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 United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF THE CATO INSTITUTE, FIREARMS POLICY COALITION, HAMILTON LINCOLN LAW INSTITUTE, REASON FOUNDATION, INDIVIDUAL RIGHTS FOUNDATION, MOUNTAIN STATES LEGAL FOUNDATION, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, FIRST AMENDMENT LAWYERS ASSOCIATION, AND DKT LIBERTY PROJECT IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), and its progeny held that courts should apply narrow tailoring to violations of the freedom of association. Has that requirement been overruled such that the right to associate privately does not enjoy the strong protective standard that applies to other First Amendment rights, which this Court has held requires narrow tailoring regardless of the level of scrutiny?

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INTEREST OF *AMICI CURIAE*[1]

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

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The **Foundation for Individual Rights in Education** (FIRE) was founded in 1999 as a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. FIRE engages in targeted litigation and advocacy across the country to defend the constitutional rights of students and faculty on our nation's campuses. Additionally, *amicus* FIRE works nationwide to empower campus activists, reform restrictive policies, and educate students, faculty, alumni, trustees, and the public about the state of rights on our nation's campuses.

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The **DKT Liberty Project** is a nonprofit

organization founded in 1997 to promote individual liberty against government encroachment. DKT is committed to defending privacy, guarding against government overreach, and promoting every American's right and responsibility to function as an autonomous and independent individual. DKT espouses vigilance against government overreach of all kinds, but especially overreach that restricts fundamental First Amendment rights. DKT has filed numerous *amicus* briefs in both this Court and state and federal courts in cases involving constitutional rights and civil liberties.

This case concerns *amici* because the right of private association is essential to liberty and must be protected against government intrusion. *Amici* operate or fundraise in California and are thus subject to the charity registration requirements challenged here. The state's blanket demand for donor-identity lists creates a substantial risk of donor harassment and poses a serious threat to the freedom of speech and association by eviscerating the privacy necessary to protect them. Legislation that restricts the right to anonymously engage in First Amendment activities necessarily restrains those activities and is thus detrimental to a free society. Notably, Cato is named after the anonymously written *Cato's Letters*.

INTRODUCTION AND SUMMARY OF ARGUMENT

Americans for Prosperity Foundation (AFPF) and Thomas More Law Center (Thomas More) have shown on the record the justified concerns they have for the harms that could befall their donors if they were compelled to disclose them, but those potential

harms are not why they should win this case. They should win because the Constitution protects the right to private, anonymous association, which can be overcome only by a government interest that is both compelling and narrowly tailored. Indeed, AFPF and Thomas More should win this case even if there were no demonstrated threats against donors. As Publius understood, the desire to remain anonymous in your political activities is a venerable and time-honored practice. Even without any threats, anonymity can be used to give arguments more attention than the identity of their author or funder. It's still the government's job to demonstrate when and why anonymous association should be squashed.

During the Civil Rights Era, state governments tried to force groups like the NAACP to disclose membership lists. This Court stepped in and subjected such attempts to "the closest scrutiny" because "privacy in group association" has long been recognized as "indispensable to preservation of [the] freedom of association" protected by the First Amendment. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460–62 (1958). Constitutionally authorized abridgments of the freedom of association require "'a fit that . . . employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective,'" which applies "[e]ven when the Court is not applying strict scrutiny." *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). This narrow-tailoring minimum reflects decades of First Amendment precedent in cases concerning both associational and non-associational rights.

While the Civil Rights Era was unique, the right to private association is still no less vital. When people espouse unpopular or controversial beliefs, private association is critical. Yet, in our current polarized political climate, almost anyone's beliefs will be controversial to someone. A pro-choice advocate in the deep South might anonymously support pro-choice groups, and a pro-life advocate in New England might support pro-life groups. They have seemingly little in common, but they share a significant interest in associational privacy.

