No. 19-251 & No. 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 LEGAL CENTER,

PETITIONER,

V.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

RESPONDENT.

On Writs of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF THE LIBERTY JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation firm that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights.

As part of its mission to defend fundamental rights, the Center works to protect the privacy of citizens and civil society. To that end, the Center has a number of current or recent cases defending donor privacy for nonprofit organizations: *Illinois Opportunity Project v. Holden, et al.*, Case No. 3:19-cv-17912 (D.N.J. 2019) (case settled); *Rio Grande Found. v. Oliver*, No. Civ. 1:19-cv-01174-JCH-JFR (D.N.M.) (case ongoing); *Gaspee Project & Ill. Opportunity Project v. Mederos*, No. 1:19-CV-00609-MSM-LDA (D.R.I.), No. 20-1944 (1st Cir.) (case ongoing); *Ill. Opportunity Project v. Bullock*, No. CV-19-56-H-CCL (D. Mont.) (case mooted).

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amici* funded its preparation or submission. Both Petitioners submitted letters granting blanket consent for *amicus* briefs in support of either party, and Respondent granted consent to file.

SUMMARY OF ARGUMENT & INTRODUCTION

In a free society, privacy is for individuals and civil society; transparency is for the government and how it spends our tax money.

Some people believe the opposite: that transparency should be the baseline for tax-exempt organizations, and privacy is granted by the government only in that "peculiar circumstance" when the organization can prove a "reasonable probability that the compelled disclosure would result in threats, harassment, or reprisals from either Government officials or private parties." *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 379-80 (1995) (Scalia, J., dissenting).

The panel below took this approach, making it the burden of the "party challenging a disclosure requirement" to "prov[e]a substantial threat of harassment." 24a. Even Judge Ikuta's dissent from rehearing *en banc* starts from this presumption that strict scrutiny applies only "[w]here government action subjects persons to harassment and threats of bodily harm, economic reprisal, or other manifestations of public hostility…" 78a.

This "presumption of transparency" framework is antithetical to this Court's precedents and to the principles of a free society. In a free society, privacy is the presumption, and the burden is on the government to prove its need to access private information, not on the citizen or civil society organization to prove its need for privacy because of a substantiated fear of retaliation or harassment. First Amendment rights should not be contingent on proving a serious death threat.

ARGUMENT

I. The First Amendment's guarantees for free association protect all organizations, whether or not they are controversial.

In its seminal case in this area, *NAACP v. Alabama*, this Court expressed appropriate concern about the impact of disclosure on the NAACP's members, who faced burning crosses and church bombings if their affiliation became public. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958). The *NAACP* opinion's reference to retaliation illustrated the importance of privacy, but it did not set up a requirement that a group prove a substantiated fear of retaliation before qualifying for protection from governmental intrusion or investigation.

We know this from the cases that the Court decided shortly thereafter. When the Florida State Legislature tried to get the NAACP's membership lists, this Court relied on its previous Alabama decision to recognize the "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs." *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 555-57 (1963).

"[O]f course, *all* legitimate organizations are the beneficiaries of these protections." *Id.* (emphasis added); *accord id.* at 569-70 (Douglas, J., concurring). The need for these protections is "more immediate and substantial" for groups facing retaliation because of their unpopular stances, but a reasonable fear of retaliation

is not a prerequisite to qualify for the First Amendment's associational guarantee. All legitimate organizations receive these protections, and it is not their burden to provide specific evidence of past retaliation, harassment, and threats to justify that protection. *Pollard v. Roberts,* 283 F.Supp. 248, 258 (E.D.Ark. 1968) (3-judge court), *aff'd per curiam*, 393 U.S. 14 (1968)).

As the Supreme Court of California has observed, this approach not only is constitutionally necessary, but it also best serves the important purpose of protecting all citizens from retaliation. Many groups may be broadly popular but, nevertheless, engender a real possibility of retaliation from one disagreeable segment of society. *Britt v. Superior Court*, 20 Cal. 3d 844, 854, 143 Cal. Rptr. 695, 701, 574 P.2d 766, 772 (1978).

