Nos. 19-251, 19-255

IN THE
SUPREME COURT OF THE UNITED STATES

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE JUDICIAL WATCH, INC. AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan, public interest organization headquartered in Washington, D.C. Founded in 1994, Judicial Watch seeks to promote accountability, transparency and integrity in government, and fidelity to the rule of law. Judicial Watch regularly files amicus curiae briefs and lawsuits related to these goals.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files amicus curiae briefs as a means to advance its purpose and has appeared as an amicus curiae in this Court on many occasions.

Amici, as issue-oriented educational 501(c)(3) non-profit organizations, have an interest in the proper administration of state donor disclosure laws. The misapplication of those laws imperils the very survival of these organizations, which depend on donors' contributions, and chills the free speech and associational rights of their members. Judicial Watch has a particular interest as it solicits donations in

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[1] Amici state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than Amici and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. Amici sought and obtained the consent of all parties to the filing of this brief.

California and would be subject to its donor disclosure requirement.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision to reverse the district court and uphold California's donor-disclosure requirement could have adverse effects for all issue-oriented, educational non-profit 501(c)(3) organizations. The decision is not only wrong, in that it applied cases concerning political campaigns to groups prohibited from engaging in electioneering communications or political advocacy, it would also chill the free exercise of millions of Californians' protected First Amendment rights.

In Amici's experience, compelled disclosure of its donors' personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties. It clearly affects individuals' willingness to donate. Indeed, recent widely publicized reports show that threats, harassment, or reprisals have occurred from either government officials or private parties. Donors know this and the ever-increasing risk of retaliation signals to donors that they too may be subject to asymmetric attacks causing swift, permanent damage to their reputations and livelihoods. These well-documented episodes, which occur almost daily on social media, make current and prospective donors, regardless of the size of financial support, less willing to give to charitable organizations.

California's disclosure requirement is unconstitutional.

ARGUMENT

A. Given the Risks to First Amendment Rights, the Court Has Required a Compelling Interest, Subject to Exacting Scrutiny, to Justify Forced Disclosure of Donor Records.

The rights of free speech and free association are fundamental and highly prized. *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963), citing *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Court has recognized that the "constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986), citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co.*, 475 U.S. at 8 (citations omitted).

Organizations play a critical role in this process by preserving the right to associate and by facilitating

speech, popular or otherwise. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (citations omitted). "The right of association" is "almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 933 n.80 (1982), quoting 1 A. de Tocqueville, *Democracy in America* 203 (P. Bradley ed. 1954).

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433 (1963), citing *Cantwell v. Connecticut,* 310 U.S. 296, 311 (1940). In particular, to warrant public disclosure of an organization's members, a government actor must "demonstrate[] so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Such a "significant encroachment upon personal liberty" may only be justified by "showing a subordinating interest which is compelling." *Id.* (citations omitted). "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

In evaluating the burdens imposed by the forced disclosure of donor lists, the *Bates* Court noted the

"harassment" and "fear of community hostility and economic reprisals" that followed "public disclosure of the membership lists," all of which "discouraged new members from joining the organizations and induced former members to withdraw." 361 U.S. at 524; *see Talley v. State of California*, 362 U.S. 60, 65 (1960) (fear of reprisal "might deter perfectly peaceful discussions of public matters of importance"). Even where this "repressive effect" was "in part the result of private attitudes and pressures," it was "brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names." *Bates*, 361 U.S. at 524, citing *NAACP*, 357 U.S. at 463.

B. Amici Know Firsthand That a Fear of Public Disclosure and of Consequent Harassment Diminishes Individuals' Willingness to Donate to Conservative Non-Profit Organizations.

Amici are nonpartisan, nonprofit 501(c)(3) foundations, with a conservative orientation regarding public policy issues. While Amici scrupulously avoid engaging in any type of electioneering communications or political advocacy, they know well the fear of "harassment" and "community hostility and economic reprisals" that afflicts potential donors to organizations like them. *Bates*, 361 U.S. at 524. In consequence, Amici are acutely aware of the chilling effects that expanding states' ability to compel the disclosure of tax-exempt organizations' donors will have on organizations' activities.

Donors reduce their support if there is a greater risk of a government-ordered disclosure. Donors and potential donors to Amici care about their privacy, as indicated by the fact that they routinely inquire as to whether their contributions will remain confidential. Further, existing and prospective donors routinely express concerns about the risk that donations to Amici will lead to threats, harassment, or reprisals from either Government officials or private parties. For example, contributors often tell Judicial Watch's fundraising staff that they "expect to be audited" for contributing to the organization. This fear is not just held by large donors, but also by smaller donors who are reasonably concerned that mandated disclosures requirements will eventually extend to include forced disclosures of all donors, regardless of the amount contributed.