Here, the government has not met the burden to overcome the presumption of associational privacy. The record shows that California has no need to compel donor information; the state has managed effectively both to prevent and prosecute charitable fraud for years before this new demand. Should state officials need donor-identifying information, an audit letter or subpoena would easily produce it.

Those are the facts, as detailed in the petitioners' briefs and on the record. But a purely fact-bound holding here would be both contrary to the history and meaning of the First Amendment and fundamentally unworkable. If future groups are required to demonstrate threats against members, then few groups will have either the evidence available (not every threatening person sends a tweet, letter, or email) or have the legal and institutional means to demonstrate their situation to the relevant authorities. The presumption of associational privacy protected by the First Amendment should not be practically reversed, with the government in essence saying, "demonstrate sufficient level of threat or lose your right to freedom of association."

Moreover, people who fear no concrete backlash, but merely want to keep their co-workers from knowing their political-spending habits—a common, understandable, and increasingly wise desire—would be unprotected by a fact-bound decision focusing on a demonstrated fear of threats and retaliation. Refraining from political spending would thus be a wise choice for someone whose political beliefs are generally normal but contextually dangerous—such as opposing recycling policies while working in a Silicon Valley start-up or supporting Black Lives Matter while serving as a clerk in a police department. Those potential victims of California's First Amendment violations—if sustained by this Court—will largely remain hidden.

The record demonstrates this alarming chilling effect California's compelled disclosure has on donors. State employees posted more than 1,800 confidential Schedule B forms on a website, opening charitable donors up to potential intimidation, retaliation, and harassment. This kind of publicity not only affects donors' speech, but also has the potential to dry up charities' largest sources of support and further inhibit the freedom of association.

The Court's precedents are clear: No matter the level of judicial scrutiny, state actions that infringe First Amendment freedoms, such as the compelled disclosure of donor lists, must be narrowly tailored to the governmental interest asserted. Petitioners AFPF and Thomas More have provided an opportunity for the Court to reaffirm those precedents and continue its protection of First Amendment freedoms.

The Ninth Circuit misconstrued this Court's precedents, ignored the question of fit, and gave California free rein to demand donor information for any charity in the nation that operates in the state. The Ninth Circuit is wrong. The state did not meet the necessary burden to restrict the freedom of speech and the freedom of association. California's Schedule B requirement is unconstitutional on its face.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS A PRESUMPTIVE RIGHT TO PRIVATE ASSOCIATION, WHICH THE GOVERNMENT CAN OVERCOME ONLY THROUGH NARROWLY TAILORED MEANS THAT ADVANCE A COMPELLING INTEREST—WHICH CALIFORNIA HAS NOT EMPLOYED

The First Amendment was mostly written by a man who wrote some of his most famous works under the pseudonym "Publius." Yet it was not just James Madison's anonymous speech that helped give us the Constitution, but also the numerous still-unknown Anti-Federalists who wrote against the Constitution's ratification and helped push Madison and others to compromise on a Bill of Rights. Pauline Maier, *Ratification: The People Debate the Constitution, 1787–1788*, 400–25 (2011). Those Anti-Federalists wrote anonymously because "in that polarized climate, more than one writer suggested that it was 'unsafe to be known to oppose' the proposed Constitution, so true anonymity was necessary to participate in politics." Jordan E. Taylor, "Anonymous Criticism Helped Make America Great," Wash. Post, Sept. 2, 2018, https://wapo.st/3aJ5cE2.

