Nos. 19-251, 19-255

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
v.
XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

ON WRITS OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

I. ALEC Is a Mainstream Policy Development Forum.

With over 2,000 members, the American Legislative Exchange Council ("ALEC") is America's largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism. For nearly five decades, ALEC's mission has been to serve as a forum for the education, study, and robust debate of ideas and policies based on the principles of free markets and individual rights. ALEC's work has resonated and its ideas have influenced the intellectual marketplace for years. *See, e.g.*, Sarah Harney, *What Makes ALEC Smart?*, Governing.com, Oct. 2003.[2] ALEC also has a long history of partnering with other organizations, such

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[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record for all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. At various times, Petitioner Americans for Prosperity Foundation ("AFPF") has been a dues-paying member of ALEC but they have not renewed their membership at this time. And at no point has AFPF provided any funds for the purpose of funding this brief. Finally, no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] https://www.governing.com/archive/What-Makes-Alec-Smart.html.

as its partnership with the ACLU to address criminal justice reforms. *See* Vanita Gupta, *How to Really End Mass Incarcerations*, N.Y. Times, Aug. 14, 2013.[3] ALEC is a Virginia-based nonprofit educational organization exempt from taxation under Section 501(c)(3) of the Internal Revenue Code.

Private nonprofit and for-profit organizations also are members and financial supporters of ALEC. These corporate members provide jobs to more than 30 million people in the United States. ALEC's interest in these appeals arises from the critical importance of its members' ability to associate and participate in policy discussions freely and candidly without fear of government or private retaliation. ALEC also desires to enlist members and participants from the State of California without having to reveal particular financial supporters to the government, so the reporting requirement at issue here directly impacts ALEC's ability to engage with potential members and donors there.

II. ALEC's Members Long Have Suffered Harassment.

Like Petitioners here, ALEC is all too familiar with the sort of threats and retaliation that are designed to deter core First Amendment activity. Starting in approximately 2012, ALEC's ideological opponents began an intensive campaign to defame, harass, and boycott ALEC members. This campaign

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[3] https://www.nytimes.com/2013/08/15/opinion/how-to-really-end-mass-incarceration.html.

was extensively documented in *The Intimidation Game*; *How the Left Is Silencing Free Speech*, a 2016 book by *Wall Street Journal* Editorial Board member Kimberley Strassel. (The Hachette Book Group 2016), at 245-276. The harassers' ultimate goal has been to ruin ALEC and eliminate its ideas from the public square. The harassment has become more intense and vicious over the years and has continued virtually unabated to this day.

A key element of the campaign is a demand that ALEC reveal the full roster of the organization's legislative members and private contributors. *See, e.g.*, PRWatch, *CMD Calls on ALEC to Disclose Information During Sunshine Week*, Mar. 16, 2016;[4] Eli Clifton, *EXCLUSIVE: Shareholders Call on Companies to Disclose ALEC Ties*, ThinkProgress.org, Apr. 11, 2012.[5] ALEC has resisted those demands, which are pressed solely for the purpose of facilitating further harassment. But the organization has lost members nonetheless due to the prolonged hostile pressure. The campaign remains particularly unrelenting on the internet, where philosophical opponents target companies and individuals they merely suspect might be ALEC members. *See, e.g.*, Ctr. for Media and Democracy, *ALEC Exposed*.[6] Thus,

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[4] https://www.prwatch.org/news/2016/03/13061/cmd-calls-alec-disclose-information-during-sunshine-week.

[5] https://archive.thinkprogress.org/exclusive-shareholders-call-on-companies-to-disclose-alec-ties-f3231af640ed/.

[6] https://www.alecexposed.org/wiki/ALEC_Exposed.

there is nothing speculative about ALEC's concern for the privacy and peace of its members.

III. Government Officials Are Active Participants in the Harassment Campaigns.

ALEC's private, political opponents may have started the harassment. But it did not stop there. ALEC's antagonists sought to enlist the support of public officials in their campaign against the organization. For example, in 2012 ALEC's opponents pressured the Internal Revenue Service and other state regulatory officials to investigate ALEC. *See* Brendan Fischer, *Criminal Tax Penalties for ALEC? CMD's Powerful Investigation Provides Facts for Powerful New Complaint by Former IRS Official*, July 9, 2012.[7]

Eventually opponents found public officials willing to join their crusade by lending the authority of public office to harass ALEC members. Most infamously, Senator Richard Durbin of Illinois – an opponent of ALEC's pro-business ideas like tort reform – blatantly misused the power of his office to target companies and individuals he suspected were, or had been, ALEC members. In August 2013, as ALEC was holding its annual meeting in Chicago, Senator Durbin launched a letter, on official Senate Assistant Majority Leader letterhead, to approximately three hundred organizations he suspected had been members or donors to ALEC

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[7] https://www.prwatch.org/node/11627.

between 2005 and 2013. *See, e.g.*, Letter from Ass't Senate Majority Leader Richard Durbin to John Allison, President and CEO of the Cato Institute, Aug. 6, 2013.[8] The Senator demanded that each recipient inform him, among other things, whether it had "served as a member of ALEC or provided any funding to ALEC." *Id.* Senator Durbin then proclaimed his intent to disclose their responses at a Senate hearing the following month. *See id.* As characterized by Ms. Strassel, the letter was "half intimidation, half fishing expedition." *Intimidation Game*, at 259.

