No. 19-255

In The
Supreme Court of the United States

THOMAS MORE LAW CENTER,

Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

This Court has held that "the closest" First Amendment strict scrutiny applies when states seek to compel nonprofit advocacy groups to turn over confidential identifying information about their donors and supporters. *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460–61 (1958). A more lenient standard applies to organizations that engage in political campaigning, because the state has a significant interest in maintaining the integrity of the electoral process. *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010). The Ninth Circuit, however, held that the "exacting scrutiny" standard applies—thereby exacerbating a circuit split over the following question:

What level of scrutiny applies—specifically, does narrow tailoring apply—when a state forces a nonprofit advocacy group not engaged in campaigning to provide the state with confidential donor information?

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files *amicus* briefs when its or its clients' objectives are directly implicated.

Among GI's priorities is the protection of the privacy rights of those who donate to non-profit research and advocacy groups. GI has litigated or participated as *amicus curiae* in courts around the nation to defend the rights of those who are forced to disclose their personal information to the government when they contribute money to policy think tanks or advocacy organizations. *See*, *e.g.*, *CUT v. Denver* (Colo. Ct. of App. No. 2019CA543) (pending); *Rio Grande Foundation v. City of Santa Fe* (D. N.M. No. 1:17-cv-00768-JCH-CG) (pending). GI participated as *amicus* in *Center for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015), which raised similar questions at issue here. GI

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[1] Pursuant to Supreme Court Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *Amicus Curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity, other than *amicus*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

scholars have also published research on the important free speech issues raised by donor-disclosure mandates like those at issue here. *See* Matt Miller, *Privacy and the Right to Advocate: Remembering* NAACP v. Alabama *and its First Amendment Legacy on the 60th Anniversary of the Case*, Goldwater Institute (Jan. 17, 2018)[2]; Jon Riches, *Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving*, Goldwater Institute (2015).[3]

But the questions presented here are also central to GI's own operations. GI, like Petitioner, received a demand from the California Attorney General ordering it to disclose private information of its donors to the state as a condition of fundraising in California. GI has so far refused to comply. GI believes it owes its many supporters a duty to defend their constitutional right to confidentiality, as well as its own. As this Court declared in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), "[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." GI submits this brief in defense of that privacy both as a private interest essential to its work and as one of the constitutional freedoms it is pledged to protect.

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[2] https://goldwaterinstitute.org/wp-content/uploads/2018/01/naacp-1-16-2018-1.pdf.

[3] https://goldwaterinstitute.org/wp-content/uploads/2015/08/Dark-Money-paper.pdf.

SUMMARY OF ARGUMENT

In recent years, state and local governments have ramped up efforts to force nonprofit policy groups to reveal confidential information about their donors to the government—often to have that information placed on a publicly accessible list. Often the consequences have been threats, intimidation, retaliation, and even violence against supporters of these groups. These were precisely the concerns behind this Court's rulings in cases such as *Patterson*, 357 U.S. at 462, which held that non-profit advocacy organizations have First Amendment rights, and that the state can demand their donors' confidential information only in the most extraordinary circumstances. By disregarding the warnings of *Patterson* and applying, not strict scrutiny as that case requires, but the more lenient "exacting" scrutiny of *Buckley v. Valeo*, 424 U.S. 1 (1976), the court below worsens an already significant threat to public policy organizations across the country.

Not only does the trend of forcing organizations to disclose confidential donor information chill the free speech rights of both these individuals and these organizations, but it also exacerbates the dangerously undemocratic tendency to short-circuit debate over the merits of public policy proposals, and to focus instead on personal animosities and personal demonization rather than persuasion.

Consider some examples:

- In September 2019, San Francisco declared the National Rifle Association, which has 5.5

million members, to be a terrorist organization.[4] Obviously, the NRA has never supported terrorism, nor any criminal activity. It does not advocate for the overthrow of the federal government. Instead, it promotes Second Amendment rights for its members and all Americans. Despite this, San Francisco's declaration exposes the organization and its members to harassment and intimidation from its ideological opponents.

