Nos. 19-251, 19-255

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of California,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of California,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE U.S. CHAMBER OF COMMERCE FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The U.S. Chamber of Commerce Foundation ("Foundation") is a 501(c)(3) charitable organization that harnesses the power of business for social good and educates the public on emerging issues and creative solutions that will shape the future. It does so through a variety of charitable and educational programs. For example, the Foundation's Center for Education and Workforce informs and mobilizes the business community to support education and train the work force of the future. Its Corporate Citizenship Center educates the public and the business community about corporate citizenship programs and

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the Chamber, the Foundation, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written consent for the filing of this brief.

organizes the business community around issues such as disaster relief, economic opportunity, and sustainability. Hiring Our Heroes connects veterans, transitioning service members, and military spouses with meaningful civilian employment opportunities.

The Chamber and its Foundation have a strong interest in this important case. Effective education and advocacy require funding. But many donors to nonprofits prefer to remain anonymous for a variety of reasons, including to protect themselves from being targeted by extremists who hold different views, to avoid further requests for solicitations, or simply because they do not wish to publicize their charitable good deeds. Without anonymity, Chamber members and Foundation donors may be deterred from supporting the Chamber's policy advocacy and the Foundation's educational initiatives. That reluctance will be detrimental to the public and the interests of healthy democratic debate. Moreover, as the record in this case shows, donors who elect to contribute at the price of having their donations revealed may become targets for threats, harassment, and violence.

SUMMARY OF ARGUMENT

This Court has repeatedly recognized that group association "undeniably enhance[s]" "[e]ffective advocacy of both public and private points of view, particularly controversial ones." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *see also Buckley v. Valeo*, 424 U.S. 1, 65 (1976) ("[G]roup association is protected because it enhances 'effective advocacy.'"). Indeed, it is "[b]eyond debate that freedom to engage in association for the advancement of beliefs and

ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. at 460. For that reason, this Court has long held that state action encroaching on the freedom of association—including on privacy in association—"is subject to the closest scrutiny." *Id.* at 460–61.

I. The Ninth Circuit's decision departs from the protections for associational privacy that this Court has long deemed required by the First Amendment. The decision upheld the California Attorney General's blanket, up-front, governmental demand for the individual identities and addresses of major donors to private nonprofit organizations, without requiring any showing that the demand was narrowly tailored to an important government interest. Departing from the review required under *NAACP v. Alabama*, the Ninth Circuit erroneously held that "narrow tailoring and least-restrictive-means tests … do not apply" to infringements on associational privacy. App. 22a.[2]

The Ninth Circuit justified its departure from precedent on a misreading of *Buckley*. *See* App. 15a–17a; 23a–39a; *see also* App. 104a. In *Buckley,* this Court applied *NAACP v. Alabama* and required the government to show that its campaign-finance disclosure requirements were narrowly drawn to curb the evils of campaign ignorance and corruption. First,

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[2] "App." refers to the cert-stage appendix filed by the Americans for Prosperity Foundation in No. 19-251. "Law Ctr. App." refers to the cert-stage appendix filed by the Thomas More Law Center in No. 19-255.

the Court required the government to show that these interests were "sufficiently important." 424 U.S. at 66. Second, the Court required that disclosure be "the least restrictive means" for achieving those interests. *Id.* at 68. Finally, the Court recognized that although the government had met its burden and shown that the statute under review was constitutional "as a general matter," those affected could still bring future as-applied challenges alleging that the disclosure requirements were "overbroad"—that is, not narrowly tailored—as applied to them. *Id.* at 68–69. The Court explained that in these future cases plaintiffs would "need show only a reasonable probability" of harassment to demonstrate overbreadth. *Id.* at 74.

The Ninth Circuit's rejection of narrow tailoring overlooked the second step of *Buckley*'s First Amendment analysis. Instead of requiring the Attorney General to show that the state's demand for Schedule B information—*i.e.*, the donor list—was minimally intrusive, the court jumped to the third step and required the Thomas More Law Center ("Law Center") and the Americans for Prosperity Foundation ("AFP Foundation") (collectively, "petitioners") to prove a "significant" burden on the associational rights of their donors. App. 24a, 39a; Law Ctr. App. 25a. To make matters worse, as the five dissenting judges recognized, the Ninth Circuit interpreted that requirement in a way that made it "next-to-impossible" to meet. App. 96a.

The Ninth Circuit's analysis thus conflicts with *NAACP v. Alabama*, misreads *Buckley*, and erodes the First Amendment's guarantee to freedom of association.