Senator Durbin ultimately made good on his threats, chairing a Senate hearing in October 2013 where he called out ALEC and bragged that his intimidation tactics led 140 members to reject an ALEC policy proposal. *See* "Stand Your Ground" Laws: Civil Rights and Public Safety Implications of the Expanded Use of Deadly Force, Hearing before the U.S. Senate Judiciary Subcommittee on Constitution, Civil Rights and Human Rights, S. Hrg. 113-626 (2013) (Statement of Sen. Richard Durbin).

Many publications, including Senator Durbin's home state newspaper, the *Chicago Tribune*, condemned his tactics. *See, e.g.*, *Durbin's Enemies List*, Chicago Tribune, Aug. 8, 2013;[9] *Durbin Makes a*

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[8] https://www.cato.org/sites/cato.org/files/documents/sen._durbin_letter_to_cato_institute.pdf.

[9] https://www.chicagotribune.com/opinion/ct-xpm-2013-08-08-ct-edit-durbin-20130809-story.html.

List, Wall Street Journal, Aug. 7, 2013.[10] Some observers even compared Durbin's intimidation methods to Senator Joseph McCarthy's anti-communist crusade of the 1940s and 1950s. *See, e.g.*, Tiger Joyce, *An Ominous Letter from Sen. Dick Durbin Raises Threats to the First Amendment*, Forbes.com, Sept. 11, 2013.[11]

A few ALEC members had the fortitude publicly to challenge his threats. *See, e.g.*, Press Release, *More Than 300 State Legislators Sign Statement Expressing Disappointment Over Senator Durbin's Letter*, ALEC, Aug. 12, 2013.[12] The Goldwater Institute, Cato Institute, and American Tort Reform Association, for example, responded to the Senator accusing him of abusing public office to intimidate American citizens from exercising hallowed constitutional rights. *See* Letter of Darcey Olsen, President of the Goldwater Institute, to the Office of Senator Richard Durbin, Aug. 9, 2013;[13] Letter from John A. Allison, President of the Cato Institute, to Senator Richard Durbin, Aug. 8, 2013;[14]

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[10] https://www.wsj.com/articles/SB10001424127887324522504578653920316430206.

[11] https://www.forbes.com/sites/realspin/2013/09/11/an-ominous-letter-from-sen-dick-durbin-raises-threats-to-the-first-amendment/?sh=7ca64603b182.

[12] https://www.alec.org/press-release/durbinresponseletter/.

[13] https://arizonadailyindependent.com/2013/08/12/goldwater-asks-durbin-have-you-no-sense-of-decency/.

[14] https://www.cato.org/sites/cato.org/files/documents/cato_letter_to_sen_durbin.pdf.

Joyce, *An Ominous Letter from Sen. Dick Durbin Raises Threats to the First Amendment.*

IV. The Harassment Has Chilled Member Participation.

The intimidation campaign undertaken by Senator Durbin, other public officials, and their private allies significantly impacted ALEC and its members and impaired ALEC's ability to fulfill its associational purpose. That year, ALEC's funding plummeted by nearly $2 million from its 2011 funding level. *See* ALEC, *Public Reporting* (providing ALEC's 2013 and 2011 IRS Form 990s).[15] The anti-ALEC campaign caused such substantial losses in revenue that it took five years of vigorous effort to rebuild the organization's support to 2011 levels. *See id.* (providing ALEC's 2016 IRS Form 990).

Membership numbers also declined. Nearly 25 percent of ALEC's corporate members left the organization between 2011 and 2013. *See, e.g.*, Press Release, ALEC, Guardian Correspondence, Dec. 4, 2013 (discussing ALEC's loss of funds and membership);[16] Ed Pilkington, *ALEC Facing Funding Crisis from Donor Exodus in Wake of Trayvon Martin Row*, The Guardian, Dec. 3, 2013.[17] Approximately 400 state legislators left ALEC during this period as

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[15] https://www.alec.org/about/public-reporting/.

[16] https://www.alec.org/press-release/alec-guardian-correspondence-2/.

[17] https://www.theguardian.com/world/2013/dec/03/alec-funding-crisis-big-donors-trayvon-martin.

well, *see id.*, including many Democrats. As to the latter, ALEC's antagonists focused particular threats of retaliation in state capitals – "to separate Democratic members from [ALEC to] help remove the bipartisan[ship] ALEC has been relying upon." Press Release, *PCCC Pressures Democratic Members to Drop ALEC*, PRWatch, Apr. 23, 2012 (calling out Democratic legislators in 26 states who were believed to be ALEC members).[18] For an organization that takes pride in its non-partisanship, and indeed has been chaired by Democratic state legislators in the past, these losses were a significant setback. Indeed, one hallmark of ALEC's effectiveness has been its ability to bring together legislators from different political parties to discuss policy issues.

Since Senator Durbin's attack in 2013, ALEC has devoted substantial resources to rebuilding its membership and countering the ongoing campaign. These efforts have been successful but ALEC's success has come at great cost to the organization and its members. These are resources that should have been available for policy research, publication, and education.