Donors' fear that they will be harassed or threatened because of the public disclosure of their support for organizations like Amici is not conjecture, but based on recent, troubling events. As has been widely reported, merely holding conservative views, let alone contributing financial support to conservative causes, subjects individuals and organizations to attack and retaliation from those ideologically opposed to these viewpoints. In fact, given the current political climate, a prospective donor must consider the potential risks posed by public disclosure of her support for conservative causes. Targeting has been carried out by both government and non-government sources.

In California, for example, citizens who supported Proposition 8, a 2008 ballot initiative which defined marriage as occurring between a man and a woman, were harassed. During the election campaign, opponents of the initiative developed an online database of the names, addresses (with maps), and places of employment of all individuals who had donated more than $100 in support of Proposition 8.[2] The opponents obtained this information by means of the State's campaign finance laws. The supporters so identified were subjected to severe harassment, including intimidation, vandalism, and loss of income or employment.[3] This harassment was the direct result of targeting facilitated by the State's disclosure laws.

The targeting of Proposition 8 supporters continued years after the election. In April 2014, Mozilla Chief Executive Officer Brendan Eich resigned following boycotts, protests, and intense public scrutiny of Eich's 2008 financial support for Proposition 8.[4] When Mozilla announced that Eich would become the company's new CEO in March 2014, a firestorm erupted almost immediately over Eich's six-year-old, $1,000 donation.[5]

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[2] Thomas M. Messner, The Price of Prop 8, THE HERITAGE FOUNDATION, (Dec. 31, 2016), https://goo.gl/KV7Dbv.

[3] *Id.*

[4] FAQ on CEO Resignation, Mozilla.org, (April 5, 2014), https://goo.gl/MgyaDg.

[5] Alistair Barr, *Mozilla CEO Brendan Eich Steps Down*, WALL ST. J., April 3, 2014, https://goo.gl/6cevCo.

Another notorious scandal concerned the actions of staff for the Internal Revenue Service ("IRS"), who targeted conservative organizations' applications for tax-exempt status.[6] What followed was an extremely troubling episode in which public officials used government resources to silence conservative organizations and their members.

After widespread reports and Congressional inquiries regarding selective targeting of conservative organizations, the U.S. Treasury Inspector General for Tax Administration ("TIGTA") audited the unit responsible for processing applications by organizations seeking tax-exempt status under I.R.C. §§ 501(c)(3) and 501(c)(4). U.S. Treas. Insp. Gen. for Tax Admin., Ref. No. 2013-10 053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* 3 (May 14, 2013). TIGTA's report on the matter showed that there had been a deliberate, systematic targeting of conservative groups. *Id.* at 30. The audit focused on allegations that the IRS targeted specific groups, delayed the processing of certain applications, and requested unnecessary information from certain applicants. *Id.* TIGTA found that the IRS unit responsible for processing tax-exempt applications used inappropriate criteria for selecting and referring applications for additional scrutiny by the IRS. *Id.* at 5. Initially, IRS staff conducted ad hoc application reviews looking for conservative terms such as "Tea Party," "Patriots," "9/12," "We the People," or "Take Back the Country." *Id.* A few weeks later, the IRS

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[6] Judicial Watch, *ABCs of IRS Mess; Justice Dept. Is Tainted Too* (last visited Dec. 29, 2016), https://goo.gl/rtDGoS.

systematized this process, developing a formal "Be On the Look Out" list of buzzwords staff should search for to identify conservative organizations for additional scrutiny based on viewpoint. *Id.* at 6, 35. Evidence discovered through litigation shows that the IRS's targeting was even more pervasive than TIGTA reported.[7]

As a result, conservative organizations seeking tax-exempt status experienced oppressive delays in receiving final IRS determinations ranging from more than two years to over 1,000 days. *Id.* at 11, 14. These delays caused some applicants to withdraw their applications or abandon their constitutionally protected activities. *Id.*

These instances of targeting and harassing conservative donors and non-profits are nationally famous. Donors are certainly aware of these events, as shown by the fact that they have raised them with Judicial Watch's staff. In Judicial Watch's experience, any law or regulation that requires additional disclosure of donor data—especially to a state government that has publicly demonstrated animosity to conservative viewpoints—has the real potential to chill speech in non-electioneering contexts.