The fix proposed by the petitioners here would go a long way toward correcting the problem created by the Ninth Circuit's rejection of narrow tailoring. As petitioners correctly point out, this Court has consistently applied *NAACP v. Alabama* when reviewing state action burdening First Amendment rights "outside the election context." AFP Found. Br. 30; *see also* Law Ctr. Br. 31. The Chamber and the Foundation agree with petitioners that this Court should clarify that narrow tailoring applies in such cases.

But the Court should not stop there. The Chamber has consistently taken the position in court that the freedoms of speech and association deserve the same rigorous protection in the context of elections as they do in other contexts. And this Court's precedents confirm that narrow tailoring is required any time associational privacy is threatened, even in the electoral context. Indeed, *Buckley* and its progeny "apply the same strict standard of scrutiny … developed in *NAACP v. Alabama*," 424 U.S. at 75, and require that campaign-finance disclosures be the "least restrictive means" of combatting campaign ignorance and corruption, *id.* at 68; *see also McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (plurality) (applying least-restrictive-means test). This Court should reaffirm the rigorous standard of review established by this Court's precedents, taking care not to undercut associational privacy in the electoral context.

II. In addition to this Court's precedents, the original public meaning of the First Amendment compels reversal of the Ninth Circuit. The "right to

remain anonymous" is a core First Amendment freedom, recognized since the Founding, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), when "Founding-era Americans opposed attempts to require that anonymous authors reveal their identities," *id.* at 361 (Thomas, J., concurring). California's demand for Schedule B information eliminates that right by exposing to state officials the identity of donors who would prefer to remain anonymous. The complete elimination of the right to remain anonymous cannot be salvaged by *any* degree of judicial balancing because "the interest in having anonymous works enter the marketplace of ideas *unquestionably outweighs any public interest* in requiring disclosure as a condition of entry." *Id.* at 342 (emphasis added). The original public meaning of the First Amendment thus provides an alternative basis on which to reverse.

III. If allowed to stand, the Ninth Circuit's disregard for associational privacy rights will deter the free and democratic debate protected by the First Amendment. The experience of the Foundation and the many other charities participating in this case shows why. Many donors, for legitimate reasons, prefer to remain anonymous. If these donors are no longer permitted to remain anonymous, they may be deterred from supporting the Foundation's charitable and educational initiatives. The result is a less robust marketplace of ideas that is deprived of important points of view. Moreover, as the record in this case shows, donors who elect to contribute at the price of having their donations revealed may later become targets for threats, harassment, and violence.

The same is true for advocacy organizations. Although this case involves charities organized under section 501(c)(3) of the Internal Revenue Code, such as the Foundation, many charities are affiliated with social welfare organizations or business associations organized under sections 501(c)(4) and 501(c)(6), like the Chamber. Donors to those organizations, like donors to charities, also have associational privacy rights that are put at risk by the Ninth Circuit's decision. The silencing of social welfare and business organizations is especially pernicious because, in many cases, the very reason those organizations are formed is to express a point of view.

The Court should reverse the Ninth Circuit and clarify that *NAACP v. Alabama* applies whenever associational privacy is threatened. In the alternative, the Court should reverse because the California donor disclosure requirement violates the right to remain anonymous.

ARGUMENT

I. The Ninth Circuit Departed From This Court's "Strict Test" For Reviewing Burdens On First Amendment Associational Privacy Rights.

A. The Ninth Circuit Wrongly Eliminated Narrow Tailoring From Its Analysis.

The First Amendment, applicable to the states through the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. amend. I. Implicit in that guarantee is the "right to associate with others" for expressive purposes, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622

(1984); *see also Janus v. AFSCME*, 138 S. Ct. 2448, 2463 (2018), and the corresponding right to "privacy in one's associations," *NAACP v. Alabama*, 357 U.S. at 462.

Burdens on associational privacy must survive exacting First Amendment review. Since *NAACP v. Alabama*, the Court has required "the closest scrutiny" of state actions that may infringe associational privacy. 357 U.S. at 461. Under that test, the interest asserted by the government "must be compelling." *Id.* at 463. In addition, the government must establish a "substantial relation" between interest and means, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963), and show that the means are "narrowly drawn to prevent the supposed evil," *Louisiana v. NAACP*, 366 U.S. 293, 297 (1961). *Buckley* itself was clear that this "strict test" is "necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." 424 U.S. at 66.