In sum, ALEC's experience is a stark example of the burdens and costs visited upon private associations when ideological opponents, including public officials like Senator Durbin, harass their members. And it is a lesson in the misuse of disclosure of private association participants and

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[18] https://www.prwatch.org/news/2012/04/11474/pccc-pressures-democratic-members-drop-alec.

financial supporters. Absent this Court's strong affirmation of the highly protective First Amendment standard flowing from *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958), ALEC and countless other charitable and educational organizations will face a grave threat to their continued ability to participate in the marketplace of ideas.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

These appeals present the Court a much-needed opportunity to clarify the jurisprudence of associational privacy and compulsory disclosure of association members and donors in a non-electoral setting. The Ninth Circuit's treatment of the cases below was seriously flawed in several important respects.

First, the Ninth Circuit resisted this Court's prior holdings that compulsory disclosure of the names of those participating in a private association *per se* burdens core First Amendment rights. Instead of properly crediting this principle, the Ninth Circuit rummaged through the district court's factual findings, concluding that while "some" contributors were subject to threats, harassment or economic reprisals, not enough of these instances existed to require serious First Amendment scrutiny. This fallacy needs correction. In these cases, the Ninth Circuit should have started with the presumption that associations have a fundamental right to be private. Rather than starting its analysis by parsing the factual record for evidence of actual harassment as in

an as-applied challenge, the court should have required California to justify its rule facially. Furthermore, as explained below, it makes no difference to a finding of harm that the disclosure was to a government entity rather than the public at large.

Second, in evaluating the disclosure requirement, the Ninth Circuit should have applied strict scrutiny or, if termed "exacting scrutiny," it should have been tantamount to strict scrutiny. The cases now before the Court present textbook examples of the sort of vague, unproven, and second-order governmental interests that lower courts are approving with increasing frequency based on casual judicial review. The Court should use these cases to instruct lower courts to closely scrutinize the proffered governmental interests and, where the interests are compelling, to demand that the disclosure demonstrably advances "a compelling interest and is narrowly tailored to achieve that interest." *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). This is particularly important in the context of non-electoral cases, as association for educational and issues-based purposes is a different – and more private – type of association than public spending on campaigns and elections.

Third, the Ninth Circuit erred by imposing a nearly insurmountable burden on the Petitioners to establish actual harm to their associations caused by the disclosure in order to state an as-applied First Amendment claim. Even though the Petitioners presented evidence of probable harm that convinced the district court, the Ninth Circuit brushed aside those findings in contravention of the rule stated in

Buckley v. Valeo that "evidence offered need show only a reasonable probability" of harm to the association. 424 U.S. 1, 74 (1976).

In sum, the Court should restore the precious freedom of private association unanimously recognized in *NAACP*, and clearly define the heightened constitutional protection to which it is entitled.

ARGUMENT

I. All Compulsory Disclosure *Per Se* Burdens the First Amendment Right of Association.

In *Buckley*, the Court observed that "we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. The Court further recognized that once the government compels disclosure, it is responsible for all repercussions visited upon a political organization and its members or contributors, even from private criticism. *Id*. at 65. And the Court ruled "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations." *Id*. at 66.

Recently, however, lower courts have disagreed over the nature of the constitutional harm implicated by compelled disclosure. The Ninth Circuit ruled that the Thomas More Legal Center and Americans for Prosperity Foundation each bore the initial burden of

proving actual threats, harassment and retaliation against its members as a direct result of California's compelled disclosure of their major donors' identities to the Attorney General. *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000, 1014 (9th Cir. 2018) ("The mere possibility that *some* contributors *may* choose to withhold their support does not establish a substantial burden on First Amendment rights."). That is, the government will be held to its rigorous burden of truly justifying a law compelling exposure of an association's members *only if* the plaintiffs can first prove that the government's law caused supporters to withhold their support.

In a related case, the Ninth Circuit imposed upon the non-profit Center for Competitive Politics[19] the threshold burden of proving that its donors were subjected to economic reprisals, harassment, threats, or some other actual chill in order to state a *facial* claim of First Amendment infringement, ruling that compulsory disclosure presents no patent harm to First Amendment rights. *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1312-1314 (9th Cir. 2015) ("CCP is incorrect when it argues that the compelled disclosure *itself* constitutes such an injury, and when it suggests that we must weigh that injury when applying exacting scrutiny."). The Second Circuit also has concluded that compulsory disclosure does not constitute a burden on free association. *Citizens*

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[19] The Center for Competitive Politics has changed its name to The Institute for Free Speech. It is a non-profit organization under section 501(c)(3) of the Internal Revenue Code.

United v. Schneiderman, 882 F.3d 374, 383 (2d Cir. 2018) ("requiring disclosure is not itself an evil").

But the Supreme Court has not required citizens to prove harassment or retaliation actually would flow from the targeted disclosure requirement in order to invoke the protection of the First Amendment. In *NAACP*, the Court accepted as sufficient the NAACP's evidence that "on past occasions revelation of the identity of its rank-and-file members has exposed these members to" reprisals; it did not require additional proof that the Alabama disclosure regime would cause reprisals. 357 U.S. at 462-463. Similarly, no such proof was required of plaintiffs in the *facial* challenges in *Talley v. California,* 362 U.S. 60 (1960), *McIntyre v. Ohio Elec. Comm'n*, 514 U.S. 334 (1995), and *Buckley*.