And it is impossible to predict ahead of time when a group may become controversial or when opposing activists may choose to make one group a *cause celebre* such that donors who previously supported a mainstream group, and thus were disclosed, may suddenly find themselves associated with a cause that prompts boycotts or other retaliation. *See, e.g.,* Taren Kingser & Patrick Schmidt, *Business in the Bulls-Eye? Target Corp. and the Limits of Campaign Finance Disclosure*, 11 ELECTION L.J. 21, 29-32 (2012) (Target and Best Buy find themselves subject to unexpected boycotts for supporting a Chamber of Commerce group that ran ads supporting a Republican candidate for governor who supported lower taxes and less regulation but also supported traditional marriage).

The First Amendment finds its most urgent application as a shelter for views and voices that are on the

margins of our society. But this truth does not mean that mainstream voices do not enjoy its guarantees or that unpopular groups get extra protection. This Court should reject any framework that starts from the premise that disclosure is the norm, and a group must show its need for privacy by proving its unpopularity.

Instead, the Court should start from a presumption of free and private association and place the burden on the government to prove its need to infringe the First Amendment rights of civil society. *See United States v. Playboy Entm't Grp.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.").

II. This right to privacy of all associations is protected by strict scrutiny on the government.

When the presumption is privacy, rather than transparency, then the government bears the burden to prove its need for information survives strict scrutiny. *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6-7 (1971) ("When a State seeks to inquire about an individual's beliefs and associations a heavy burden lies upon it to show that the inquiry is necessary…"); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974); *id.* at 98 (Marshall, J., dissenting) ("The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure.").

In both its NAACP cases and its "Red Scare" cases on private association, this Court consistently used the

language of strict scrutiny (compelling interest and narrow tailoring) to describe the test for a governmental interest in compelling disclosure of a group's private membership and donor records.

The Court consistently said that the government could only require disclosure of a group's private record because of an overriding and compelling interest. *De Gregory v. Attorney Gen. of N.H.*, 383 U.S. 825, 829 (1966) ("overriding and compelling state interest"); *Gibson*, 372 U.S. at 546 ("overriding and compelling state interest" and "compelling regulatory concern"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("only a compelling state interest"); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("a subordinating interest which is compelling"); *Barenblatt v. United States*, 360 U.S. 109, 127 (1959) ("subordinating interest of the State must be compelling"); *Uphaus v. Wyman*, 360 U.S. 72, 81 (1959) ("the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy of persons"); *NAACP*, 357 U.S. at 463 ("interest of the State must be compelling").

In other associational privacy cases from that era, the Court also used the language of narrow tailoring. *See NAACP v. Alabama*, 377 U.S. 288, 307-08 (1964) (in a different NAACP case against Alabama, the government's "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved," quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)); *La. ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296-97 (1961) ("narrowly drawn," citing *Talley v. California*, 362 U.S. 60 (1960)).

Accord Button, 371 U.S. at 438 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.").

In fact, the Court frequently used substantial criminality as the only compelling interest sufficient to justify an invasion of an organization's privacy.

In the original Alabama case, the Court confronted the question of how to reconcile its holding with its previous decision upholding a statute requiring disclosure of Ku Klux Klan membership lists, *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928). The Court concluded the different treatment was justified only because of "the particular character of the Klan's activities, involving acts of unlawful intimidation and violence." *NAACP*, 357 U.S. at 465.

After that point, the Court consistently used criminality as the touchstone that justified an invasion of privacy for a private organization, especially as it dealt with its "Red Scare" cases. The Court differentiated its decisions like *NAACP* and *Gibson,* distinguishing the NAACP from the Communist groups based on the latter's criminality. *Uphaus*, 360 U.S. at 80 (disclosure of list of speakers and supporters for a Communist-front group "undertaken in the interest of self-preservation, the ultimate value of any society."); *Barenblatt*, 360 U.S. at 128 ("this Court has recognized the close nexus between the Communist Party and violent overthrow of government"); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 52 (1961); *Gremillion*, 366 U.S. at 297 ("criminal conduct … cannot have shelter in the First Amendment."); *Baird*, 401 U.S. at 9 (Stewart, J., con-

curring) ("knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals."); *Familias Unidas v. Briscoe*, 619 F.2d 391, 401 (5th Cir. 1980) ("The disclosure requirements in *Communist Party* and *Zimmerman* attached only to organizations either having a demonstrated track record of illicit conduct or explicitly embracing, as doctrine, plainly unlawful means and ends."). *See Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 264 (1994) (Souter, J., concurring) (application of this principle in Racketeer Influenced and Corrupt Organizations Act prosecutions); *Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (application of this principle in prosecutions against members of the Aryan Brotherhood).