Concerns about the dangers of being exposed and attacked—metaphorically or literally—for political opinions are just as acute when looking at the funding rather than the actual writing of political speech. *See McConnell v. FEC*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part, dissenting in part) ("But where the government singles out money used to fund speech as its legislative object, it is acting against speech as such, no less than if it had targeted the paper on which a book was printed or the trucks that deliver it to the bookstore."). A politician who wants to stifle criticism can use a polarized political climate to his advantage, whether in the 1790s or the 2020s. Some people speak and others fund that speech. That division of labor "presents opportunities for repression: Instead of regulating the various parties to the enterprise individually, the government can suppress their ability to coordinate by regulating their use of money." *Id.*

For these reasons, it is "beyond debate" that the freedom of association is protected by the First Amendment and is applied to the states through the Fourteenth Amendment. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958). This freedom includes the right to associate anonymously and privately, especially for groups espousing minority views. *Id.* at 462; *Gibson v. Fla. Leg. Investigation Comm.*, 372 U.S. 539, 543–44 (1963) (holding that it is "clear that the guarantee [of associational freedom] encompasses protection of privacy of association in organizations such as [the NAACP]"). In protecting the right to private association, the Court has treated membership and donor lists "interchangeably." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976).

Moreover, the First Amendment never requires people to bear the burden of proving that they should be free to speak or associate. It is the government that bears the burden of justifying intrusions on those freedoms. A constitutionally valid requirement that organizations disclose their member or donor lists must serve a compelling governmental interest and be narrowly tailored to that interest. *NAACP v. Alabama*'s "strict test" is "necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66. Removing any aspect of that test would endanger First Amendment protections and represents a sharp departure from the Court's established jurisprudence.

A. *NAACP v. Alabama* and Its Progeny Require Narrow Tailoring of State Actions That Violate the Freedom of Association

The Court laid strong foundations for protecting associational privacy in *NAACP v. Alabama*, subjecting "state action which may have the effect of curtailing the freedom to associate" to "the closest scrutiny." 357 U.S. at 460–61. That case concerned an attempt by Alabama to compel the NAACP to produce its state membership list. *Id.* at 451–53. The NAACP had shown 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." *Id.* at 462. If Alabama were permitted to force the NAACP to disclose its entire state membership list, it was "likely to affect adversely the ability of [the group] and its

members to pursue their collective effort to foster beliefs" by "induc[ing] members to withdraw from the [NAACP] and dissuad[ing] others from joining it." *Id.* at 462–63. Justifying such an infringement would require the "subordinating interest of the State" in seeking the disclosure to be "compelling," and Alabama couldn't satisfy that test. *Id.* at 463.

Notably, the *NAACP* Court was clear that the reason for protecting associational privacy was not limited to threats of physical violence. "[E]conomic reprisal, loss of employment . . . and other manifestations of public hostility" were important considerations too. *Id.* at 462. In fact, nonviolent threats were the most common way southern states waged war against the NAACP. Patricia Sullivan, *Lift Every Voice: The NAACP and the Making of the Civil Rights Movement* 425–27 (2010). In the mid-1950s, most southern states "established investigating committees designed to expose the NAACP's activities and publicly identify and harass its membership." *Id.* at 425. The campaigns were often successful. In South Carolina, "membership fell from 8,266 to 2,202 between 1955 and 1957." *Id.* The Court was of course well aware of the myriad threats faced by members of the NAACP. While violence was a possibility, social sanctions, job loss, and other nonphysical consequences were also widespread.

The Court returned to the question of private association two years after *NAACP* in *Bates v. City of Little Rock*, which arose from another attempt to force the NAACP to disclose its members. 361 U.S. 516, 517–18 (1960). Unlike in the Alabama case, however, the government purpose asserted—the power to tax—was deemed "fundamental." *Id.* at 524–25. Still, the

Court held that the disclosure rule must also "bear[] a reasonable relationship to the achievement of the governmental purpose asserted." *Id.* at 525. And, in *Gibson v. Fla. Leg. Investigation Comm.*, the Court considered whether a state could compel production of NAACP membership lists pursuant to a legislative investigation. 372 U.S. at 541–42. It held that, when impinging on the freedom of political association, the state must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest." *Id.* at 546.