Drawing from the campaign finance context, *Buckley* shifted the burden to the plaintiff to establish an *as-applied* "exception" to the disclosure scheme that the Court, in the first instance, had found facially justified by the governmental interest in disclosure of contributions to candidates and expenditures explicitly advocating the election of candidates. The Fourth Circuit appears to have followed this approach, ruling on the facial constitutionality of a state campaign finance disclosure law while assuming a constitutional harm, rather than shifting the burden to the plaintiffs to prove harassment. *See Center for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 281-285 (4th Cir. 2013).

If a fundamental right to association is to have practical value, then privacy in that association must

be part of the right. *NAACP*, 357 U.S. at 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations."). And any compelled disclosure of members necessarily burdens that right and constitutes a cognizable constitutional harm. The Court should take the present opportunity to instruct the lower courts that the associational right to privacy is an important right in all cases, compelled disclosure is *per se* harm, and it is always the government's burden to justify infringement of that right.[20]

II. Compulsory Disclosure – Even When Disclosure Is Limited to Government Officials – Imposes Burdens on the First Amendment Right of Private Association.

The Attorney General of California has argued that private associations do not state a First Amendment violation when the state compels disclosure of their members only to government officials, rather than to the public. *See, e.g.*, First Br. on Cross-Appeal, *Thomas More Law Center v. Becerra*, 903 F.3d 1000, at 32, 57-60 (9th Cir. filed Sept 11,

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[20] To the extent amicus United States' brief at the certiorari stage could be interpreted to argue that "exacting scrutiny" applies only to compulsory disclosure laws that "carry a reasonable probability of harassment, reprisals, and similar harms," that would write out of the First Amendment the inherent right to privacy in association. *See* Brief of the United States as Amicus Curiae at 11-12, Nov. 2020. Probability of harassment and other harms should be a relevant inquiry, under *Buckley*, only where a compulsory disclosure law is otherwise justified by the government.

2018). But this position contradicts *NAACP*, where the Court ruled court-compelled disclosure of NAACP members and donors to the state Attorney General burdened freedom of association. 357 U.S. at 451 ("The question presented is whether Alabama . . . can compel [NAACP] to reveal to the State's Attorney General the names and addresses of all its Alabama members and agents . . ."). The donor information sought by the Alabama Attorney General by subpoena was ostensibly limited to use by state officials to enforce Alabama business statutes regulating the Alabama activities of foreign corporations. There was no public exposure scheme at issue. Yet the Supreme Court recognized the threat to the NAACP, its members, and its associational purpose posed by disclosure to those officials. The Court stressed that any "state action which may have the effect of curtailing the freedom to associate is subject to the strictest scrutiny." *Id.* at 460-461.

Indeed, compulsory disclosure of the identities of an organization's members and donors to government officials poses a powerfully chilling threat to their peace and livelihoods, because government officials wield police power of the state to expose, harass, or disadvantage them in both explicit and subtle ways. As ALEC's experience demonstrates, public officials, including United States Senators, have used public office in ways intended to ruin associations with which they disagree by demanding membership lists and threatening their members with harmful public attention or worse. *See, e.g.*, Jamie Corey, *Senator Whitehouse Exposes ALEC*

Climate Change Deal, PRWatch, Mar. 13, 2015.[21] And further, public officials cater to – and form alliances with – private organizations in order to both advance their shared causes and to win their political support. ALEC lost members and resources because of a direct attack by a public official doing the bidding of allied interest groups.

The chill here is not ameliorated because disclosure is limited to the Attorney General of California. The Attorney General has coercive powers comparable to those of a United States Senator. ALEC and its members have a fundamental right to associate privately without interference by a United States Senator wielding a gavel and the threat of hostile legislative treatment to disrupt the association. But that happened.

Of course, ALEC's experience is not unique. Throughout history, the most damaging inquisitions into private associations have been launched by government officials. It was the Federal Bureau of Investigation and the House Unamerican Activities Committee armed with secret lists of citizens that persecuted progressives in the 1940s and 1950s. *See* Victor S. Navasky, *Naming Names* (Viking Press 1980). The Attorney General of New Hampshire invaded the private membership of the Progressive Party of New Hampshire in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). State Attorneys General launched an inquisition into the private

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[21] https://www.prwatch.org/news/2015/03/12771/senator-whitehouse-exposes-alec-climate-change-denial.

climate policy research of the Competitive Enterprise Institute in order to punish thought with which they disagreed. *See* Heartland Institute, *State Attorneys General Launch Legal Attack on Climate Realists*, Mar. 28, 2017.[22]

United States Senator Sherman Minton in 1938 used the congressional subpoena and threat of legislative action to invade the internal affairs of the free-market Committee on Constitutional Government (CCG), which had successfully opposed New Deal policies, dispatching congressional staff to rummage through the organization's records. David Beito & Marcus Witcher, *"New Deal Witch Hunt" – The Buchanan Committee Investigation of the Committee for Constitutional Government*, The Independent Review, Vol. 21 No. 1 (Summer 2016) at 47-52. Years later, New Deal Democrats on the House Select Committee on Lobbying Activities subpoenaed the CCG for lists of the people who purchased free-market books from the organization and arrested the CCG leader when he declined to name the names. *See United States v. Rumely*, 345 U.S. 41, 46 (1953). Although ultimately vindicated by this Court, the inquisition diverted resources and distracted the organization for years, harming its reputation and effectiveness in the process. *See, e.g.*, Beito, *"New Deal Witch Hunt"* at 58.

