No. 24-781

IN THE
Supreme Court of the United States

FIRST CHOICE WOMEN'S RESOURCE CENTERS, INC.,

Petitioner,

v.

MATTHEW J. 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 NATIONAL TAXPAYERS UNION FOUNDATION AS *AMICUS CURIAE* IN SUPPORT PETITIONER

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August 28, 2025

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect everyday life. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels. NTUF's Taxpayer Defense Center advocates for taxpayers in the courts, producing scholarly analyses and engaging in direct litigation and *amicus curiae* briefs upholding taxpayers' rights, challenging administrative overreach by tax authorities, and guarding against unconstitutional burdens on interstate commerce.

Pursuant to that mission, NTUF brings challenges on behalf of itself, its sister 501(c)(4) organization, and others under associational standing. In doing so, NTUF has need to protect donor privacy in a variety of litigation in other jurisdictions like California, including defending against tactics similar to those used by New Jersey in this case. Accordingly, *Amicus* has an institutional interest in this case.

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[1] Pursuant to Supreme Court Rule 37, counsel for *Amicus* represents that none of the parties or their counsel, nor any other person or entity other than *Amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case presents this Court with the opportunity to reaffirm the principle that the government must survive exacting scrutiny anytime it seeks nonprofit donor lists. Such a categorical rule will not break the system, for this Court has allowed uses of donor lists for appropriate needs or electioneering regulations to survive exacting scrutiny. At the same time, however, novel uses of existing laws to demand broad disclosure of donors will need to be met with proof of a weighty enough interest and proper narrow tailoring to that interest, as this Court articulated most recently articulated in *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) ("*AFPF*").

Here, New Jersey demands the complete donor list of a pro-life pregnancy center so that the state may take a "representative sample" to see how consumers and supporters understand the work of First Choice. This pretextual use of a general consumer protection statute is fraught with danger to core First Amendment and Fourteenth Amendment freedoms. Fraud investigations should not be lightly applied to one of the most controversial topics in modern political debate in America.

This Court has long understood that for all the important quotes and tests protecting donor privacy from *AFPF* and its application of landmark Civil Rights cases, the underlying laws were seemingly commonplace but abused and weaponized to harass political opponents. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ("*NAACP*"), the state used a routine business registration law as a hook to try to suss out the supporters of a group the

government officials did not like. *Bates v. Little Rock*, 361 U.S. 516 (1960), started with a simple—indeed boring and routine—license tax to operate in a city which was used to demand the donor lists of the NAACP. But these banal business registration laws were weaponized to attack ideological foes. So too here. Applying the clear precedents from this Court will show New Jersey cannot meet its burden under exacting security.

Importantly and unfortunately, this case is no outlier. States are beginning to use statutes like the one at issue here as well as general subpoena powers in ordinary litigation to demand donor lists. *Amicus* is currently in a fight to protect the donors of National Taxpayers Union in a challenge to a retroactive state tax increase. Yet California demands the complete list of donors, under the guise of assuring standing. Texas likewise demanded the donor lists of pro-choice groups fighting S.B. 8, the subject of this Court's decision in *Whole Woman's Health v. Jackson*, 595 U.S. 30, 35 (2021). Such demands turn this Court's doctrine of associational standing on its head. In order to represent its members, associations now risk invasive demands for the identities of their supporters.

This case presents the opportunity for this Court to (1) clarify that exacting scrutiny applies any time the government is seeking donor lists and (2) that novel use of everyday laws must meet exacting scrutiny. Doing so will help end creative uses—really, abuses—of provisions to deter a government official's ideological foes.

ARGUMENT

I. THE GOVERNMENT MUST SURVIVE EXACTING SCRUTINY WHENEVER IT DEMANDS DONOR LISTS.

The New Jersey Attorney General demands the donor lists of organizations to which he is ideologically opposed. *See* Pet.App.89a–110a (demand for donor list); J.A. 363–64 (multiple Attorneys General letter decrying pro-life pregnancy centers); J.A. 379 (signature of Respondent to that letter); Opening Br. of Pet. at 7–8 (discussing same). The Attorney General seeks "present or last known place of employment of every one of First Choice's donors who gave through any means other than one specific website marketed towards its donors." *See* Opening Br. of Pet. 9 (citing Pet.App.98a, 100a.).[2] The state claims it needs donor names and contact information so that he could "contact a representative sample and determine what they did or did not know about their charitable giving." J.A. 346.