- In August 2019, Texas Representative Joaquin Castro published the names of 44 private citizens in his district who donated to the reelection campaign of President Donald Trump. Some were almost immediately subjected to harassing and threatening phone calls. Jonathan Easley, *Castro Takes Heat as Outed Trump Donors Swing Back*, The Hill (Aug. 10, 2019).[5]

- In October 2017, the Internal Revenue Service "expresse[d] its sincere apology" to conservative groups, and reached a substantial monetary settlement, after the IRS targeted conservative groups for intense scrutiny based on their ideological positions.[6]

- In 2016, several Senators gave speeches on the Senate floor characterizing free-market

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[4] https://www.npr.org/2019/09/10/759333549/nra-sues-san-francisco-after-lawmakers-declare-it-a-terrorist-organization.

[5] https://thehill.com/homenews/campaign/456899-castro-takes-heat-as-outed-trump-donors-swing-back.

[6] https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups.

organizations such as the Heritage Foundation and Americans for Tax Reform as obstructing worthy environmental legislation at the behest of wealthy private citizens—whom the Senators repeatedly named on the Senate floor. When the organizations wrote back to object to what they called "bully[ing] and singl[ing] out groups to blame rather than ideas to debate,"[7] the senators responded by demanding to know "who pays your bills[?]"[8]

- In 2014, the CEO of Mozilla Corporation was forced to resign after opponents publicized the fact that he donated $1,000 to support California's now-overturned 2008 gay marriage ban. Even though Eich was widely recognized as a well-qualified and successful CEO, his ideological opponents called for—and got—his resignation from the company.[9]

- In 2012, Senator Chuck Schumer replied to concerns that mandatory disclosure might lead to retaliation by saying "It's good to have a deterrent effect." Remarks of Sen. Chuck Schumer regarding the DISCLOSE ACT (Senate Rules and Administration Committee Hearing, July 17, 2012).[10]

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[7] https://www.alec.org/app/uploads/2016/07/2016-07-12-Coalition-Letter-Senate-Web-of-Denial-Resolution-v2.pdf.

[8] https://www.whitehouse.senate.gov/news/release/senators-hit-back-in-letter-to-denial-front-groups.

[9] https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/.

[10] https://www.youtube.com/watch?v=NHX_EGH0qbM.

- In 2013, Illinois Senator Dick Durbin sent letters to several free-market organizations, including the Goldwater Institute, demanding to know whether the Institute contributed money to the American Legislative Exchange Council (ALEC)—in retaliation for ALEC's adoption of model legislation relating to the right to self-defense. (The Institute refused to answer.)

- In 2008, after the names and addresses of donors to California's controversial anti-same-sex marriage initiative, Proposition 8, were posted on the Internet, many of them were subjected to harassment, threats, and reprisals in their homes and workplaces. John R. Lott, Jr. & Bradley Smith, *Donor Disclosure Has Its Downsides*, Wall Street Journal (Dec. 26, 2008)[11]; Thomas M. Messner, *The Price of Prop. 8*, Heritage Foundation Backgrounder No. 2328 (Oct. 22, 2009).[12]

These are just a few examples of the ways mandatory donor disclosure laws both chill political speech and undermine the proper working of deliberative democracy. The circuit split raised by this petition is therefore of crucial importance to advocacy organizations across the country and across the political spectrum—and to the general citizenry.

[11] https://www.wsj.com/articles/SB123025779370234773.

[12] http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf.

ARGUMENT

I. Courts are divided on whether "exacting" or "strict" scrutiny applies to disclosure mandates in this context.

In *Patterson* and other cases, this Court held that states may not force nonprofit advocacy organizations to hand over to the government their donor lists or other personal identifying information about their supporters, without meeting the "closest" level of First Amendment scrutiny. 357 U.S. at 461. The reason is obvious: such disclosure chills political participation and speech because donors will understandably fear that they will face retaliation for supporting causes their neighbors do not support. Even if the government itself is not engaged in retaliation, anti-privacy mandates are a material part of retaliation and intimidation, and therefore such mandates are permitted only in rare circumstances where the need is very great and the government's actions are narrowly tailored to satisfy that need. "It is not sufficient to answer . . . that whatever repressive effect compulsory disclosure of names of petitioner's members may have upon participation by . . . citizens . . . follows not from state action but from private community pressures. The crucial factor is the interplay of governmental and private action[.]" *Patterson*, 357 U.S. at 463.