Then in *Shelton v. Tucker*, decided the same year as *Bates*, the Court examined an Arkansas law forcing teachers to disclose annually any organizations they had belonged to in the previous five years. 364 U.S. 479, 480–81 (1960). As in *NAACP v. Alabama* and *Bates*, the required disclosures "impair[ed] . . . [the] right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Shelton*, 364 U.S. at 485–86 (citing *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Bates,* 361 U.S. at 522–23). But even when the governmental purpose is "legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488.

The lack of narrow tailoring was the key problem with the Arkansas law in *Shelton*. The requisite "compelling" government purpose was met because the state had a right to "investigate the competence and fitness of those whom it hires to teach in its schools." *Id.* at 485. Second, unlike *NAACP* and *Bates*, where there was no "substantially relevant

correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists," there was no question that a state's inquiry into the groups its teachers belonged to was "relevant to [their] fitness and competence." *Id.*

The problem was with the scope of that inquiry. The question was "not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships," but "whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period." *Id.* at 487–88. The inquiry here was "completely unlimited," looking into relationships that had "no possible bearing upon the teacher's occupational competence or fitness." *Id.* at 488. Given the "breadth of legislative abridgment," the law "must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*

Narrow tailoring was hardly an unknown concept when *Shelton* was decided in 1960. Indeed, the *Shelton* Court noted "a series of decisions" in First Amendment cases in which it had instituted the same requirement. *Id.* But *Shelton* underlined that associational rights are no less protected than the freedoms of speech or religious exercise. *See, e.g., Saia v. New York*, 334 U.S. 558, 560 (1948) (invalidating an ordinance banning "the use of sound amplification devices except with permission of the Chief of Police" because it was "not narrowly drawn"); *Martin v. Struthers*, 319 U.S. 141, 147 (1943) (holding overbroad an ordinance stopping door-to-door canvassers and solicitors from "ring[ing] the door bell, sound[ing] the door knocker," or taking similar actions to distribute materials and contrasting it with

"similar statutes of narrower scope"); *Cantwell v. Connecticut*, 310 U.S. 296, 304, 311 (1940) (holding that a defendant could not be convicted of offenses relating to public proselytizing "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State," and that, in the First Amendment context, a state's "power to regulate must be so exercised as not, in attaining a permissible end, unduly infringe the protected freedom").

In the nearly two decades between *NAACP v. Alabama* and *Buckley*, the Court repeatedly upheld the *NAACP* test, including the crucial narrow-tailoring requirement. A year after *Shelton*, in *Louisiana ex rel. Gremillion v. NAACP*, the Court again encountered an attempt by a state to compel the NAACP to disclose its membership list. 366 U.S. 293, 294–95 (1961). The Court reiterated that such a rule would infringe on associational rights. *Id.* at 296. In such cases, "[w]e are in an area where, as [*Shelton*] emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment." *Id.* The *Gremillion* Court then quoted *Shelton*'s prohibition against the pursuit of even "legitimate" governmental purposes through "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.*

The Court extensively used *Shelton*'s language in a variety of contexts in the years between *Shelton* and *Buckley*, because the narrow-tailoring requirement applies to all First Amendment rights, not just associational freedom. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 101 n.8 (1972) (holding that "[t]he Equal Protection Clause requires

that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives," and noting that "[i]n a variety of contexts" the Court has used *Shelton*'s "more narrowly achieved" language and "carefully applied [this standard] when First Amendment interests are involved."); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183–84 (1968) ("An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'") (quoting *Shelton*, 364 U.S. at 488); *Elfbrandt v. Russell*, 384 U.S. 11, 18–19 (1966) ("A statute touching those protected rights [of association] must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.'") (quoting same, and also quoting *Cantwell*, 310 U.S. at 311); *NAACP v. Alabama*, 377 U.S. 288, 307–08 (1964) ("This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.") (quoting same).