Buckley also makes clear that one aspect of the associational privacy protected by the First Amendment is privacy in one's donations to an organization. Because "financial transactions can reveal much about a person's activities, associations, and beliefs," *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97 n.13 (1982) (citation omitted), government efforts to compel disclosure of contributor names must be reviewed under "the same strict standard of scrutiny … developed in *NAACP v. Alabama*" for the protection of membership lists, *Buckley*, 424 U.S. at 75; *see also id.*

at 65–66 (declining to distinguish "between contributors and members").

The Court has repeatedly applied strict scrutiny to strike down laws infringing upon donor privacy. For example, in *Bates v. City of Little Rock*, 361 U.S. 516 (1960), the Court invalidated the state court convictions of several NAACP officers who had violated municipal ordinances requiring "disclosure of the names of the organizations' members and contributors." *Id.* at 519. More recently, the Court invalidated a federal obligation that would have required "millionaires" to disclose contributions they intended to make to their own, self-funded political campaigns. *Davis v. FEC*, 554 U.S. 724, 744 (2008). Similarly, in *Brown*, 459 U.S. at 87, the Court held that a donor disclosure requirement imposed by Ohio was inadequately justified as applied to the Socialist Workers Party. *See id.* at 100–02. In each of these cases, as in others, the Court "closely scrutinized" the relevant state action to ensure that the burden placed on the "privacy of association and belief guaranteed by the First Amendment" was justified. *Davis*, 554 U.S. at 744.

This case should be addressed in the same manner. Here, the Attorney General demanded that petitioners disclose "the names and addresses of their largest contributors." App. 8a. Even the Ninth Circuit acknowledged that petitioners' "evidence show[ed] that some individuals who have or would support the plaintiffs may be deterred from contributing if the plaintiffs are required to submit their Schedule Bs to the Attorney General," App. 27a (emphasis omitted), and "plainly show[ed] at least the

possibility that the plaintiffs' Schedule B contributors would face threats, harassment or reprisals if their information were to become public," App. 33a (emphasis omitted). In addition, the court acknowledged the Attorney General's "poor track record" of shielding such information from public dissemination. App. 35a.

Nevertheless, the Ninth Circuit did not apply the strict test articulated by this Court—"even though," as the five dissenting judges explained, "the facts squarely called for it." App. 79a. Instead, the Ninth Circuit held that "the narrow tailoring and least restrictive means tests … do not apply here." App. 22a; *see also* App. 16a ("To the extent the plaintiffs ask us to apply the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny, or to require the state to choose the least restrictive means of accomplishing its purposes, they are mistaken."). The panel even acknowledged that its decision to jettison the narrow-tailoring requirement was dispositive. *See* App. 22a ("by applying an erroneous legal standard," "[t]he district court reached a different conclusion").

The Ninth Circuit's rejection of narrow tailoring is directly contrary to the Court's precedent and will have implications that reach far beyond this case. "Under the panel's analysis," the dissenting judges explained, "the government can put the First Amendment associational rights of members and contributors at risk for a list of names it does not need" without meeting the First Amendment scrutiny this Court has required "time and time again." App. 96a–97a.

B. The Ninth Circuit's Opinion Misreads *Buckley*.

The Ninth Circuit justified its departure from *NAACP v. Alabama* on a misreading of *Buckley*. *See* App. 15a–17a, 23a–39a, 104a. And the result was to turn *Buckley*'s shield defending associational privacy into a sword that governments may wield against donors who would prefer to remain anonymous.

In *Buckley*, the Court considered a challenge to disclosure requirements imposed by the Federal Election Campaign Act ("FECA") on political committees and candidates for federal office, including a requirement to disclose "the name and address of everyone making a contribution" over a certain dollar amount. 424 U.S. at 63. Applying *NAACP v. Alabama*, the Court first held that the interests articulated by the government in dispelling "campaign ignorance" and "deter[ring] actual corruption and avoid[ing] the appearance of corruption" were "sufficiently important." *See id.* at 66–68.[3] Second, the Court held that "public disclosure of contributions to candidates and political parties … *in most applications* appear to be the *least restrictive means* of curbing the evils of campaign ignorance and corruption." *Id.* at 68 (emphases added). Third, the Court considered whether, notwithstanding the facial

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[3] At least one Justice believes "it is time for the Court to reconsider" this aspect of *Buckley*—that is, "whether a State's interest in an informed electorate can *ever* justify the disclosure of otherwise anonymous donor rolls." *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2377 (2016) (Thomas, J., dissenting from the denial of certiorari) (emphasis added).

validity of FECA's disclosure requirements, they might yet be "overbroad"—that is, not narrowly tailored—as applied to some "minor parties and independent candidates." *Id.* at 68–69.