Even setting aside the obvious political animus, getting a "representative sample" is not a weighty enough interest nor is it narrowly tailored to survive the First Amendment's exacting scrutiny. New Jersey's demand is not truly pursuant to an important interest that can only be resolved by narrowly tailored compelled disclosure. New Jersey's demand for donor

[2] The state also demands copies of all donor solicitations and every document or video provided to donors over a nearly three-year period. *See* Pet.App.90a, 100a–02a.

lists is pretextual and a thin read of consumer protection laws.

A. Exacting Scrutiny Exists to Protect an Organization's Donor List.

Under *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) ("*AFPF*") and other landmark cases dating back to the Civil Rights Era,[3] any government demand for membership or donor lists must survive the First Amendment's exacting scrutiny. 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." *Id*. at 611 (citations omitted).

Exacting scrutiny is required because this Court has long recognized that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," and that there is a "vital relationship between freedom to associate and privacy in one's associations." *NAACP*, 357 U.S. at 460–61, 462. This language recognizes two rights: (1) to engage in debate concerning public policies and issues and (2) to effectuate that right, to associational privacy.

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[3] *See*, *e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam); *NAACP v. Button*, 371 U.S. 415 (1963) ("*Button*"); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963); *Talley v. Cal.*, 362 U.S. 60 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) ("*NAACP*").

All Americans have the right "to pursue their lawful private interests privately and to associate freely with others in so doing." *Id.* at 466. This "basic constitutional protection[]," *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973), "'lies at the foundation of a free society,'" *Buckley*, 424 U.S. at 25 (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). This includes presenting support and information from a pro-life viewpoint (or the opposite).

Therefore, freedom of association must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," such as registration and disclosure requirements and the attendant sanctions for failing to disclose. *Bates*, 361 U.S. at 523 (collecting cases); *see also Button*, 371 U.S. at 433 (noting that the freedoms of speech and association are "delicate and vulnerable" to "[t]he threat of sanctions [which] may deter their exercise almost as potently as the actual application of sanctions"). Indeed, just three years ago, this Court reaffirmed that there is a "vital relationship between freedom to associate and privacy in one's associations" via financial support. *AFPF*, 594 U.S. at 606.

Exacting scrutiny is "not a loose form of judicial review." *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014). It is instead a "strict test," *Buckley*, 424 U.S. 66, requiring an analysis of the burdens imposed, and whether those burdens advance the government's stated interest because, "[i]n the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (Roberts, C.J., controlling opinion).

If a law impacting core First Amendment freedoms is novel, and not merely a retread of already-approved interests and tailoring, then the government must provide concrete evidence that the new law also survives the heightened scrutiny. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised"). *Nixon* is an important safety value for heightened First Amendment scrutiny: once a regime is approved as having a weighty interest and proper tailoring, then the government need not reinvent the record needed. *Nixon* applied to Missouri's use of the same campaign finance limits approved by this Court in the landmark *Buckley* decision. *See id*. at 395 ("Nor do we see any support for respondents' various arguments that in spite of their striking resemblance to the limitations sustained in *Buckley,* those in Missouri are so different in kind as to raise essentially a new issue about the adequacy of the Missouri statute's tailoring to serve its purposes."). But importantly, the *Nixon* Court rejected "mere conjecture as adequate to carry a First Amendment burden." *Id*. at 392. Instead, the government must prove the strength of its interest. *See*, *e.g.*, *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995) ("[W]hen the Government defends a regulation on speech as a means to… prevent anticipated harms, it must do more than simply posit the existence of a disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural") (cleaned up).

What does such a showing of substantial interest look like? Congress sought to significantly expand the disclosure regime for campaign-related speech, regulating "candidate advertisements masquerading as issue ads" that aired shortly before an election. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 132 (2003) (cleaned up). In campaign finance parlance, these are known as "electioneering communications" and, prior to 2002, were never regulated by the federal government. Applying exacting scrutiny, that innovation required a significant showing, and the government needed to build a 100,000-page record to demonstrate that, at least facially, its law was appropriately tailored to a real and concrete problem. *See McConnell v. Fed. Election Comm'n*, 251 F. Supp.2d 176, 209 (D.D.C. 2003) (three-judge court) (per curiam); *cf. Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 332 (2010) (discussing and citing 100,000-page record amassed by dozens of litigants in *McConnell*).