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[22] https://www.heartland.org/topics/climate-change/state-attorneys-general-launch-legal-attack-climate-realists/index.html.

Even the film industry's blacklisting of Hollywood artists during the Red Scare was instigated by government officials. The Hollywood executives who signed the 1947 Waldorf Statement promising not to employ progressive screenwriters and actors did so under pressure from Senators and Representatives in Congress. *See* Sarah D. Katz, *"Reputations . . . A Lifetime to Build, Seconds to Destroy": Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 Cardozo J. Int'l & Comp. L. 185, 203 (2011). The private retaliation was intended to appease powerful government policymakers who could affect the industry.

The upshot is that limiting compelled disclosure of association members' identities to government officials such as the Attorney General of California offers little comfort to associations and their members and visits a significant chill on robust association and members' willingness to provide financial support. Accordingly, the Court should construe the First Amendment to afford heightened protection to those subject to California's donor disclosure requirement here.

III. Whether Labeled "Strict Scrutiny" or "Exacting Scrutiny," This Court Should Set a High Bar Before Government May Compel Disclosure.

Perhaps the point of jurisprudence in greatest need of clarification is the level of scrutiny applicable to compulsory disclosure schemes outside of the electoral context. Some have posited that "exacting

scrutiny" was fashioned for laws compelling disclosure in connection with the democratic process, such as campaign finance and ballot petition signatures, but that it is an inappropriate standard for associational rights outside of the electoral context. The appropriate standard for associational rights outside of such context, in their view, is strict scrutiny. *See, e.g.*, Br. for the Petitioner Thomas More Law Ctr., *Thomas More Law Ctr. v. Becerra*, No. 19-255, at 17 (filed Feb. 22, 2021). Others accept "exacting scrutiny" as a uniform First Amendment standard for analyzing compulsory disclosure in all contexts but argue courts have relaxed that standard in application to the point it affords no practical protection at all. *See, e.g.*, Br. of the Cato Institute *et al.*, as Amici Curiae in Support of Petitioners, *Americans for Prosperity Foundation v. Becerra*, No. 19-251, at 15 (filed Sept. 25, 2019).

Adopting unique standards for electoral versus non-electoral associations would, of course, complicate First Amendment jurisprudence. The Court is already familiar with the growth of litigation over the line separating issue advocacy from electoral advocacy. *See, e.g.*, *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007) (Roberts, C.J.); *McConnell v. FEC*, 540 U.S. 93 (2003).

Rather than further complicate this area of law, the Court should clarify these points once and for all here and restore a high bar for courts to uphold government invasions of associational privacy in all contexts. One way to do that without complicating the law unnecessarily would be for the Court to clarify that "exacting scrutiny" and "strict scrutiny" require

the government to satisfy the same proof requirements.

This Court frequently has used the term "exacting scrutiny" to analyze compelled disclosure laws in the electoral context. *Davis v. FEC*, 554 U.S. 724, 744 (2008). Yet, whether that standard applies in non-electoral contexts, such as non-profit fundraising, and what it might mean in those contexts, has eluded and confused lower courts, legislators, and practitioners.

Early case law required a "showing of 'overriding and compelling state interest' that would warrant intrusion into the realm of political and associational privacy protected by the First Amendment." *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966), *quoting Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1961). And since then, the Court has reiterated that, where a law burdens First Amendment rights, "exacting" and "strict" judicial review "are one and the same." *Burson v. Freeman*, 504 U.S. 191, 198 (1992). Even in the electoral context, *Buckley* cited the "strict test" of *NAACP*. 357 U.S. at 66 (citing 357 U.S. at 460-61). Lower courts historically followed this Court's lead and applied "exacting scrutiny" as the functional equivalent of "strict scrutiny." *See, e.g., United States v. Hamilton*, 699 F.3d 356, 370 n.12 (4th Cir. 2012); *Pharm. Care Management Assoc. v. Rowe*, 429 F.3d 294, 309 (1st Cir. 2005); *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980).

But more recently, relying upon language in the election-related decisions *McConnell* and *Citizens United v. FEC*, 558 U.S. 310 (2010), an increasing number of lower courts have concluded the two scrutiny tests are quite different. *See, e.g., Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 10-11 (D.C. Cir. 2009); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2012); *Green Party of Connecticut v. Garfield*, 616 F.3d 213, 229 n.9 (2d Cir. 2010); *Vermont Right to Life Committee, Inc. v. Sorrell*, 758 F.3d 118, 132 n.12 (2d Cir. 2014); *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 787 (9th Cir. 2006). Such lower courts are diluting the standard by applying a very forgiving review akin to rational basis review. *See, e.g., Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 413 (6th Cir. 2014); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012); *Schneiderman*, 882 F.3d at 382; *Americans for Prosperity Foundation*, 903 F.3d at 1009; *Center for Competitive Politics*, 784 F.3d at 1312-1314. The Third Circuit, for example, upheld a Delaware law requiring disclosure of donors to entities engaged in issue advocacy that was merely "rationally related" to the government's stated objective. *Delaware Strong Families v. Attorney General of Delaware*, 793 F.3d 304, 310 (3d Cir. 2015).