The demonstration of narrow tailoring at the second step of *Buckley* was critical to the Court's analysis. To begin, it drove the Court's conclusion that, as a general matter, FECA's disclosure requirements were the "least restrictive means" of advancing Congress's substantial interests in combatting campaign ignorance and corruption. That was so, the Court explained, because "disclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66–67 (footnote omitted). In addition, the disclosure requirements would "deter actual corruption and avoid the appearance of corruption by exposing large [campaign] contributions and expenditures to the light of publicity," *id.* at 67, and permit law enforcement to "detect violations of the contribution limitations," *id.* at 68. FECA's disclosures were, therefore, the least intrusive means of accomplishing Congress's goals in the campaign-finance context.

The demonstration of narrow tailoring was also crucial to establishing a baseline for *Buckley* to consider the as-applied challenge. The Court held that, "as a general matter," FECA's disclosure requirements were the "least restrictive means" of advancing Congress's substantial interests in combatting campaign ignorance and corruption, 424 U.S. at 68, *see also id.* at 68–74. Against that

backdrop, the as-applied challenge before the Court could not succeed because it was based on "highly speculative" and "generally alleged" facts that were not supported by "record evidence." *Id.* at 70–72. However, *Buckley* made clear that a future as-applied challenge could succeed where the evidence showed "only 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." *Id.* at 74; *see also Doe v. Reed*, 561 U.S. 186, 203 (2010) (Alito, J., concurring) (explaining *Buckley*'s "as-applied exemption plays a critical role in safeguarding First Amendment rights").

The Ninth Circuit first erred by overlooking the second step of the *Buckley* analysis. Unlike this Court in *Buckley*, the Ninth Circuit did not require the government to prove a substantial, narrowly tailored relationship between its disclosure requirement and its purported law enforcement interest. Instead, the court held that "narrow tailoring" and "least restrictive means tests … do not apply here." App. 22a; *see also* App. 16a ("To the extent the plaintiffs ask us to apply the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny, or to require the state to choose the least restrictive means of accomplishing its purposes, they are mistaken.").

Then, because the Ninth Circuit did not recognize this third step of the *Buckley* analysis as an as-applied exemption to an otherwise facially valid campaign-finance disclosure requirement, the court wrenched that exemption out of context. That is,

instead of requiring *the state* to show that its demand was narrowly tailored as a general matter, the court required *petitioners* to show a "significant" burden on the First Amendment rights of their donors, App. 24a, 39a—even though California had not first shown that its demand was narrowly tailored as a general matter.

None of the reasons the Ninth Circuit gave for its rejection of narrow tailoring is persuasive. The Ninth Circuit claimed that this Court does not apply narrow tailoring to "disclosure requirements." App. 14a–15a. But, as the five dissenting judges observed, all the cases the Ninth Circuit cited for that proposition were from the electoral context and descended from *Buckley*. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010). "These cases did not discuss whether disclosure was narrowly tailored to address the government's concern" with dispelling campaign ignorance and corruption because "*Buckley* already held that it is." App. 83a. *Buckley*'s progeny, in other words, simply embrace what *Buckley* established: in our "campaign finance system," "disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech." *McCutcheon* 572 U.S. at 223 (plurality); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). Far from undermining narrow tailoring, this Court's campaign-finance cases *affirm* the narrow-tailoring requirement by following *Buckley*. The Ninth Circuit was wrong to conclude that the government need not show narrow tailoring in disclosure cases, including those in the campaign context.

The Ninth Circuit was also mistaken when it suggested that narrow tailoring is not ordinarily a

component of "exacting scrutiny." App. 15a–16a. The petitioners collect dozens of cases from this Court and the lower appellate courts applying narrow tailoring under exacting scrutiny, including disclosure cases. AFP Found. Br. 24–27; Law Ctr. Br. 32. And the five dissenting judges likewise recognized that this Court and the lower appellate courts regularly apply narrow tailoring in cases like this one. App. 78a–79a, 83a–86a.

In light of that clear body of case law, it is puzzling that the panel justified its rejection of narrow tailoring by asserting that *Buckley* "told us that *NAACP v. Alabama* applied exacting scrutiny," not "strict scrutiny." App. 102a–104a. "Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest *and is the least restrictive means to further the articulated interest*." *McCutcheon*, 572 U.S. at 197 (plurality) (emphasis added) (citing *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)). That, *Buckley* recognized, is "the same *strict* standard of scrutiny … developed in *NAACP v. Alabama*," 424 U.S. at 75 (emphasis added); *see also id.* at 66 ("[t]he *strict* test established by *NAACP v. Alabama* is necessary" (emphasis added)); Erwin Chemerinsky, *Constitutional Law* 1202 (4th ed. 2011) ("*NAACP v. Alabama*" employed "strict scrutiny"), that requires "least restrictive means" analysis. *Buckley*, 424 U.S. at 68.