New Jersey has done nothing remotely close to show whether novel use of consumer protection laws to demand the donor disclosure of pregnancy centers can survive exacting scrutiny. "'To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *AFPF*, 594 U.S. at 607 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). New Jersey has a theory of both consumer and donor confusion arising out of First Choice not providing abortion services. But beyond the conjecture that some may be confused that a pro-life center is, well,

pro-life, there is little connection to why every supporter of a particular organization need be disclosed to the New Jersey Attorney General. Indeed, other than mere anxiety from the government, there is little indication of confusion by First Choice's marketing materials, either to donors or to prospective users of its services.

But even assuming, *arguendo*, that there was such confusion, interviewing a "representative sample" of donors is in no way tailored to the question of what is said by First Choice or the truthfulness of the statement. *See* J.A. 346 (New Jersey justifying the demand for the whole donor list so investigators can contact "a representative sample and determine what they did or did not know about their charitable giving."). A "representative sample" does not do anything to indicate if there was fraud by some sort of concealment or false representation nor if its to any donor or consumer's detriment. *See*, *e.g.* Fraud, BLACK'S LAW DICTIONARY (12th ed. 2024) (defining fraud as "[a] knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment."). That is, fraud needs to be proven objectively by the actions and words of the accused, not what a "sample" of donors may say.

In any event, the burden on the freedom of association means that New Jersey must show how its demand—a novel use of the state's consumer protection laws—survives exacting scrutiny. Because the state relies on conjecture and a broad disclosure demand for the sake of taking a mere "sample," the government fails exacting scrutiny.

B. Donor Privacy Protections Apply to Even Routine Business Disclosures.

New Jersey positions this case under the broad powers of the state of New Jersey to prevent consumer fraud. J.A. 346.[4] But revisiting this Court's decisions on donor privacy reveal that the government always uses some excuse and claim of routine to demand donor lists. Whether it is routine business registration statues, which were abused by Southern states to combat the Civil Rights movement, or a counterfeit concern about consumer protection, the government cannot intimidate by disclosure demands.

Each time the matter of privacy of association has reached this Court, this Court has reiterated that donor lists must be kept out of the hands of government officials. Indeed, some of the most significant cases on donor privacy were generated by generally applicable business statutes that could be banally described as mere financial records. *NAACP* centered on the state's use of foreign corporation registration statutes as a means of getting the civil rights group's donor list. *See NAACP*, 357 U.S. at 451.

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[4] Of course, this case on the merits also implicates the restrictions on the power of the government to regulate speech. *See*, *e.g.*, J.A. 308–12 (New Jersey asserting that it wishes to investigate First Choice due to statements on website and failure to phrase disclaimers in the state's preferred way); *cf. Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 766 (2018) (rejecting state scheme that required clinics to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them. One of those services is abortion—the very practice that petitioners are devoted to opposing.").

Bates, 361 U.S. at 517, examined the city's use of business license tax registration. *Shelton*, 364 U.S. at 481, dealt with employment paperwork to be employed as schoolteacher. *AFPF*, 594 U.S. at 600, centered on what should be routine charities registration with the Attorney General of California. Nevertheless, in each of these instances this Court has repelled the attack on donor privacy when otherwise broad disclosure rules would apply.

Admittedly, states generally have the power to regulate corporations doing business within their borders. In a similar vein, consumer fraud laws generally do not run afoul of the First Amendment. But when a consumer fraud law is used to demand the disclosure of donors, it becomes a cudgel to intimidate an ideological organization. The First Amendment demands the state survive exacting scrutiny for using consumer protection laws in this new way.

Here, there is little harm to New Jersey's ability to combat fraud. As in the *NAACP* line of cases, it is plainly a pretextual demand for donors of the government official's ideological foes. But that is why donor disclosure demands must be subjected to exacting scrutiny each time a novel theory is presented. Because New Jersey did not bring such evidence to bear, its investigative subpoena should be quashed.

II. GOVERNMENTS ARE USING OTHER SUBPOENAS TO DEMAND DONOR LISTS AS WELL.

Investigative subpoenas are not the only threat to donor privacy. This Court should be aware that First Choice's predicament is part of a growing trend to demand donor lists as method of lawfare—harassment of an organization by the government to deter actions that officials dislike. A strong reaffirmance of *AFPF* and the cases upon which that decision relies will go far in preventing harm to organizations asserting the rights of their members and donors.