The rules in the context of political campaigns are different, because this Court has held that a state's interest in ensuring the integrity of the electoral process permits it to demand the disclosure of certain information, including information about the identities of

signers of election petitions. *Reed*, 561 U.S. at 196. In doing so, the Court has not required the same narrow tailoring that applies under *Patterson* and its progeny. Indeed, the separate opinions in *Reed* sparred over precisely this point. Justice Thomas in dissent objected that the Court had failed to require narrow tailoring of the disclosure mandate at issue, *see id.* at 232 (Thomas, J., dissenting)—and Justices Sotomayor, Stevens, and Ginsburg, replied that it was "by no means necessary" for such mandates to be narrowly tailored. *Id.* at 213 (Sotomayor, J., concurring).

Two other points are also significant here. First, the Court has never endorsed the proposition that states have an "informational interest" that justifies compulsory disclosure—in other words, states may not force such disclosure for the purpose of "providing information to the electorate about who supports [a political position]." *Id.* at 197.

Second, the Court never applied the *Reed* principle to cases *not* involving elections—that is, it has never allowed states to compel disclosure of donors' identities on this reduced level of constitutional scrutiny with regard to organizations *not* involved in elections. Instead, it has developed a distinction between compelled disclosure in the *non*-election context—subject to "the closest" scrutiny under *Patterson*, 357 U.S. at 460–61—and the election context, where a less severe scrutiny seems to apply under *Buckley*, 424 U.S. at 25–27.

The reason for this distinction is plain: as the dissent below put it, the state's interest in "ensuring our election system is free from corruption or its appearance," is categorically distinct from "[t]he interests served by disclosure outside the electoral context, such as policing types of charitable fraud." *Americans for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1180 (9th Cir. 2019) (Ikuta, J., dissenting from denial of rehearing en banc).

The basic difference is the question of "narrow tailoring." *See id*. Cases such as *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), and *Local 1814, International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, 667 F.2d 267 (2d Cir. 1981), and even *Reed*, 561 U.S. at 196, described the legal test that applies to informational demands such as the one at issue here by the term "exacting scrutiny," and this can lead to confusion, because *Patterson* itself did not use that term or the term "narrow tailoring."[13] But *Patterson* did say that "state action which may have the effect of curtailing the freedom to associate is subject to the *closest* scrutiny." 357 U.S. at 460–61 (emphasis added).

The "closest" First Amendment scrutiny should require narrow tailoring, given that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v.*

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[13] The phrase "narrow tailoring" seems to have been first used in *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 101 (1972).

Button, 371 U.S. 415, 438 (1963). But because *Reed* failed to resolve this point, the question remains in doubt, and as the dissent below noted, federal courts of appeals have begun applying what they *call* exacting scrutiny, but "without a narrow tailoring requirement." *Americans for Prosperity*, 919 F.3d at 1182 (Ikuta, J., dissenting from denial of rehearing en banc).

The result is that these courts—specifically, the Ninth and Second Circuits—have "broken from the uniform application" of *Patterson*'s strict scrutiny requirement, *id*., and obscured the difference between the election and the non-election context, and have applied a standard that is more lenient, and is not "the closest" scrutiny, to cases that involve mandatory disclosure *outside* the context of elections. And, as the petition explains, they have done so in direct conflict with several circuits, which have faithfully applied the narrow tailoring requirement. Pet. at 24–28.

The bottom line is that certiorari is necessary to resolve the confusion that has arisen over how narrow tailoring applies in the non-election context when the government forces organizations to place their donors' private identifying information on a publicly accessible list.

II. Forcing organizations to divulge confidential information about their donors undermines democracy and contradicts their ethical duties.