In its preoccupation with labels, the Ninth Circuit overlooked that the First Amendment always requires the *government* to justify the burdens it places on associational freedoms. "The First

Amendment is a limitation on government, not a grant of power." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring). By straying from that foundational principle, the Ninth Circuit turned the First Amendment on its head. Instead of requiring the Attorney General to show that the state's demand for the donor information was narrowly drawn, the court required petitioners to prove "significant" impairment of the associational rights of its donors. App. 24a, 39a. That was error.

C. *NAACP v. Alabama*'s "Strict Test" Applies Whenever Associational Privacy Rights Are Threatened.

Petitioners ask this Court to clarify that *NAACP v. Alabama* remains good law *outside* the electoral context. AFP Found. Br. 30; Law Ctr. Br. 31. The Chamber and its Foundation agree.

But the Court should reaffirm that associational rights are not somehow limited in the electoral context. The Chamber has long explained that the freedoms of speech and association deserve the same rigorous protection in the context of elections as they do in other contexts. *See, e.g.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (amicus); *Citizens United v. FEC*, 558 U.S. 310 (2010) (amicus); *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (amicus); *McConnell v. FEC*, 540 U.S. 93 (2003) (party); *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (amicus); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) (amicus). This Court can vindicate that principle in this case by affirming that

Buckley and its progeny did not create a separate test for the electoral context.

Indeed, *Buckley* and its progeny "apply the same strict standard of scrutiny … developed in *NAACP v. Alabama*," 424 U.S. at 75, and require that campaign-finance disclosures be the "least restrictive means" of combatting campaign ignorance and corruption, *id.* at 68; *see also McCutcheon*, 572 U.S. at 197 (plurality) (applying least-restrictive-means test). In *Buckley*, the Court explained that "as a general matter," FECA's disclosure requirements were the "least restrictive means" of advancing Congress's substantial interests in combatting campaign ignorance and corruption. 424 U.S. at 68; *see also id.* at 68–74. But that does not mean that all campaign-finance disclosure requirements automatically satisfy the narrow-tailoring inquiry. Where, for example, a disclosure requirement is broader than the FECA disclosure requirement at issue in *Buckley*, a court must hold the government to the burden of proving its alleged interests and demonstrating that the law is narrowly tailored, giving serious consideration to all arguments that it fails this standard.[4]

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[4] For example, Congress is now considering legislation that would impose broad donor disclosure obligations on so-called "campaign-related disbursements"—a new category of speech that includes, in addition to "express advocacy," communications that "promote[ ]," "attack[ ]," "support[ ]," or "oppose[ ]" a candidate for federal office (including an incumbent), as well as the nomination or Senate confirmation of a Federal judge or justice. H.R. 1, 117th Cong., § 4111 (2021); *see also* U.S. Chamber, Key Vote Alert (Mar. 5, 2019) (opposing HR-1 in 116th

To be sure, while the constitutionality of burdens on electoral speech is not now before the Court, this case is a timely opportunity to reaffirm that infringements on expressive association in the electoral context also cannot escape rigorous First Amendment scrutiny. At the very least, the Court should ensure that is ruling does not diminish First Amendment rights in the electoral context.

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Consistent with First Amendment precedent, the Court should reverse the Ninth Circuit and clarify that *NAACP v. Alabama*'s "strict test" applies whenever associational privacy is threatened.

Congress), https://www.uschamber.com/sites/default/files/190305_kv_hr1_house.pdf. These disclosure obligations are, by design, broader than those approved in *Buckley*, reaching beyond "only funds used for communications that *expressly advocate* the election or defeat of a clearly identified candidate" and appearing to serve different interests. 424 U.S. at 80 (emphasis added) (footnote omitted).

As of this writing, HR-1 is scheduled for a House vote in early March. *See* Lindsey McPherson, *House to vote on HR 1 government overhaul, policing bill first week of March*, Roll Call (Feb. 16, 2021), https://www.rollcall.com/2021/02/16/house-to-vote-on-hr-1-government-overhaul-policing-bill-first-week-of-march/.

II. The Original Public Meaning Of The First Amendment Protects Anonymous Speech And Association.

Even apart from the "strict test" imposed by this Court's precedent, California's demand for donor information is unconstitutional because it effectively eliminates a core First Amendment right—the "right to remain anonymous." *McIntyre*, 514 U.S. at 357. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (holding "total ban" on constitutional right "violate[s] that right" irrespective of benefit).