Even in associational rights cases where the Court did not use *Shelton*'s language, it unambiguously described the narrow-tailoring requirement in other ways. In *NAACP v. Button*, a challenge to a Virginia statute regulating the solicitation of legal business as applied to the NAACP, the Court held that "[b]ecause

First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." 371 U.S. 415, 433 (1963). Citing *Shelton*, *Gremillion*, and similar cases, the Court further wrote that "[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 438. The Court would go on to use similar language, in other cases to describe narrow tailoring. *See*, *e.g.*, *Kusper v. Pontikes*, 414 U.S. 51, 58–59 (1973) (quoting *Button* regarding "precision of regulation," and, citing *Shelton*, holding that states must opt for "less drastic way[s] of satisfying its legitimate interests" instead of means that "broadly stifle[] the exercise of fundamental personal liberties").

B. California's Schedule B Demand Is Not Narrowly Tailored

AFPF has been registered with the California attorney general since 2001 and has never included a Schedule B in its annual filings. *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1053 (C.D. Cal. 2016). The attorney general first notified AFPF that its filing was incomplete for lack of a Schedule B in 2013. *Id.* As the district court observed, the "only logical explanation for why AFPF's 'lack of compliance' went unnoticed for over a decade" is that the government does not actually use the Schedule B in its day-to-day business. *Id.* This admission was made by the registrar for the state's Registry of Charitable Trusts. *Id.* (referring to Eller Test. 3/3/16 Vol II., p. 75:16–20). Additional testimony confirmed that auditors and attorneys in the investigative unit of the Charitable Trusts Section seldom use Schedule

B when auditing or investigating charities, and one investigative auditor testified that out of 540 investigations over the past ten years, only five involved the use of a Schedule B. *Id.* at 1053–54 (referring to Bauman Test. 3/4/16, p. 31:8–32:10).

Moreover, the claimed interest in efficiency can be achieved through much more narrowly tailored means, as evidenced by the testimony of the attorney general's own attorneys. *Id.* at 1055. One auditor admitted that he "successfully" audited charities and found wrongdoing without Schedule Bs for years—even before the Schedule B existed. *Id.* (referring to Bauman Test. 3/4/16, p. 27:18–23 and Bauman Dep., TX-731, p. 49:2–15). The district court record failed to show even a single instance in which preemptively collecting a Schedule B did anything to advance an investigation or other regulatory efforts. *Id.*

Improving administrative efficiency cannot be enough to supersede the First Amendment. The Constitution was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). An interest in efficient government is surely valid, but by itself cannot justify the regulation of speech and association. And that interest is not being met through disclosure here anyway: California does not need donors' confidential information, hardly ever uses it, and can readily obtain it via an audit or subpoena on a reasonable suspicion of fraud.

II. BECAUSE THE BURDEN IS ON THE GOVERNMENT TO PROVIDE A COMPELLING INTEREST THAT IS NARROWLY TAILORED, EVEN THE IRS'S COLLECTING OF DONOR INFORMATION SHOULD NOT BE PRESUMED CONSTITUTIONAL

The collection of Schedule B donor information by the IRS is not squarely before the Court. But a presumption of associational privacy is the constitutional baseline protected by the First Amendment—and that's true even when the IRS is involved. A broad, generalized interest in "protecting charities and the public from fraud," while "sufficiently substantial," *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 792 (1988), can't be used to create a blanket authority for abridging associational privacy and flip the burden of proof from the government to the individual seeking First Amendment protection. The Schedule B disclosure requirement is not narrowly tailored. It is a "prophylactic, imprecise, and unduly burdensome" regulation that might be subject to a successful constitutional challenge. *Id.* at 800.

The IRS is not above the Constitution regardless of the federal government's right to collect taxes. The same fears over California's access to Schedule B information extend to the federal tax agency. And those fears are not unfounded. The IRS has targeted nonprofit organizations and their donors in the past. *See, e.g.,* Peter Overby, "IRS Apologizes for Aggressive Scrutiny of Conservative Groups," NPR, Oct. 27, 2017, http://n.pr/2ZpIUkg. This is not a new method for abusing power. The IRS has been used for political targeting as far back as President Franklin D.