Resolving the circuit split raised by this case is critical because of an increasing trend of forcing nonprofits—even those not engaged in politics—to disclose personal identifying information about their donors. Although usually marketed as a form of "transparency," these anti-privacy mandates are in fact profoundly *anti*-democratic propositions. They deter freedom of speech, distort the behavior of private citizens engaging in politics, and focus public debate away from the merits of a controversy and instead onto the identities and personalities on each side. Such anti-privacy mandates also violate the ethical duties of nonprofit organizations.

Donor disclosure mandates deter public participation—particularly from small donors. As Professor Raymond J. La Raja notes, although "[t]ransparency in politics is universally touted as salutary for democracy," empirical research shows that "lack of privacy tends to dampen political participation," particularly among groups "who are especially sensitive to being 'outed' based on their groups' historical experience [or] social status." Raymond J. La Raja, *Does Transparency*

of Political Activity Have a Chilling Effect on Participation? 1, 3 (Paper delivered at 2011 Midwest Political Science Association meeting).[14]

Scholars have shown that while polls indicate strong generic support for disclosure mandates, the same polls reveal that most people would hesitate to contribute to a campaign or an institution if their names or other personal identifying information would be subject to compulsory disclosure. *Id.*; Dick M. Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform* 2, Institute for Justice (Mar. 2007).[15] As the Fifth Circuit put it in *Briscoe,* "The public opprobrium, reprisals, and threats of reprisals that attend the airing of one's affiliation with an unpopular cause or group are substantial disincentives to engaging in such affiliations." 619 F.2d at 399.

This deterrent effect falls heaviest on small-dollar donors than on big-money donors, who are typically more impervious to the social pressures that intimidate the contributors of smaller amounts. Raymond J. La Raja, *Political Participation and Civic Courage: The Negative Effect of Transparency on Making Campaign Contributions*, 36 Political Behavior 753 (2014).[16] And "rules that restrict and deter some contributors but not others" raises another concern in a democratic system

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[14] https://cces.gov.harvard.edu/files/cces/files/la_raja-_transparency_of_political_activity.pdf.

[15] https://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf.

[16] https://ssrn.com/abstract=2202405.

which is supposed to value the views of all citizens. William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1, 48 (2003).

These concerns are sometimes shrugged off on the theory that a person should have the courage of her convictions and be willing to publicly identify her political positions. Justice Scalia, for example, believed that "[r]equiring people to stand up in public for their political acts fosters civic courage." *Reed*, 561 U.S. at 228 (Scalia, J., concurring). But a person should not have to have "civic courage" in order to participate in democracy. *See Talley v. Cal.*, 362 U.S. 60, 65 (1960) ("identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance.").

In fact, as this Court has recognized, people have many valid reasons to desire anonymity when expressing their political and social views, or when supporting organizations that do so. The most obvious is fear of retaliation. As the California Court of Appeal noted in a case involving an effort to obtain information about Planned Parenthood's donors and supporters,

> Human experience compels us to conclude that disclosure carries with it serious risks which include, but are not limited to: the nationwide dissemination of the individual's private information, the offensive and obtrusive invasion of the individual's neighborhood for the purpose of coercing the individual to stop constitutionally-protected associational

> activities and the infliction of threats, force and violence.

Planned Parenthood Golden Gate v. Super. Ct., 99 Cal. Rptr. 2d 627, 638 (2000).

But even aside from these risks, people may also simply wish "to preserve as much of [their] privacy as possible." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341–42 (1995). Their religious beliefs may require them to remain anonymous. *See*, *e.g.*, Virginia B. Morris & Brian D. Ingram, *Guide to Understanding Islamic Investing* 14 (2001) ("[M]any scholars urge Muslims to make [a] donation anonymously."); Joseph B. Meszler, *Gifts for The Poor: Moses Maimonides' Treatise on Tzedakah* 73 (Marc Lee Raphael, ed., 2003) ("one who gives . . . to the poor and . . . the poor person does not know from whom he receives" engages in a highly elevated form of charity).