History proves that right. "Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'" *McIntyre*, 514 U.S. at 361 (Thomas, J., concurring). In the years leading up to the Revolution, the Colonists were subject to the "obnoxious press licensing law of England." *Talley v. California*, 362 U.S. 60, 64 (1960). This law was designed to "lessen the circulation of literature critical of the government" through "exposure of the names of printers, writers and distributors." *Id.* England's seditious libel cases show numerous instances of authors being punished—even sentenced to death—for "writing, printing or publishing books." *See id.* at 64–65. As a result, "colonial patriots frequently had to conceal their authorship" to avoid "prosecutions by English-controlled courts." *Id.* at 65.

That practice continued after the Revolution. A large part of the debate among the founding generation regarding the ratification of the

Constitution took place anonymously. James Madison, Alexander Hamilton, and John Jay famously published the Federalist Papers, advocating for ratification under the pseudonym "Publius." *See* Robert G. Natelson, *Does "The Freedom of the Press" Include a Right to Anonymity? The Original Meaning*, 9 N.Y.U. J. L. & Liberty 160, 177 (2015). The works of their opponents—staunch anti-Federalists Robert Yates, George Clinton, Oliver Ellsworth, and Richard Henry Lee—published their responses as "Brutus," "Cato," "Landholder," and "Federal Farmer," respectively. *See id.* at 178 n.69. In fact, "during the founding era *most* writing about the Constitution was pseudonymous or anonymous." *Id.* at 177 (emphasis altered).

In this period, attempts to undermine anonymous speech were swiftly rebuked. In 1787, for example, "a Federalist, writing anonymously himself," called for newspapers to refrain from publishing anonymously authored works. *McIntyre*, 514 U.S. at 363 (Thomas, J., concurring). Several Federalist-owned newspapers then proceeded to adopt policies disfavoring anonymous speech. *See id.* at 363–64. In response, Anti-Federalists leveled "withering criticism," arguing that these policies undermined the Colonists' hard-won "freedom of the Press." *Id.* at 364–66 (citations and quotations omitted). In the face of this criticism, there was "an open Federalist retreat on the issue," and the offending newspapers reversed course. *See id.* at 366–67. Particularly telling is that throughout the controversy, the pro-disclosure writers "urged it upon the editors and printers as good policy," but "[*n*]*o one* suggested that disclosure be

mandated by the government." Natelson, *supra*, at 195 (emphasis in original).

After the Constitution was ratified, the tradition of anonymous political debate continued. "[A]ctual names were used rarely, and usually only by candidates who wanted to explain their positions to the electorate." *McIntyre*, 514 U.S. at 369 (Thomas, J., concurring); *see also* Natelson, *supra*, at 179 ("[N]on-disclosure of one's identity was a nearly-universal practice in letters, essays, and pamphlets dealing with political subjects"). During the first federal elections, for example "anonymous political pamphlets and newspaper articles remained the favorite media for expressing views on candidates." *McIntyre*, 514 U.S. at 369 (Thomas, J., concurring).

As this historical record makes plain, early Americans broadly understood "that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367. And as Justice Thomas has explained, the "fact that the Founders located the right to anonymous speech in the 'freedom of the press' is of no moment, as 'it makes little difference in terms of our analysis, which seeks to determine only whether the First Amendment, as originally understood, protects anonymous writing.'" *McConnell*, 540 U.S. at 275 n.9 (Thomas, J., concurring) (quoting *McIntyre*, 514 U.S. at 360 (Thomas, J. concurring)).

The First Amendment's protection of the right to anonymous writing applies with equal force to anonymous contributions. As this Court has explained, it is well settled that "contributions of

money for the propagation of opinions" is an essential part of the liberty guaranteed by the First Amendment. *Janus*, 183 S. Ct. at 2464; *cf. Buckley*, 424 U.S. at 64 ("compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment").

California's demand for disclosure tramples this core First Amendment right of petitioners to speak and associate with anonymity. The Attorney General required petitioners to disclose "the names and addresses of their largest contributors." App. 8a. For those individuals, their fundamental right to anonymous speech and association is destroyed. And if that were not enough, the record here shows that the Attorney General exposed this information to the public, increasing "the possibility that the plaintiffs' Schedule B contributors would face threats, harassment or reprisals." App. 33a.