Amicus is currently defending the privacy of its members in California in a challenge to that state's retroactive and confusing taxation calculation scheme. The case, *National Taxpayers Union v. California Franchise Tax Board*, No. 24CV016118 (Superior Ct. Cal., Sacramento Cnty.),[5] is in the early stages of litigation. But right now, we are not discussing the legal arguments of California Revenue and Taxation Code section 25128.9. Instead, the state Franchise Tax Board has used the discovery process to demand the complete donor list of NTU.

California's Attorney General's office filed motions to compel further special interrogatories, compel further document production, and further responses after the deposition of NTU President Pete

[5] National Taxpayers Union Foundation ("NTUF"), *amicus* here, is serving as counsel for its sister organization National Taxpayers Union ("NTU"), a § 501(c)(4) social welfare organization with members in California.

Sepp. In each motion to compel, California sought *all* donors and members of NTU. *See*, *e.g.*, Minute Order on Motion to Compel Special Interrogatories at 2, *NTU v. Cal. Franchise Tax Bd.*, No. 24CV016118 (Superior Ct. Cal., Sacramento Cnty., May 5, 2025); Minute Order on Motion to Compel Further Documents at 2, *NTU v. Ca. Franchise Tax Bd.*, No. 24CV016118 (Superior Ct. Cal., Sacramento Cnty., May 5, 2025); Minute Order on Motion to Compel Further Responses RE: Pete Sepp at 1, *NTU v. Ca. Franchise Tax Bd.*, No. 24CV016118 (Superior Ct. Cal., Sacramento Cnty., May 5, 2025). NTU continues to fight such broad donor disclosure demands.

NTU has long protected the right of organizations to stand in the shoes of their members, specifically winning that issue before the D.C. Circuit 30 years ago. *See Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1435 (D.C. Cir. 1995) ("Even though NTU does not itself have standing to challenge Section 13208, it may have standing to attempt to redress the grievances of its members who are affected by" the tax law.). The D.C. Circuit did not demand searching discovery of the complete donor list of NTU: the court instead relied on the pleaded facts and attestation of the organization to find standing. *See id.* at 1435 ("According to NTU, its members include at least one estate of a testator who died between January 1 and February 25, 1993, leaving a taxable estate subject to the estate tax rate increase enacted in Section 13208….Certainly, such injury would be redressed if we were to declare Section 13208 unconstitutional. Thus, NTU meets the first prong of the *Hunt*

inquiry.")[6] (applying *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977)).

California's donor demand against NTU is becoming commonplace. It has become a trend in the law where states use various purported hooks to demand *all* the supporters of an organization in order to challenge a statute. For example, the Texas Attorney General issued broad subpoenas, including donor lists, in challenges to Texas' restrictions on access to abortion services. *See* Brian Hawkins, *Legal Fight Over Texas Abortion Law Spurs Donor Privacy Concerns*, PEOPLE UNITED FOR PRIVACY (Nov. 14, 2023) https://unitedforprivacy.com/legal-fight-over-texas-abortion-law-spurs-donor-privacy-concerns/; Carter Sherman, *Texas lawyer asks abortion funds for details of every procedure since 2021*, THE GUARDIAN (Sept. 28, 2023) https://www.theguardian.com/world/2023/sep/28/texas-lawyer-abortion-ban-procedure-patient-information ("They also asked for information about every person who the funds may have worked with, including volunteers and donors, according to court documents.").

When applying *AFPF* and the other Civil Rights cases to reject New Jersey's donor disclosure demand in this case, this Court should clarify that the government needs to survive exacting scrutiny any time it seeks the donors and members of nonprofits. The chilling effect of threatened disclosure is real. When faced with the threat of compelled disclosure, prospective members decline to join, donors close their

[6] NTU also satisfied the other two *Hunt* factors, meaning it has associational standing to challenge in the shoes of its members. *See id*.

pocketbooks, and advocacy groups reconsider their speech in the future. State officials are using novel applications of otherwise unobjectionable laws in order to get the supporters of causes. This Court should apply its already-existing law to ensure these shenanigans end.

CONCLUSION

For the foregoing reasons, *Amicus* requests that this Court reverse the decision below.

Respectfully submitted,

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