For its part, in a case involving similar disclosures to those at issue here, the Second Circuit described "exacting scrutiny" as just another term for "intermediate scrutiny" and proceeded to defer to the government's proffered interests without any evidence to support them. *Schneiderman*, 882 F.3d at

382. And in a predecessor to the matters now before the Court, the Ninth Circuit applied *Davis* as a sliding scale test or balancing test, requiring the citizen first to prove "actual burdens" and, based upon the severity of those burdens, then deciding the necessary strength of the government's interest – even in a facial challenge. *Center for Competitive Politics*, 784 F.3d at 1314.

The D.C. Circuit has acknowledged confusion between "strict" and "exacting" scrutiny, but concluded the difference is merely semantic. "In many respects, this debate over the appropriate adjective is beside the point. Whatever the test is *called,* the [Supreme] Court has already described what the test *is*." *Nat'l Ass'n of Mfrs.*, 582 F.3d at 10-11. The D.C. Circuit then quoted *Davis* without further elaboration and held that the disclosure law at issue satisfied strict scrutiny in any event. *Id.* at 11. Another federal district court recently expounded at length upon the lack of clarity in this area and then chose "strict scrutiny" as the appropriate test. *The Washington Post v. McManus*, 355 F. Supp. 3d 272, 289-290 & n.14 (D. Md. 2019), *aff'd* 944 F.3d 506 (4th Cir. 2019).

Justice Thomas has opined that only "strict scrutiny" can properly apply to the review of compelled exposure of citizens exercising First Amendment rights – in all contexts. *Doe v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., *dissenting*). Offended by the Third Circuit's approval of Delaware's sweeping compulsory exposure regime targeting those engaged in the publication of public officials' voting records online, Justice Thomas

admonished that the case revealed how "exacting scrutiny" has effectively devolved to "no scrutiny at all." *Delaware Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., *dissenting* from the denial of certiorari). Justice Thomas' point is borne out by the case law and needs correction by this Court.

Moving past the level of scrutiny to its application, courts likewise have failed to achieve uniformity in applying the standard for tailoring. *McIntyre* stated that the Court will "uphold the [compulsory disclosure] restriction only if it is narrowly tailored to serve an overriding state interest." 514 U.S. at 347. Previously, the Court had stated that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Buckley*, 424 U.S. at 41. Other courts have used the language of "substantial relationship" between compulsory disclosure and the asserted government objective. *See, e.g., Center for Individual Freedom*, 706 F.3d at 282. Courts know that disclosure only "tenuously related" to the state's asserted objective is inadequate to carry the government's burden, *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 204 (1999), but after six decades of jurisprudence since *NAACP*, the law has become unclear as to the degree of tailoring that is constitutionally required.

Finally, the Court should make clear that the government must choose the narrowest means of infringement when seeking to compel disclosure of associations. Many disclosure schemes demand far

more disclosure than is necessary to prevent corruption or validate the bona fides of a nonprofit organization. Overbroad disclosure unnecessarily exacerbates the degree of the First Amendment harm. *See Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (stating that disclosure "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved").

Lower courts have been inconsistent in enforcing tightly circumscribed boundaries for disclosure. *Compare Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012) (upholding the FEC's "for the purpose of" donor disclosure rule with respect to electioneering communications) *with Citizens for Responsibility and Ethics in Washington v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (striking FEC's decades-old "for the purpose of" donor disclosure rule with respect to independent expenditures). The Third Circuit's treatment of this issue is illuminating. Having found the government's broad informational interest to be "sufficiently important," that court uncritically deferred to the government's chosen means of compelling that disclosure. *Delaware Strong Families*, 793 F.3d at 310. The Ninth Circuit here upheld the state's compulsory disclosure scheme that merely "furthers" the state's interest in "efficiency," even though the compulsory disclosure mechanism is unnecessary, overbroad, and harmful. *Americans for Prosperity Foundation*, 903 F.3d at 1011.

To the extent a compulsory disclosure scheme limits the disclosure to government officials only, rather than to the public, that feature of the scheme

should be considered only in a court's review of the scheme's *tailoring*. The Court should set clear rules for the degree of tailoring that is required between the government's asserted objective, if the government has first justified an infringement, and the compulsory exposure mechanism.

Here, for example, California has asserted that it needs to know an organization's donors from across the country for vague and amorphous "law enforcement" purposes. It contends that to prepare for the rare time when it might need to locate the identity of a problematic donor, it must first build a haystack of unnecessary donor information about thousands of organizations and donors. Of course, a targeted subpoena would suffice. California also has argued that it needs to know a nonprofit's donors in order to analyze self-dealing. But self-dealing violations seldom, if ever, involve a donor contributing money to a non-profit. Instead, self-dealing concerns almost always arise from a non-profit's operators (i.e. directors or officers) paying themselves excessively from donations, and that concern is addressed adequately through the part of IRS Form 990 that requires disclosure of insider contracts and the compensation of insiders. *See* IRS Form 990, Schedule R and Schedule J.[23] Furthermore, in protecting the consumers of California, there is no reasonable need for the Attorney General to know an

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[23] https://www.irs.gov/charities-non-profits/required-filing-form-990-series.

out-of-state organization's donors from, say, Virginia or Maine.[24]

IV. The Burden to Prove Threats and Retaliation Should Shift to the Private Association Only After the Government Has Satisfied Its Demanding Burden.