The Ninth Circuit's decision to countenance this invasion is grossly incompatible with the original public meaning of the First Amendment. The right to anonymity cannot be balanced away. As a majority of the Court explained in *McIntyre*, "the interest in having anonymous works enter the marketplace of ideas *unquestionably outweighs any public interest* in requiring disclosure as a condition of entry." 514 U.S. at 342 (emphasis added).

At the very least, the purported state interest identified by the Ninth Circuit is insufficient to overcome the right to anonymity, unless the government can proffer evidence of wrongdoing. The Ninth Circuit identified an abstract interest in

"preventing fraud and self-dealing in charities by making it easier to police for such fraud." *See* App. 17a–23a (alteration omitted). But *McIntyre* explained that a state's interest in using disclosures "as an aid to enforcement of [the law] and as a deterrent to [unlawful behavior]"—including as a "weapon against fraud"—may not justify a blanket disclosure regime. *McIntyre*, 514 U.S. at 349–53.

All the more here. The district court's review of the factual record revealed that the government's blanket disclosure requirement did not help prevent charitable fraud, App. 44a–45a, and in fact may have chilled speech and caused harassment, App. 48a–50a. "Given the specter of these First Amendment harms, a State's purported interest in disclosure cannot justify revealing the identities of an organization's otherwise anonymous donors." *Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2377 (2016) (Thomas, J., dissenting from the denial of certiorari); *see also Doe*, 561 U.S. at 202–12 (Alito, J., concurring) (finding government's "informational interest will not in any case be sufficient to" justify disclosure and "harbor[ing] serious doubts" about whether government interest in detecting fraud would survive an as-applied disclosure challenge).

To be sure, the Court has sometimes "back[ed] away" from protecting anonymity. *McConnell*, 540 U.S. at 276 (Thomas, J., concurring). But it also has a proud record of defending it. For example, in *Talley v. California*, the Court struck down an ordinance that required disclosure of hand-bill authors because there was "no doubt that such an identification requirement would tend to restrict freedom" and

could "deter perfectly peaceful discussions of public matters of importance." 362 U.S. at 64–65. The Court had no need to reach narrow tailoring because the public interest in disclosure was simply not compelling enough to justify outing anonymous authors. *See id.* at 64–65. Likewise, in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, the Court found that the government's interest in campaign-related disclosures was greatly "diminished in the case of minor political parties" and therefore insufficient to "compel[ ] disclosures by a minor party." 459 U.S. at 92–102; *see also Davis*, 554 U.S. at 744 (striking down disclosure requirement because "the burden imposed by" the law could not "be justified").

Thus, as an alternative or in addition to clarifying that the strict test of *NAACP*, *Buckley*, and their progeny applies, this case presents an opportunity to reaffirm—consistent with the original public understanding of the First Amendment—that the government may not impose a disclosure requirement that infringes the right to remain anonymous.

III. If Allowed To Stand, The Ninth Circuit's Weakened Protection For Associational Privacy Rights Will Deter Free And Democratic Debate.

Absent reversal by this Court, the Ninth Circuit's decision will erode the associational privacy and free-speech rights of not just charities, but individuals and organizations from across the ideological spectrum in a wide variety of contexts that advocate a broad array of views.

Most immediately, the decision will subject individuals exercising their First Amendment rights to threats, harassment, and violence. This case is a perfect illustration. "During the course of trial, the Court heard ample evidence establishing that AFP, its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." App. 49a. For example, the district court heard and credited testimony that "several hundred" protesters surrounded an AFP Foundation tent in Michigan and "used knives and box-cutters to cut at the ropes of [the] tent, eventually causing the large tent to collapse with AFP supporters still inside." App. 49a–50a. The district court likewise credited evidence of numerous violent threats against the AFP Foundation's supporters and major donors, such as death threats made against the grandchildren of Charles and David Koch. App. 50a; *see also* App. 78a–79a.

The same is true for the Law Center. The Law Center is regularly subjected to harassing, intimidating, and obscene communications. *See, e.g.*, Law Ctr. App. 59a ("In one particularly angry letter to [the Law Center] in response to a request for donations an opponent wrote, 'YOU FU**ING FEAR MONGERING PIECE OF S**T F**K YOU!!!'"). And the Law Center's donors have suffered reprisals. Activists organized a boycott against a pizza chain owned by Tom Monaghan, one of the Law Center's most prominent donors. Law Ctr. App. 60a; *see also* Law Ctr. Br. 48. The Law Center also produced evidence that some individuals sent in anonymous

donations out of fear that "there would be consequences of being personally tied to [the Law Center]." Law Ctr. App. 60a.