Roosevelt's administration. "My father," Roosevelt's son observed, "may have been the originator of the concept of employing the IRS as a weapon of political retribution." Burton W. Folsom, *New Deal or Raw Deal?: How FDR's Economic Legacy Has Damaged America* 146 (2009). President Richard Nixon's Bill of Impeachment included charges that he attempted to cause "income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner." H.R. Res. 803, 93d Cong. (1974). It's thus no surprise that donors and the groups they support fear their private information being exposed when those tasked with protecting it are often the same people using it against them. While the present case does not directly involve the IRS and federal government, this pattern of hostility toward opposing viewpoints should concern anyone who cares about the First Amendment.

III. PUBLIC DISCLOSURE PRESENTS REAL RISKS TO DONORS

Compromising the First Amendment right to associate and speak anonymously would have chilling effects in our polarized political climate. Times of political division bring attempts to silence opposition, whether through direct government action or "just" threats and harassment. As discussed above, during the Civil Rights Era, the NAACP was the subject of numerous attempts to compel disclosure of membership lists, which the organization showed was "likely to affect adversely the ability of [the NAACP] and its members" to engage in constitutionally protected advocacy. *NAACP*, 357 U.S. at 462–63.

Unfortunately, groups advocating any number of unpopular ideas still face many of the physical, social, and economic dangers that the NAACP faced for decades. In the last several years, donors and activists across the political spectrum have faced death threats, public harassment, and economic pressure for their views and activities.

Opponents of former president Trump have organized boycotts against companies because they or their officers donated to him or politicians who support him. *See, e.g.*, #GrabYourWallet, https://grabyourwallet.org. Congressman Joaquin Castro tweeted a list of San Antonians who donated to the president, saying it was "[s]ad to see." Christian Britschgi, "Rep. Joaquin Castro's Doxxing of Trump Donors in His District Has Flipped the Campaign Finance Discourse on Its Head," Reason, Aug. 7, 2019, https://bit.ly/2mq8lSs. In October 2018, a pipe bomb was placed in the mailbox of billionaire philanthropist George Soros, who "donates frequently to Democratic candidates and progressive causes" and is thus often portrayed as a "villain" by the far right. William K. Rashbaum, "At George Soros's Home, Pipe Bomb Was Likely Hand-Delivered, Officials Say," N.Y. Times, Oct. 23, 2018, https://nyti.ms/2D2hI1I. And in 2014, Mozilla Firefox CEO Brendan Eich was forced to resign after a public donor list showed that six years earlier he had given $1,000 to a California ballot initiative preventing same-sex marriage. Alistair Barr, "Mozilla CEO Brendan Eich Steps Down," Wall St. J., Apr. 3, 2014, http://on.wsj.com/3ay83zq.

For petitioners, this problem is all too real. AFPF donors have received death threats and violent attacks because of their affiliation. *Ams. for*

Prosperity Found., 182 F. Supp. 3d at 1056. Similarly, Thomas More's positions on controversial issues "have led to threats, harassing calls, intimidating and obscene emails, and even pornographic letters." *Thomas More Law Ctr. v. Harris*, No. 15-3048, 2016 U.S. Dist. Lexis 158851, at *11–15 (C.D. Cal. Nov. 16, 2016). One Thomas More client, Pamela Geller, received death threats after using her blog to criticize a lawyer who represented the parents of a girl who fled her home in fear of her life after converting from Islam to Christianity. Thomas More Pet. Cert. 30. ISIS instructed its followers to kill Geller and labeled those like Thomas More who enable her speech as "legitimate targets." Thomas More Pet. Cert. 30.