The Ninth Circuit here imposed upon the nonprofit associations the burden of proving threats and harassment directly caused by the state's compulsory disclosure but allowed California to proffer a justifying government interest that is merely "important." *Americans for Prosperity*, 903 F.3d at 1011 (approving state's "important" interest), at 1014 (characterizing the necessary burden on associational rights as "substantial"), and at 1019 (upholding compelled disclosure of a non-profit's organization's

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[24] To the extent that the United States, the State of California, or any other government entity argues that the First Amendment does not protect non-profit organizations because these organizations receive tax benefits from the government, such views are mistaken. Regardless of the rationale ultimately offered, government must always justify the burdens it imposes on core First Amendment rights, even where the entity receives some sort of tax benefit from the government. This Court would not, for example, deny First Amendment scrutiny of a law allowing the Attorney General to demand, without cause, taxpayer information merely because the individual claimed something other than the standard deduction. Nor should it deny First Amendment scrutiny to non-profit organizations exercising their right to a tax exemption under statute. A "benefits" theory could be stretched so far as to remove First Amendment protection from a wide array of activities.

donors "[b]ecause the burden on the First Amendment right to association is modest, and the Attorney General's interest in enforcing its laws is important"). In effect, the Ninth Circuit shifted the burden to the Petitioners to prove "substantial" harassment or retaliation and causation in order to state both facial and as-applied First Amendment infringement claims. *Id*. at 1008.

But the Supreme Court has rejected requiring such proof to establish a facial infringement in a number of cases. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002) ("The decision [in] favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."), *quoting McIntyre*, 514 U.S. at 341-342; *accord Talley*, 362 U.S. at 69 (Clark, *dissenting*). Evidence of harassment or retaliation should become relevant only in an as-applied challenge to a disclosure law that the government has justified facially. Even there, the government still should bear the burden of justifying the as-applied burden. Therefore, the burden must always be upon the government to justify compulsory disclosure of individuals' private political belief, speech and association, in both facial and as-applied challenges.

The most workable — and most First Amendment protective — approach to burden shifting was set forth in *Buckley*, an election-related case, and its progeny. There, in the context of campaign contributors, the Court held that mandatory disclosure of campaign contributors is constitutional

because the government has a compelling interest in preventing corruption of politicians. 424 U.S. at 67-68.

Having upheld the compulsory disclosure regime, the Court then carved an as-applied exception to the otherwise facially constitutional compulsory disclosure scheme: if a party could demonstrate that its members were the object of harassment or threats, the party could be excepted from disclosure. *Id.* at 64-68.

A few years later, the Court returned to this privacy exception in *Brown v. Socialist Workers '74 Campaign Committee*, which applied *Buckley* to a minor political party. 459 U.S. 87 (1982). Were there any doubt, the Court's remand in *Doe* made clear that *Buckley*'s exception for as-applied challenges is available to all organizations – i.e., it is not merely limited to minority or dissident groups. 561 U.S. at 186 (applying the *Buckley* exception to a broad range of citizens).

In sum, compulsory disclosure is an exception to the First Amendment right of private association that demands a compelling government justification. Once justified, a private association can qualify for an exception to the compulsory disclosure in an as-applied challenge. The judicial approach should thus be conceived as an analysis of a citizen's as-applied exception to the government's exception to the citizen's fundamental First Amendment right of private association.

Turning next to the standard required of citizens seeking to invoke the exception, the level of required proof should be reasonable. *Buckley* "recognize[d] that unduly strict requirements of proof could impose a heavy burden" upon citizens associational rights, and therefore instructed lower courts to apply "sufficient flexibility in the proof of injury to assure a fair consideration of their claim." 424 U.S. at 74. The Court further instructed that the

> evidence offered need show 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 or private parties. The proof may include, for example, specific evidence of past or present 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. New parties that do not have their own history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.

Id.

A new organization should not have to expose its members to substantial public harassment to the point that the organization is ruined before it can succeed in an as-applied challenge. By that time, it is

too late for effective judicial protection of First Amendment freedoms. Moreover, the fact that some members are brave enough—or secure enough—to stand up to threats and harassment should not diminish First Amendment protection for those who are more vulnerable. As observed by perhaps the first federal judge to articulate the First Amendment freedom of associational privacy in an early Red Scare decision:

> There has been some suggestion that [compulsory disclosure of members] restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure. But nothing turns on this question of fact. The views of timid people are not necessarily worthless to society. No one needs self-expression more. The Constitution protects them as it protects others.

Barsky v. United States, 167 F.2d 241, 255 (D.C. Cir. 1948) (Edgerton, J., *dissenting*).

