to have real teeth.

A growing number of lower courts have failed to place the burden of persuasion on the government in compelled disclosure cases.

**1.** It did not take long for lower courts to "conflict with the landmark ruling [in *AFPF*]." *Ward v. Thompson*, No. 22-16473, 2022 WL 14955000, at *3 (9th Cir. Oct. 22, 2022) (unpublished order) (Ikuta, J., dissenting). Pouncing on the *AFPF* majority's recounting of procedural history, some courts have

revived the individualized harm requirement desired by the *AFPF* dissenters.

The Ninth Circuit made this error early, holding in 2022 that "the party resisting disclosure must make a '*prima facie* showing . . . that enforcement . . . will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or chilling of, the members' associational rights.'" *Ward*, No. 22-16473, 2022 WL 14955000, at *1 (quoting *Perry v. Schwarzenegger*, 591 F.3d 1147, 1160 (9th Cir. 2010) (quotation marks and citation omitted)). "In short, before subjecting a compelled disclosure to heightened scrutiny under the First Amendment, we must determine that 'disclosure of the information will have a deterrent effect on the exercise of protected activities.'" *Id*. (citing *Perry*, 591 F.3d at 1162). The Ninth Circuit thereby relied on a 2010 circuit precedent with no serious examination of the holding in *AFPF*.

The Ninth Circuit's decision triggered a baffled dissent by Judge Ikuta, who accused the court of immediately bucking the Supreme Court only one year after its rebuke in *AFPF*. She explained that "*whenever* the government compels disclosure of members' identities, it burdens the First Amendment right of expressive association." *Id*. at *3 (Ikuta, J., dissenting) (citing *AFPF*, 594 U.S. at 605–07). And she noted that "the Court subjected disclosure requirements to exacting scrutiny without first requiring plaintiffs to establish that the disclosure will actually subject them to threats, harassment, or reprisal." Accordingly, "courts must

presume that a disclosure requirement burdens First Amendment rights without any showing of specific deterrence of individual members." *Id.*

Her view has not carried the day. Shortly thereafter, the Ninth Circuit, over strenuous dissents, reaffirmed its pre-*AFPF* line of cases requiring associational plaintiffs to show that compelled disclosures "actually and meaningfully deter contributors." *No on E v. Chiu*, 85 F.4th 493, 509 (9th Cir. 2023), *cert. denied sub nom. No on E, San Franciscans v. Chiu*, 145 S. Ct. 136 (2024) (citing *Family PAC v. McKenna*, 685 F.3d 800, 807 (9th Cir. 2012)).

The Ninth Circuit is not alone in its error. The Sixth Circuit (also over a dissent) has done likewise, reaffirming pre-*AFPF* caselaw requiring Plaintiffs to show that compelled disclosure "'directly or indirectly' affects their 'group membership' in a way that undermines their message." *Lichtenstein v. Hargett*, 83 F.4th 575, 603 (6th Cir. 2023) (citing *Miller v. City of Cincinnati*, 622 F.3d 524, 538 (6th Cir. 2010)).

**2.** To be sure, not every lower court is misapplying *AFPF*. Judge Ikuta's prescient dissent in *Ward v. Thompson* has been adopted by the Tenth Circuit. *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023) (noting that "[c]ompliance with [compelled disclosure] requirements *necessarily burdens* WyGO's First Amendment right to association") (emphasis added) (citing *Ward*, No. 22-16473, 2022 WL 14955000, at *3 (Ikuta, J., dissenting)).

The Eighth Circuit also looks to the compelled disclosure itself, rather than requiring

individualized harm, when applying exacting scrutiny. *Dakotans for Health v. Noem*, 52 F.4th 381, 392 (8th Cir. 2022) (applying exacting scrutiny where the "personal information required by SB 180—upon penalty of criminal sanctions as well as the invalidation of all signatures on a petition—*may* subject circulators of controversial petitions to harassment or even risk of personal harm.") (emphasis added). District courts have likewise recognized that the threshold question in a compelled disclosure case concerns the risk of First Amendment harm, not a threshold burden to show individualized chill. *See, e.g.*, *Students for Life Action v. Jackley*, 746 F. Supp. 3d 668, 687 (D.S.D. 2024) (plaintiff organization had standing where they plausibly alleged donors may fear reprisals that "threaten[] chilling the association rights of its donors"); *Buckeye Inst. v. Internal Revenue Serv.*, No. 2:22-CV-4297, 2023 WL 7412043, at *4 (S.D. Ohio Nov. 9, 2023), *amended*, No. 2:22-CV-4297, 2024 WL 770872 (S.D. Ohio Feb. 26, 2024) (applying exacting scrutiny without requiring a showing of individualized harm); *All. of Health Care Sharing Ministries v. Conway*, No. 24-CV-01386-GPG-STV, 2025 WL 315389, at *24 (D. Colo. Jan. 13, 2025) ("rephras[ing] this inquiry in terms of 'risks of a chilling effect' or burdens rather than actual chilling effects or burdens.").