Thankfully, donors to AFPF and Thomas More have yet to experience as close a call as Mr. Soros, and the threats and harassment they have experienced are "not as violent or pervasive" as those experienced by members of the NAACP during the Civil Rights Era. *Ams. for Prosperity Found.*, 182 F. Supp. at 1056.[2] As the district court correctly noted, however, the protections of the First Amendment do not require death threats to turn into actual deaths before courts can enforce them. *Id.* ("[T]his Court is not prepared to wait until an AFPF opponent carries out one of the numerous death threats made against its members.").

But in some cases the animosity *has* turned to physical violence. At a Michigan rally, knife-wielding protestors tore down Americans for Prosperity's heavy tent, which collapsed on supporters, including

[2] For some examples of the violence faced by the NAACP, see the organization's history webpage. *Nation's Premier Civil Rights Organization*, NAACP, https://bit.ly/2HKy8x8.

elderly people who could not escape on their own. AFPF Pet. Cert. 12; *see also* "Michigan Right to Work: Tensions Rise as Americans For Prosperity Tent Falls Outside Capitol," MLive, Dec. 11, 2012, http://bit.ly/3rYTgno. At one of AFPF's summits in Washington, D.C., protestors physically blocked exits, "tried to push and shove and keep people in the building," and caused a 78-year-old attendee to tumble down the stairs. AFPF Pet. Cert. 12.

In addition to harm to individual donors and supporters, disclosure rules harm the nonprofits themselves by chilling support for their advocacy efforts. One Thomas More contributor anonymously mailed cash rather than leave a donor record. Thomas More Pet. Cert. 31. Similar reactions were seen after 9/11 when Muslim organizations were mislabeled as terrorist groups. Muslim charities experienced large drops in donations because people were afraid of becoming the targets of law enforcement or branded as terrorists. Kathryn A. Ruff, Note, *Scared to Donate: An Examination of the Effects of Designating Muslim Charities as Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. Legis. & Pub. Pol'y 447, 473 (2006).

Donors are the lifeblood of any nonprofit. Schedule B donors are especially vital because they are an organization's largest contributors; each accounts for at least 2 percent of an organization's annual revenue. The donors listed on Schedule Bs are limited in number—in recent years, they have totaled fewer than a dozen for AFPF—but their financial contributions are outsized. AFPF Pet. Cert. 11. Losing even one such donor could require AFPF to shut down parts of its operation. *Id*. While the donors in these

two cases have not suffered physical harm yet, the threats of harm are enough to chill both their speech and their association with AFPF and Thomas More.

Those seeking to intimidate and silence AFPF have posted online the names and addresses of its reported supporters—and even the addresses of their children's schools. AFPF App. to Pet. Cert. 79a. They have also sent countless threats of death and violence, with some targeting the supporters' grandchildren. AFPF App. to Pet. Cert. 50a.

The question is not whether people have a right to initiate peaceful boycotts and protests against businesses and individuals who support particular causes. They do. But the government shouldn't enable such reprisals by trampling the right to speak anonymously and assemble privately. While not all associations and expressions present risk of harm, many do. The LGBTQ community is a prime example. A contribution to the Human Rights Campaign, Log Cabin Republicans, or other organizations that support gay rights often "amounts to an involuntary outing courtesy of the government." Bradley A. Smith, "In Defense of Political Anonymity," City Journal (Winter 2010), http://bit.ly/3s6qm4Y.

That underscores a crucial point: Protecting private association is not about protecting the powerful. As in *NAACP*, the powerful have more often used government to go after those who challenge prevailing orthodoxy. The risks to donors can be real—and forced disclosure can achieve the desired outcome: the silencing of political speech.