That this reasonable evidentiary standard was applied in *Buckley* and *Socialist Workers* to campaign finance disclosure, the north star of compelled public exposure regimes, indicates that no more demanding evidentiary standard should apply in other associational contexts such as presented by the Petitioners here.

In the District Courts below, Petitioners each presented copious and compelling evidence that its founders and funders faced death threats, public vilification, economic retaliation in the form of boycotts, and enough overall harassment so that its donor base was highly sensitive to exposure. *See* Complaint for Preliminary and Permanent Injunctive Relief and for a Declaratory Judgment at ¶¶ 14-19 (Dec. 9, 2014); Motion for a Preliminary Injunction, Decls. of Mark V. Holden and Christopher Fink (Dec. 15, 2014), *Americans for Prosperity Foundation v. Harris*, Civil Action No. 2:14-cv-09448 (C.D. Cal. Feb. 23, 2015). The trial courts heard this evidence and were convinced that the state-compelled exposure chilled each organization's donor base and harmed the associational rights of its members. *See Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016); *Thomas More Law Ctr. v. Harris*, Case No. CV 15-3048-R, 2016 WL 6781090, at *4 (C.D. Cal. Nov. 16, 2016).

On appeal, however, the Ninth Circuit moved the goal post. The Ninth Circuit imposed upon both petitioners a gauntlet of heightened evidentiary proof standards. The Ninth Circuit reasoned that although each organization's founders and funders were indeed subjected to death threats and harassment, neither organization's lawyers could specifically trace those threats to the organization's activities and, moreover, the organization could not specifically tie the associational chill to California's compulsory disclosure law. *See Americans for Prosperity Foundation*, 903 F.3d at 1015-1017. Being controversial and facing threats in the political arena

generally was not enough, according to the Ninth Circuit.

The Ninth Circuit rationalized (903 F.3d at 1019-1020) this approach by misapplying language, originally from *Davis* (554 U.S. at 744) and later quoted by *Doe* (561 U.S. at 196), that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights," to effect a sliding scale relaxation of the government's burden in response to an as-applied challenge. In other words, the strength of the government's interest need not be very high if the private association cannot prove substantial disruption of its association directly caused by the government's disclosure scheme at issue. The Ninth Circuit's sliding scale effectively imposed an insurmountable evidentiary burden upon the Petitioners – an evidentiary burden far more burdensome, and less protective of associational freedom, than the Supreme Court established in *Buckley* and *Brown*. There, even in the campaign finance context, the Court set a less demanding evidentiary standard for as-applied exceptions to an otherwise justifiable disclosure scheme.

Speaking of the evidentiary burden courts may impose upon citizens in as-applied challenges to exposure regimes that are ruled facially constitutional, Justice Alito wrote in *Doe* that "speakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle. We acknowledged as much in *Buckley,* where we noted that 'unduly strict requirements of proof could impose a heavy burden' on speech." *Doe*, 561 U.S. at

204 (Alito, J., *concurring*). Coming from the author of *Davis*, that description of the proper evidentiary standard should carry substantial weight.

Few organizations in America could meet the Ninth Circuit's evidentiary burden, even though they may suffer harm. It is difficult to publicly prove the numerous donors who privately admit – or politely will not admit – to disassociating due to concerns over a specific exposure law. ALEC likely could establish direct harm to its association as a result of the combined effects of Senator Durbin's threats to suspected members and the allied boycott campaign. In the wake of that intimidation campaign, ALEC lost nearly $2 million in receipts and nearly 500 corporate and public members. But this kind of stark record is seldom available. One federal court considering a similar disclosure scheme recently took judicial notice of a pervasive "cancel culture" whose existence must inform First Amendment jurisprudence. *Americans for Prosperity v. Grewal*, Case No. 3:19-cv-14228, 2019 WL 4855853, at *20 (D. N.J. Oct. 2, 2019) (observing "a climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others").

Indeed, we live in a time when an entire generation of Americans is less tolerant of differing points of view than previous generations. April Kelly-Woessner, *The End of the Experiment* (ed. Stanley Rothman) (Routledge 2017) at 187-200; Greg Lukianoff, *The Coddling of the American*

Mind (Penguin Press 2018). The counter campaigns are vicious and intense. *See, e.g.*, Strassel, *The Intimidation Game*; Kirsten Powers, *The Silencing: How the Left is Killing Free Speech* (Regnery Publishing 2015). And, as in prior eras of intolerance, aggressors employ public disclosure as a cudgel to disrupt and eliminate not only specific ideas, but even entire associations and entire philosophical movements. Navasky, *Naming Names*.

This Court's First Amendment jurisprudence should recognize these realities. Efforts to silence both speakers and ideas are antithetical to one of the principal objectives of the First Amendment – to improve our democracy through robust exchange of ideas, sometimes popular, sometimes not.

CONCLUSION

The times in which we find ourselves recall the famous words of Justice Black who, at the height of the Red Scare, observed that "[t]here is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society." *Dennis v. United States*, 341 U.S. 494, 581 (1951) (Black, J., *dissenting*). The Court should accept Justice Black's challenge, reverse the Ninth Circuit, and take this opportunity to clarify and restore the First Amendment's protection of associational privacy to the rightful, "high preferred place" in our society.

Respectfully submitted,

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