Read as a whole and recognizing that they pre-date our modern tiers-of-scrutiny framework, these cases show that the Court applied strict scrutiny.

III. A presumption of privacy can be reconciled with the government's compelling needs for information as outlined in other lines of doctrine.

The Court need not start from scratch in reconciling its NAACP and "Red Scare" cases, which all are fifty-plus years old, with its more recent holdings in areas like campaign finance.

Quite simply, "the Government has a compelling interest in prevention of corruption and the appearance of corruption." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 486 (2007) (Scalia, J., concurring). *See Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S.

721, 776 (2011) (Kagan, J., dissenting) ("Our campaign finance precedents leave no doubt: Preventing corruption or the appearance of corruption is a compelling government interest."). "[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976). The Court in *Buckley* found that the government's interest in deterring violations of campaign finance limits and informing the electorate of the sources of campaign funds were also sufficiently compelling to justify overriding *NAACP's* presumption of privacy. *Id.* at 66-68.

Similarly, the fair and efficient administration of the tax system is a compelling governmental interest. *United States v. Lee*, 455 U.S. 252, 260 (1982). Thus, this Court would not create problems within its other doctrines by holding that strict scrutiny applies to any government mandate that a private, nonprofit association disclose its donors.

IV. Adopting a more generous reading of *Buckley* and *Socialist Workers '74* would be a mistake.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court had to wrestle through how to square its holding in favor of campaign finance disclosure with its previous holding in *NAACP v. Alabama* about the privacy of nonprofit associations, of which campaigns and parties are one type. The Court responded by affirming the Court of Appeals' finding that the government's interests in disclosure met the exacting scrutiny called for in *NAACP*. *Id.* at 65-68. But the Court held out the pos-

sibility that an individual candidate or party could offer sufficiently substantial evidence of harassment rising to the level of seriousness shown by the NAACP. *Id*. at 69-72. The Court then took its first and only case to apply that holding to a set of sufficient facts in *Brown v. Socialist Workers 1974 Campaign Committee*, 459 U.S. 87 (1982).

Under those cases, a group must prove "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties" to qualify for an exemption from, for instance, campaign finance disclosure. *Buckley*, 424 U.S. at 74;[2] *Socialist Workers '74*, 459 U.S. at 100; *accord McConnell v. FEC*, 540 U.S. 93, 199 (2003).

In order to show such a reasonable probability, the group must offer "specific evidence of past or present

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[2] Sometimes this is characterized as the "minor party" exception, but the protection has been granted to a wide variety of organizations, including major political parties, major labor unions, religious groups, business associations, and advocacy organizations. *See, e.g., Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968) (Republican Party); *Int'l Longshoremen's Asso. v. Waterfront Com. of N.Y. Harbor*, 667 F.2d 267, 272 (2d Cir. 1981) (labor union); *Christ Covenant Church v. Town of Sw. Ranches*, No. 07-60516-CIV, 2008 U.S. Dist. LEXIS 49483, at *20 (S.D. Fla. June 29, 2008) (church); *Marshall v. J. P. Stevens Emps. Educ. Comm.*, 495 F. Supp. 553, 561 (E.D.N.C. 1980) (business group); *Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 954 F. Supp. 2d 127, 141 (E.D.N.Y. 2013) (advocacy organization). *See generally Doe v. Reed*, No. 11-35854, 2011 U.S. App. LEXIS 23327, at *6-7 (9th Cir. Nov. 16, 2011) (N.R. Smith, J., dissenting) (discussing the minor-party doctrine and *Doe v. Reed*, 130 S. Ct. 2811, 2821 (2010)).

harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient." *Id*. For newer groups to qualify, they may "offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Id*.