California's disclosure requirement and the Ninth Circuit's misapplication of First Amendment law is a

dangerous combination if allowed to stand. At best, it means that a fifth of the country will enjoy less First Amendment protection.[3] At worst, charitable giving will be chilled nationwide as charities are forced to either stop fundraising in California—giving up nearly 40 million potential donors—or disclose their Schedule Bs, which include non-California donors. Given California's record of repeatedly releasing sensitive data onto the internet and the insufficiency of current protections, few would blame donors who felt as though the compelled disclosures were "of the same order" as a requirement that they wear "identifying arm-bands," exposing them to threats, harassment, and boycotts. *NAACP*, 357 U.S. at 462.

IV. A FACT-BOUND RULING THAT TASKS LOWER COURTS WITH ASSESSING WHETHER A DISCLOSURE RULE IS "HARMFUL ENOUGH" WOULD BE UNWORKABLE AND INSUFFICIENTLY PROTECTIVE OF PRIVATE ASSOCIATION

How many threats are sufficient to warrant protection of the freedom of association? That question is inevitably raised by the Ninth Circuit's fact-bound reasoning—and would be raised by any similar decision from this Court. Is a Twitter threat from a blue-check-mark account worth some multiple of threats from unverified accounts? Do the threats have to be for physical violence or is impugning someone's reputation enough? What if there are no

[3] The Ninth Circuit covers "40% of the nation's land mass and 20% of its population." Mark Brnovich & Ilya Shapiro, "Split Up the Ninth Circuit—But Not Because It's Liberal," Wall St. J., Jan. 11, 2018, https://on.wsj.com/2sbpNN2.

current threats but someone is concerned that future plans to seek elected or appointed office might be harmed if his political associations are discovered?

Countless Americans share fears like these about their political associations becoming widely known. How are those fears to be weighed against claims by government officials that donor information is required to fulfill some government purpose? This Court could construct a multi-part test that tasks lower courts with looking into demonstrated threats and concerns about retaliation. But such a test would inevitably be administered with such discretion that it would chill a significant amount of First Amendment-protected activity.

As this Court has held, unfounded speculation, conclusory statements, fear, and uncertainty untethered to the disclosure requirement at issue are insufficient. *Buckley*, 424 U.S. at 64, 69, 71–72. However, "[a] strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought would make the task even more difficult." *Id.* at 74. Examples of the type of evidence sufficient to succeed on a constitutional challenge include past or present harassment of members due to their associational ties, or of harassment directed against the organization itself, or a pattern of threats or specific manifestations of public hostility. *Id.*

Lawmakers, bureaucrats, and judges should not be given a balancing test to determine whether their own laws sufficiently harm would-be speakers. The discretion allowed by such a test would be akin to allowing officials discretion in issuing time, place, and

manner restrictions. The Court has held time and again that allowing such discretion is *per se* unconstitutional. *See, e.g.*, *Niemotko v. Maryland* 340 U.S. 268, 285 (1951) (Frankfurter, J., concurring) ("The vice to be guarded against is arbitrary action by officials."); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (a parade-licensing scheme "may not delegate overly broad licensing discretion to a government official").

The burden here is on governments that seek to breach the presumed right to associational privacy, not on organizations that should be spared having to deliver bags of threats to courts like letters to Santa Claus. The Court has already established a legal test for determining whether a state's intrusion into the freedoms of speech and association can be justified: exacting scrutiny as laid out in *NAACP v. Alabama*.

CONCLUSION

In *Gibson v. Fla. Investigation Comm.*, Justice Douglas wrote a concurrence that's relevant here: "The First Amendment mirrors many episodes where men, harried and harassed by government, sought refuge in their conscience." 372 U.S. at 574 (Douglas, J., concurring). He notably identified St. Thomas More, the namesake of the Thomas More Law Center, quoting several lines from *A Man for All Seasons*, Robert Bolt's famous play where More refuses to acquiesce to a demand from the king that violates his conscience. *Id.* at 574–75. Justice Douglas concluded that "[b]y the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into these precincts." *Id.* at

575–76. Since *Gibson*, the Court has defended these principles by protecting the presumption of associational privacy and enforcing a narrow-tailoring requirement. It should again do so here.

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