If the Ninth Circuit's decision is allowed to stand, individuals associated with groups like the AFP Foundation and the Law Center will pay a heavy price. *See* App. 50a ("this Court is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members"). And even when donors and potential donors are not physically threatened, the Ninth Circuit's decision will chill speech. This Court has "repeatedly" recognized that disclosure requirements "seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Davis*, 554 U.S. at 744 (quoting *Buckley*, 424 U.S. at 64–65). Would-be donors have many legitimate reasons to insist on anonymity—"fear of economic or official retaliation," "concern about social ostracism," the assurance "that readers will not prejudge [a] message simply because they do not like its proponent," or "merely [the] desire to preserve as much of one's privacy as possible." *McIntyre,* 514 U.S. at 341–42. Without anonymity, potential donors may be deterred from financially supporting the many expressive organizations that rely on private funding to spread their message.

The Foundation is no stranger to the deterrent effect of disclosure requirements on free speech. Many of the Foundation's donors expect anonymity for their giving, which enables the Foundation's core activities of advancing social good through the

business community, educating the public on emerging issues, and proposing creative solutions.

More broadly, the chilling effect may be especially strong for historically disadvantaged communities that all too often have been the subject of discrimination and recrimination as a result of their expression of unpopular viewpoints. It is surely no coincidence that many of the Court's precedents have arisen from attacks on the associational privacy rights of ethnic, religious, and even political minorities. *See, e.g.*, *Watchtower Bible & Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 163–66 (2002) ("the Jehovah's Witnesses are not the only 'little people' who face the risk of silencing by regulations" threatening "anonymity"). And it is telling that the trial judge in the AFP case below—a Lyndon B. Johnson appointee who was no stranger to civil rights cases and ordered the desegregation of the Pasadena Unified School District, *see Spangler v. Pasadena City Bd. of Ed.*, 311 F. Supp. 501 (C.D. Cal. 1970)—found that "[t]he Attorney General's requirement that AFP submit its Schedule B chills the exercise of its donor's First Amendment freedoms to speak anonymously and to engage in expressive association" by "plac[ing] donors in fear." App. 54a.

Aware of the reality that minority speech is often that most likely to be chilled, dozens of charities from across the ideological spectrum—including the NAACP Legal Defense & Education Fund and the Council on American-Islamic Relations—supported the rights of the petitioners below. AFP Found. Pet. 28 n.7; Law Ctr. App. 4a–7a. The suppression of these minority voices under the Ninth Circuit's decision

would be especially troubling. It would also deprive the larger community of important voices. "History has amply proved the virtue of political activity by minority, dissident groups." *NAACP v. Button*, 371 U.S. 415, 431 (1963) (citation omitted).

The chill cast by the Ninth Circuit's decision will not only harm the rights of those attempting to have their voices heard, it will also harm the public at large. Privacy in group association creates breathing space for discussion of public issues. *See Buckley*, 424 U.S. at 14. Such "speech concerning public affairs" "is the essence of self-government." *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)). Indeed, our democratic institutions necessarily rest on "our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 755, (2011) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). When people are free to express a wide range of views—even views "spoke[n] out of hatred," "ill-will[,] or selfish political motives," *Garrison*, 379 U.S. at 73–74—our institutions gain popular legitimacy. It also becomes more likely that government officials will be held accountable to the people who elected them, and that sound ideas will be brought to the attention of the public and of public officials. *See Sullivan*, 376 U.S. at 269–73. The Ninth Circuit's decision will necessarily chill such speech about public affairs.

The burden the Ninth Circuit placed on associational privacy will also harm the broader

"search for truth." *Janus*, 138 S. Ct. at 2464. Expressive association is not limited to discussion of public issues. Rather, "the beliefs sought to be advanced by association [may] pertain to political, economic, religious or cultural matters." *NAACP v. Alabama*, 357 U.S. at 460. In these areas, as in any other, "[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *NIFLA v. Becerra*, 138 S. Ct. 2361, 2375 (2018) (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)), because the free exchange of ideas will put an end to "[n]oxious doctrines," *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *see* John Milton, *Areopagitica* 35 (Thomason ed., 1644) ("Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"). Because "[e]ffective advocacy" of competing truth claims is "undeniably enhanced by group association," *NAACP v. Alabama*, 357 U.S. at 460, and because the realization of the "freedom to associate" often depends upon "privacy in one's associations," *id.* at 462, restrictions on associational privacy necessarily burden the search for truth.

CONCLUSION

For the foregoing reasons, and those set forth by petitioners, the Court should reverse the Ninth Circuit.

Respectfully submitted,

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