In short, there is growing disagreement among the lower courts concerning the threshold showing a plaintiff must make to obtain exacting scrutiny of a state disclosure demand, and a growing risk that these courts will shift the burden away from the government. Outside of the Eighth and Tenth Circuits, Judge Ikuta's—and this Court's—position has not prevailed. The Court should explain that all state

demands for donor and membership information are presumptively unconstitutional and must be subjected to exacting judicial scrutiny.

### B. A federal forum is illusory if compelled disclosure is not a constitutional injury.

Unless the Court clarifies that compelled disclosure is, in itself, a constitutional injury, a federal forum will be illusory. Even if compelled disclosure violates the First Amendment, courts will simply refashion the lack of objective chill as a failure to meet the concrete injury requirement of Article III standing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (plaintiffs must show "an invasion of a legally protected interest which is… concrete and particularized.").

That is what happened here. The Third Circuit found jurisdiction was lacking because Petitioner's affidavit did "not yet show enough of an injury." Pet.App.4a. In other words, absent a sufficient injury, the case was not ripe, Article III standing was lacking, and no federal forum was available.

But the Attorney General's demand for constitutionally privileged information, standing alone, constituted an injury in fact. After all, a demand backed by the coercive power of the state is always chilling. Government action without "sanction" is "nothing more than advice or recommendation." The Federalist No. 15 (Hamilton). There are no kind, gentle government demands, and a subpoena is necessarily understood to be more than a mere request.

Here, Petitioner's affidavits show exactly what is needed to have the Attorney General's demand

evaluated under exacting scrutiny in a federal forum: (i) Petitioner and its members and donors are engaged in expressive association, joining together to pursue their views on political, social, religious, and cultural questions; (ii) New Jersey's state action would compel disclosure of those donors; and (iii) Petitioner faces a credible threat of enforcement. Petitioner need not show more. The Third Circuit's additional requirement—that Petitioner show *individualized, particularized* harms to its associational interests—is unfounded, contrary to *AFPF*, and undermines access to federal courts for constitutional claims.

Other courts bear out this error, joining the *AFPF* dissent in requiring parties to show "a reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *See, e.g., Gaspee Project v. Mederos*, 13 F.4th 79, 92 (1st Cir. 2021) (citing *Buckley*, 424 U.S. at 74 in lieu of *AFPF*); *Ward*, No. 22-16473, 2022 WL 14955000, at *1; *see also Rio Grande Found. v. Oliver*, 727 F. Supp. 3d 988, 1010 (D.N.M. 2024); *Young Conservatives of Texas Found. v. Univ. of N. Texas*, No. 4:20-CV-973-SDJ, 2022 WL 2901007, at *3 (E.D. Tex. Jan. 11, 2022).

These courts are mistaken. In *TransUnion*, this Court clarified that concrete Article III injuries include "disclosure of private information" as well as "traditional harms … specified by the Constitution itself[,]" such as harms to First Amendment interests. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021). And disclosure requirements

backed by a concrete threat of enforcement have been found to constitute Article III harm in the campaign finance context. *See Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008).

Here, the threatened violation of the First Amendment through compelled donor disclosure sits well within the "traditional" sphere of Article III harms. It need not further ripen because the "risk of a chilling effect on association is enough," *AFPF*, 594 U.S. at 618 (majority op.), and compelled disclosure inevitably imposes that risk.

* * *

State demands for donor information are presumptively unconstitutional unless the government can bear the burdens of exacting scrutiny. This Court should clarify that parties facing such demands need show no more than a reasonable risk of enforcement before availing themselves of the protection of the federal courts.

## II. The Court's campaign finance jurisprudence has set the stage for governmental efforts to bypass the right to private association.

If the right to "privacy of association and belief," *Buckley,* 424 U.S. at 64, has become a second-class liberty, the responsibility lies with this Court's campaign finance decisions. While acknowledging the inherent chill to speech and association from compelled donor disclosure, the Court has nevertheless blessed sweeping political disclosure regimes at the heart of the First Amendment's protections. In a world where the government may compel the disclosure of miniscule political contributions and

permanently publish that information on the internet, it is no wonder that lower courts have struggled to divine a workable standard protecting private association. While awaiting an appropriate vehicle with which to reconsider its campaign finance decisions, the Court should ensure that they remain limited to the electioneering context.