In these cases, the plaintiff bears the burden to provide "objective and articulable facts, which go beyond broad allegations or subjective fears." *Dole v. Serv. Emps. Union, etc., Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (*quoting Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346, 350 n.1 (9th Cir. 1988)). Affidavits stating the group's subjective fears, without more, are insufficient. *Anders v. Benson*, No. 20-cv-11991, 2020 U.S. Dist. LEXIS 145210, at *11-12 (E.D. Mich. Aug. 13, 2020). Moreover, a group that "has been disclosing its donors for years and has identified no instance of harassment or retaliation" is automatically out of luck. *Citizens United v. FEC*, 558 U.S. 310, 370 (2010). *See N.Y. State NOW v. Terry*, 886 F.2d 1339, 1355 (2d Cir. 1989).

Lower courts look to this Court's two primary cases in this area for guidance on how many "objective and articulable facts" are needed. In the first, *NAACP v. Alabama*, the plaintiff made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. The Court in *Buckley* reaffirmed this high standard, showing itself willing to tolerate some level of "harassment or retaliation" as the cost of

transparency in campaigns, 424 U.S. at 68, and only preempting a transparency regime when the harassment is "so serious" it resembles that of the NAACP in the Civil Rights-era South. *Id.* at 71.

The Court found such a case in *Socialist Workers '74*, where evidence included "threatening phone calls and hate mail, burning of the group's literature, destruction of members' property, police harassment, firing of shots at the group's office, and termination of members' employment." *Lassa v. Rongstad*, 2006 WI 105, ¶ 70 (*summarizing Socialist Workers '74 Campaign Comm.*, 459 U.S. at 98-99).

The "objective and articulable facts" from these two cases require a showing of retaliation that is unnecessarily high in other cases. In this case, the trial court below found that AFP staff had received death threats, that AFP donors had received death threats, and that the businesses of AFP donors had been subject to boycotts. APP.50a. But this was not enough for the Ninth Circuit panel below, which insisted on evidence that the unauthorized Schedule B disclosure in particular had prompted such reactions. APP.34a. And other evidence of substantial retaliation, such as property destruction, personal harassment, and business boycotts, has not sufficed for other courts. *See, e.g., ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1213 (C.D.Cal. 2009); *ProtectMarriage.com - Yes on 8 v. Bowen*, 752 F.3d 827, 840 (9th Cir. 2014). Similarly, "alarming" evidence of threats faced by groups in the same ideological lane but located in other states has been found insufficient. *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051, 1072-73 (D.N.M. 2020).

This Court, in the light of current culture, may think it best to follow Justice Alito's concurrence in *Doe v. Reed*, where he argued "speakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle . . . [because] unduly strict requirements of proof could impose a heavy burden on speech." 561 U.S. at 204 (Alito, J., concurring). The Court could adopt for itself his encouragement that "courts should be generous in granting as-applied relief in this context." *Id.*

This outcome may even be denominated a win for the Respondents, if the Court remanded with directions for lower courts to use a forgiving standard for "reasonable probability" and the severity of the threats that takes account of modern cancel culture.

But such an outcome would be the hollowest of victories. Indeed, it would be a step backward from the *status quo* for every organization but a few of the most prominent and controversial, like Americans for Prosperity.

A decision like that would give *carte blanche* to nosy politicians and their allies in the bureaucracy to engage in an expansive campaign of compelled disclosure. Every civil society organization would be fair game for onerous, invasive disclosure requirements by federal, state, and local agencies. And anyone with the temerity to push back would be told that the U.S. Supreme Court had recently approved this approach.

Politicians would have a field day. Want to fundraise in our state? Disclose all your top donors nationwide.[3] Want a government contract from our city? Show whether you've ever associated with the National Rifle Association.[4] Want a contract from our state? Admit if you pay dues to the state Chamber of Commerce.[5] Want to run an issue ad ever, at any time, near or far from an election? Fork over the list.[6] Want to keep your tax exemption? Tell us if you have ever donated a dime to the Federalist Society.[7]

Charities would face an impossible choice: entrust the names of all their top donors nationwide to the Attorney General of California or forego fundraising in the

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[3] App.8a. California's requirement that it see a charity's Schedule B allows it to see donors in all 50 states, not just California.