It also could influence non-profits' choice of issue advocacy. For example, Judicial Watch routinely sues California, providing pro-bono representation to

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[7] *See Notice of Compliance With Court's Order*, Ex. 2 at 1-10, *NorCal Tea Party Patriots, et al. v. I.R.S., et al.*, No. 1:13-CV-341 (S.D. Ohio May 24, 2016), ECF No. 265-2.

private clients in cases ranging from enforcing the voter list maintenance provisions of the National Voter Registration Act, 52 U.S.C. § 20507, to lawsuits enforcing federal immigration law. Judicial Watch attorneys are currently and have recently represented private clients in a number of contentious cases against California state officials.[8]

In the future, other non-profits who do not have Judicial Watch's willingness to court disapproval may forgo advocacy projects in California because they do not want be subject to the State's donor disclosure laws. California should not possess the ability to deter public-spirited inquiry in this way. If the State is left with such a power, the "[e]ffective advocacy of both public and private points of view, particularly controversial ones," will be diminished. *NAACP*, 357 U.S. at 460. The resultant public atmosphere will stifle true "[f]reedom of discussion," which "must

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[8] *See Cerletti v. Hennessy*, No. CGC-16-556164 (Cal. Super. Ct., San Francisco Cty.) (taxpayer lawsuit against San Francisco Sheriff's "Sanctuary" city policy); *Crest v. Padilla*, No. 19STCV27561 (Cal. Super. Ct., LA Cty.) (lawsuit against California Secretary of State concerning SB 826, which requires publicly traded companies to have at least one woman on their Board of Directors); *Myers v. Smith*, No. 19-353510 (Cal. Super. Ct., Santa Clara Cty.) (taxpayer lawsuit challenging Santa Clara County's "Sanctuary" city policy); *Griffin v. Padilla*, 417 F. Supp. 3d 1291 (E.D. Cal. 2019), *vac. on other grounds*, 2019 U.S. App. LEXIS 38890 (9th Cir. Dec. 16, 2019) (lawsuit seeking to enjoin enforcement of SB 27's requirement that presidential candidates must disclose their personal tax returns to appear on California's ballot); *Judicial Watch v. Logan*, No. 17-8948 (C.D. Cal. Dec. 13, 2017) (NVRA lawsuit against Los Angeles County and California Secretary of State for failure to maintain accurate voter registration lists).

embrace all issues about which information is needed." *Thornhill*, 310 U.S. at 102.

C. The Ninth Circuit Substituted its View of the Evidence for The Well-Reasoned Findings By the Trial Court.

At critical moments, the panel substituted its view of the evidence for the reasonable, well-supported views of the trial court. In particular, it substituted its views regarding the weight of, and the inferences to be drawn from, evidence of First Amendment burdens presented by the Petitioners, while crediting the State's evidence.

If the district court's findings are "plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574 (citations omitted). The panel's opinion repeatedly violated this principle.

Although the trial court wrote that the evidence of threats and harassment targeting individuals publicly associated with Petitioners were too numerous to list, *Am. for Prosperity Found v. Harris*, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016), the panel found otherwise based, in part, on the observation that Petitioner did not identify an "individual whose willingness to contribute hinges on whether Schedule B information will be disclosed to the California

Attorney General." *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1014 (9th Cir. 2018). Aside from impermissibly substituting its own view of the evidence, the panel's spurious inference here ignores the realities at hand. A rational individual who was concerned about being publicly associated with Petitioners would also refuse to appear in court on their behalf. Those who worry about being targeted because they donate to an institution will also worry about being targeted because they support it in a lawsuit. Not everyone wants to be in the arena, and nothing meaningful can be extrapolated from this fact. Indeed, had such a witness testified, she would have been subject to reasonable cross examination that her very appearance at trial undermined her testimony that she was afraid of retaliation. The panel might then have reasoned that any witness willing to testify at trial must not be *too* concerned about being publicly associated with Petitioners.

Later in its analysis, the panel rejected the trial court's findings regarding California's previous failures to maintain confidentiality of the very records in question, holding, against all evidence, that there was only a "slight risk of public disclosure." *Becerra*, 903 F.3d at 1018-19; *see also Harris*, 182 F. Supp. 3d at 1057-58. The panel suggested that the trial court placed too much weight on the State's inability to keep donor information confidential because it "rested this conclusion solely on the state's *past* inability to ensure confidentiality." *Becerra*, 903 F.3d at 1019 (citations and quotations omitted). That is, despite the evidence in these very proceedings that the State failed to ensure confidentiality, the panel—again substituting its own view of the evidence for what the

district court found at trial—concluded that the State was unlikely to fail in the future.

The panel also explained that it was more concerned about public disclosure attributable to "human error" than to disclosure due to "software vulnerability." *Id.* at 1018. Of course, for an aggrieved donor facing hostile publicity, the reason information became public is utterly irrelevant. Moreover, the Panel's focus on "human error" wholly ignores that future bad actors are capable of hiding their true motivations: malice can be disguised as error. Finally, even if there is no evidence of malice in this case, it does not rule out the possibility of malicious disclosure in the future. That risk, along with the substantial body of evidence revealing California's failure to maintain confidentiality, supports the trial court's ruling finding that the Attorney General "cannot effectively avoid inadvertent disclosure." *Harris*, 182 F. Supp. 3d at 1057.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court remand with instructions to enter a permanent injunction against enforcement of the Attorney General's unconstitutional demand for Schedule B disclosures.

Respectfully submitted,

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