In a series of rulings reaching back nearly a half-century, this Court has routinely blessed extraordinarily invasive disclosure requirements with little analysis. *Buckley v. Valeo* was the first step in that chain. The decision acknowledged that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley,* 424 U.S. at 64 (citing *NAACP v. Button*, 371 U.S. 415 (1963)). And the Court explained that "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 25. After all, the Court noted, freedom of association is a "fundamental" right which lies "at the heart of a free society." *Id.* (quoting *Shelton v. Tucker,* 364 U.S. 479, 486 (1960)).

Nevertheless, the Court upheld a statute that required those contributing as little as $100 to be publicly reported by name, together with their addresses, occupations, and places of business. *Id.* at 81. A major justification for this surveillance was an "informational interest" whereby public disclosure "increases the fund of information concerning those who support the candidates" and "helps voters to define more of the candidates' constituencies." *Id.*

Chief Justice Burger dissented in part, noting that "secrecy and privacy as to political preferences and convictions are fundamental in a free society."

424 U.S. at 237–38. He pointed to the "ill-defined 'public interest'" invoked "to breach the historic safeguards guaranteed by the First Amendment." *Id.* And he recognized that "governmental power cannot be used to force a citizen to disclose his private affiliations even without a record reflecting any systematic harassment or retaliation." *Id.* (cleaned up) (citing *NAACP v. Button,* 371 U.S. 415 (1963) and *Shelton v. Tucker,* 364 U.S. 479 (1960)).

This view has not carried the day. In subsequent cases, the Court has consistently upheld statutes impeding the privacy of ordinary Americans based on vague pro-transparency rhetoric. Most prominently, in *Citizens United,* the Court again approved a wide-ranging disclosure regime because "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Citizens United v. FEC*, 558 U.S. 310, 369 (2010). More recently, in *McCutcheon v. FEC,* a plurality flatly acknowledged that donor "disclosure requirements burden speech," but nevertheless spoke approvingly of this compulsive regime "arming the voting public with information." 572 U.S. 185, 223–24 (2014).

The Court's solicitude for political disclosure appears to stem from two sources. First, as discussed, is the general "informational interest" by which contributor information supposedly guides voting behavior. The second is the view that transparency "deter[s] actual corruption and avoid[s] the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley*, 424 U.S. at 67. But even if these are sound articulations of the governmental interests, the Court's

campaign finance decisions have credulously accepted their invocation.

Take the informational interest itself. There is some surface attraction to the idea that voters should be fully informed before exercising the franchise. In *Buckley*'s formulation, "[t]he sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Id*.

But in what way does disclosing $200 contributions, as current federal law requires, materially advance that interest? *See* 52 U.S.C. § 30104(b). Is there any serious empirical basis for believing a reasonable voter would choose to support or oppose a candidate because of such a modest donation, or that campaign finance reports are ever consulted for that purpose? And what of laws that require the public disclosure of *any* contribution, no matter how small? *See, e.g., Worley v. Fl. Sec. of State,* 717 F.3d 1238, 1251 (11th Cir. 2013), *cert. denied sub nom. Worley v. Detzner*, 571 U.S. 991 (Nov. 4, 2013) (upholding "first dollar disclosure threshold" under informational interest).

It is difficult to argue that these rules reflect narrow tailoring given the many alternatives available, notably requiring recipients to report aggregate contributions over a certain (material) threshold. *See* 52 U.S.C. § 30104(b)(3). For the same reason, the government's interest in unmasking "large," potentially corrupting contributions is poorly served by the low disclosure levels actually in place. *See Buckley*, 424 U.S. at 67.

In short, this Court's campaign finance precedents have yet to grapple with the robust approach to "privacy of association and belief" the Court announced in *AFPF v. Bonta* and show little evidence of the narrow tailoring that case demands. *See Buckley,* 424 U.S. at 64 ("compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment") *and AFPF*, 594 U.S. at 610.

Nevertheless, those decisions remain good law governing speech concerning candidates and elections, precisely the place where the First Amendment "has its fullest and most urgent application." *Eu v. S.F. Cty. Democratic Cent. Comm.,* 489 U.S. 214, 223 (1989). The resulting tension—whereby individual contributors' privacy is least protected where it is most relevant—immeasurably complicates the application of the First Amendment in this area. Until the Court is presented with an appropriate vehicle with which to reconsider its political disclosure cases, it should ensure they do not extend beyond the electioneering context.

## CONCLUSION

The Court should explain that state invasions of the right to private association are presumptively unconstitutional and subject to exacting scrutiny.

Respectfully submitted,

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