[4] *See NRA of Am. v. City of L.A.*, 441 F. Supp. 3d 915, 925 (C.D. Cal. 2019) (in order to bid on any City contract, a company must "disclose all contracts with or sponsorship of the National Rifle Association.").

[5] *Ill. Opportunity Project v. Bullock*, No. CV-19-56-H-CCL (D. Mont.) (executive order mandated that all prospective bidders on state contracts must disclose donations to all nonprofit organizations that engage in issue advocacy close in time to a Montana election).

[6] *Ams. for Prosperity v. Grewal*, No. 3:19-cv-14228-BRM-LHG, 2019 U.S. Dist. LEXIS 170793 (D.N.J. Oct. 2, 2019); *Citizens Union of N.Y. v. AG of N.Y.*, 408 F. Supp. 3d 478, 489 (S.D.N.Y. 2019).

[7] *See* "Feinstein, Whitehouse Introduce Bill to Combat Dark Money in Judicial Nominations," U.S. Senate (July 2, 2020), available at https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=10A6C4A7-0631-4143-8BD9-B4459F4629E4 (announcing Senate Bill 4183).

largest state in the nation. Individuals and companies would face an easier but still painful option: just stop giving to any nonprofit groups to avoid any potential for losing a job or facing a boycott in the future.

As a result, there would be an explosion of litigation as groups of every ideological stripe and community service sector would file individual cases to secure an as-applied exemption from the new regimes. Groups would have to plead and prove their own unpopularity, knowing the embarrassment of announcing their unpopularity is worth keeping certain donors who will only give if they can remain anonymous. Admitting you're unpopular is better than losing half your revenue in one fell swoop.[8]

Federal judges would find themselves facing difficult determinations: is a death threat against a staff person of an affiliate located in another state enough to justify an exemption from donor disclosure in this state? What about graffiti on a storefront of a similar group in a different city? They would find themselves adrift and frustrated, because "the question of what evidence of harassment or threats should be required, in a situation that involves an amorphous group of individuals who seek an exemption from a disclosure requirement relating to voting rights, is not governed by clear precedent." *Doe v. Reed*, No. 11-35854, 2011 U.S.

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[8] *In re Heartland Inst.*, No. 11 C 2240, 2011 U.S. Dist. LEXIS 51304, at *14 (N.D. Ill. May 13, 2011) (court credits group president's testimony that "Heartland would lose at least half of its current funding if Heartland is required to disclose donor identities").

App. LEXIS 23327, at *7-8 (9th Cir. Nov. 16, 2011) (N.R. Smith, J., dissenting).

In other words, telling lower courts to "be generous" in granting as-applied relief from mandatory disclosure regimes is no solution. Such a rule would gut the protections of *NAACP v. Alabama* and give governments permission to require every private group to disclose its donors, which the bureaucrats could them promptly leak or post on the Internet for the world to see. That will lead to a flood of litigation, different standards in different circuits, and a steady stream of certiorari petitions to this Court with every possible permutation of the evidence presented below. It will be a practical nightmare, and it will betray the holdings of *Gibson* and numerous other cases.

CONCLUSION

"[T]he burden of guarding privacy in a free society should not be on its citizens; it is the Government that must justify its need . . ." *United States v. White*, 401 U.S. 745, 793 (1971) (Harlan, J., dissenting).

This Court should reestablish a presumption of privacy that recognizes the First Amendment protects all groups, popular and unpopular. That protection can only be infringed when the government shoulders its burden to prove a compelling interest to access private information and that its access is narrowly tailored to that interest. Anything less will expose hundreds of

thousands of independent organizations, the little platoons that are America's defining feature[9], to an invasive regime that will fundamentally alter the fabric of our civil society.

Respectfully submitted,

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[9] Edmund Burke, REFLECTIONS ON THE REVOLUTION IN FRANCE (Harvard Classics 1909 ed.) ¶ 75 ("To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed towards a love to our country, and to mankind."); Alexis de Tocqueville, DEMOCRACY IN AMERICA (Liberty Fund ed. 2010) Vol. III, p. 895 (chapter entitled "Of the Use That Americans Make of Association in Civil Life").