In fact, confidentiality is an important ethical principle for organizations whose donors entrust them with their money. *See*, *e.g.*, Ted Hart, et al., *Nonprofit Internet Strategies: Best Practices for Marketing, Communications, and Fundraising Success* 64 (2005) ("It is extremely important to develop ethical rules and guidelines surrounding information and confidentiality. . . . [D]onors count on nonprofits to respect their privacy."). As one leading textbook on fundraising for nonprofits observes, "[c]onfidentiality is indispensable to the trust relationship that must exist between a nonprofit organization and its constituents." Eugene R.

Tempel, ed., *Hank Rosso's Achieving Excellence in Fund Raising* 440 (2d ed. 2003).

"Human experience compels us to conclude" *Planned Parenthood Golden Gate*, 99 Cal. Rptr. 2d at 638, that it is far more likely that a rule whereby people must "stand up in public" *Reed*, 561 U.S. at 228 (Scalia, J., concurring in the judgment), in order to exercise their freedom of speech will only result in fewer people exercising their freedom of speech. The First Amendment contains no such requirement. Indeed, to contend otherwise is not only contrary to common sense, but amounts to an argument against the secret ballot itself[17]—which was implemented precisely to protect people against the retaliation and undue pressure that occurred under the earlier "open balloting" system. *McIntyre*, 514 U.S. at 343 (noting the "respected tradition of anonymity in the advocacy of political causes . . . exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation."). *See also* Frederick Schauer, *Anonymity and Authority*, 27 J.L. & Pol. 597, 597 (2012) ("the prevalence of the secret ballot throughout the democratic world embodies the view that public voting, although it may have some communitarian virtues, may also be too often distorted by threats and intimidation."). That is just why this Court has recognized that

[17] Indeed, during the Nineteenth Century debates over the adoption of the secret ballot in Australia and Britain, opponents of the idea tended to emphasize the need for "manly pride that scorns concealment" and the idea that "clandestine" voting was an "un-English practice." Marian Sawer, *Elections: Full, Free & Fair* 49 (2001).

"[a]nonymity is a shield from the tyranny of the majority." *McIntyre*, 514 U.S. at 357.

Not only does compulsory disclosure chill free speech, but it also tends to distort democratic deliberation, in two ways. First, evidence suggests that the fear of having their identities and giving patterns publicized may *cause* people to make contributions to organizations they *do not* agree with, in order to send a signal to their neighbors. *See* Stan Oklobdzija, *Public Positions, Private Giving: Dark Money and Political Donors in the Digital Age*, Research & Politics (Feb. 25, 2019).[18] In other words, while anti-privacy mandates are supposed to do nothing more than expose the democratic debate to "sunlight," they actually distort the process by leading donors to contribute performatively, to obtain reputational benefits—rather than to contribute to causes they truly believe in. The opposite is true, also: where privacy is respected, donors *revealed* preferences prevail over their *stated* preferences. *See id*. at 6.

Secondly, anti-privacy mandates distort democratic deliberation by shifting attention from the merits of public controversies to arguments over the identities of those supporting one side or the other. One reason why political pamphleteers in the past and bloggers today have practiced the "honorable tradition of [anonymous] advocacy," *McIntyre*, 514 U.S. at 357, is to keep the debate focused on the *message* rather than

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[18] https://journals.sagepub.com/doi/full/10.1177/2053168019832475.

on *ad hominem* disputes about the messenger. For example, one reason the authors of *The Federalist* used the pseudonym Publius was because Alexander Hamilton's foreign birth made him vulnerable to "prejudice and . . . [the] obfuscation of his message," while James Madison's Virginia citizenship would likely have rendered New York readers less open to his arguments. Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, the First Amendment, and Campaign Finance Disclosure*, 14 Wyo. L. Rev. 253, 257 (2014).

Of course, anonymity may also encourage people to say ugly or shameful things, but as this Court has so often said, the remedy for ugly or shameful speech is more and better speech, not less. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996). Anti-privacy mandates result in less speech—and in distorted speech—by discouraging contributions to public policy nonprofits and changing behavior patterns among donors.

CONCLUSION

The petition should be *granted.*

Respectfully submitted,

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