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 Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS*

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have frequently appeared before this Court as counsel either for a party, *e.g.*, *McConnell v. FEC*, 540 U.S. 93 (2003), or for amicus, *e.g., John Doe No. 1 v. Reed,* 561 U.S. 186 (2010). The proper resolution of this case is a matter of utmost concern to the ACLJ because of its dedication to First Amendment liberties, particularly in the context of grassroots political activity. Having represented 36 conservative organizations from 20 states that were targeted for discriminatory treatment by the IRS because of their political views, the ACLJ urges this Court to apply strict scrutiny review to compelled disclosure laws that threaten First Amendment associational rights.

SUMMARY OF THE ARGUMENT

The reliably rigorous demands of strict scrutiny are best suited to protect against the chill threatening First Amendment associational rights from the pervasive threat of retaliation and harassment.

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*Counsel of record for the Petitioners have filed with this Court blanket consents to the filing of amicus briefs. Counsel of record for Respondent consented to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from Amicus, its members, or its respective counsel made a monetary contribution to the preparation or submission of this brief.

Although "exacting scrutiny" has often been applied to compelled disclosure requirements, it has suffered from definitional imprecision. In some of this Court's precedents, exacting scrutiny has been a distinct standard, but at other times it has shifted into strict scrutiny for reasons that are not always clear. A shifting standard is more malleable and therefore less effective in protecting First Amendment association rights. The decision below is illustrative, as is the Second Circuit's decision in *Citizens United v. Schneiderman*, 882 F.3d 374, 381–82 (2d Cir. 2019) (equating exacting scrutiny with intermediate scrutiny and citing in support a commercial speech case).

"Precision . . . must be the touchstone" when it comes to "our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). That precision should extend to the level of scrutiny applied to laws threatening those freedoms. A malleable standard of judicial scrutiny only aggravates the chilling effect on those rights.

The need to apply strict scrutiny to compelled disclosure laws is intensified by the exponentially increasing incidence of harassment and retaliation against those with disfavored political views. Such conduct is so pervasive that there is a perpetual "reasonable probability" that those with unpopular political views will become targets if their identities are disclosed. *John Doe No. 1 v. Reed,* 561 U.S. 186, 201 (2010).

ARGUMENT

This Court should reverse the Ninth Circuit's decision and hold that strict scrutiny applies to any compelled disclosure law that burdens First Amendment associational rights. The Ninth Circuit applied "exacting scrutiny." *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1008 (9th Cir. 2018). In this Court's precedents, exacting scrutiny has been an imprecise standard that at times is indistinguishable from strict scrutiny and at other times resembles intermediate scrutiny. The Ninth Circuit's decision is one of several muddled or inconsistent interpretations of exacting scrutiny review. *Compare Becerra*, 903 F.3d at 1008 (holding that exacting scrutiny contains no narrow tailoring component and "requires [only] a substantial relation between the disclosure requirement and a sufficiently important governmental interest") *with Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 414 (6th Cir. 2014) (noting that "'[e]xacting scrutiny,' despite the name, does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may"); *and Wash. Post v. McManus*, 355 F. Supp. 3d 272, 289 n.14 (D. Md. 2019) (stating that "[t]he Court's application of the phrase 'exacting scrutiny' has not always been exacting in its own right, leading to considerable confusion").

The threat to associational rights in this country has never been graver. The corresponding chill to the exercise of First Amendment rights weighs in favor of subjecting disclosure requirements, including the

California Attorney General's donor disclosure rule, to strict scrutiny.

I. Exacting Scrutiny's Definitional Fluidity Renders It Inadequate to Protect Against Chilling of First Amendment Associational Rights.

From its inception in *Buckley v. Valeo,* 424 U.S. 1, 64 (1976), exacting scrutiny has suffered from definitional imprecision. The *Buckley* Court coined "exacting scrutiny" in upholding disclosure requirements in the Federal Election Campaign Act of 1971. *Id.* at 6–7, 64–66, 84. The Court referred to "exacting scrutiny" as a "strict test" derived from *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958). *Buckley*, 424 U.S. at 64–66. *NAACP,* however, applied strict scrutiny, as did other civil rights era cases where the right to associational privacy was burdened. 357 U.S. at 460–61 (holding that "state action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny*") (emphasis added); *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) (noting "the State may prevail only upon showing a subordinating interest which is compelling"); *Gibson v. Fla. Legis. Comm.*, 372 U.S. 539, 546 (1963) (same).

Buckley defined "exacting scrutiny," however, as requiring a "substantial relation[ship]" between a "sufficiently important" government interest and the information required to be disclosed. 424 U.S. at 64–66. Exacting scrutiny thus facially resembled the intermediate scrutiny applied to content-neutral

regulations restricting speech and to limits on commercial speech. *See, e.g.*, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 662 (1994) (content-neutral regulations); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980) (commercial speech).

In addition to requiring a substantial rather than a compelling interest, *Buckley*'s formulation of exacting scrutiny did not explicitly articulate a least-restrictive-means requirement that is normally associated with the strict scrutiny applied in other associational rights cases. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961). Instead, the *Buckley* Court "note[d] and agree[d] with [the] appellants' concession that [the] disclosure requirements [were] the least restrictive means of [achieving the government's interest in] curbing the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68.

Thus, the new term "exacting scrutiny" denominated a "strict" test derived from cases applying strict scrutiny to disclosure requirements that threatened associational rights. *Id*. at 64. But the *Buckley* Court's formulation of exacting scrutiny "was more forgiving than the traditional understanding of [strict scrutiny]." *Buckley v. Am. Const. L. Found. (ACLF)*, 525 U.S. 182, 214 (1999) (Thomas, J., concurring).

After *Buckley*, exacting scrutiny's reappearances in the Court's cases did not result in a clearer standard. For example, in *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1982),

another campaign finance disclosure case, *Buckley v. Valeo* was extensively discussed but the Court applied strict scrutiny. *Id.* at 91. The constitutional protection against the compelled disclosure of political associations and beliefs "yield[s] only to a subordinating interest of the State that is compelling, and then only if there is a substantial relation between the information sought and an *overriding and compelling* state interest." *Id.* at 91–92 (internal citations omitted) (emphasis added). *See also John Doe No. 1 v. Reed,* 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) (citing *Brown* in support of the contention that "our precedents [] require application of strict scrutiny to laws that compel disclosure of protected . . . association").

Then, in *ACLF*, 525 U.S. at 204, the Court held that requiring petition circulators to wear name badges failed exacting scrutiny because the requirement was "no more than tenuously related to the *substantial* interests disclosure serves." (emphasis added). The Court seemingly equated "exacting" with "strict" scrutiny, remarking: "Our decision is entirely in keeping with the 'now-settled approach' that state regulations 'imposing "severe burdens" on speech . . . must be narrowly tailored to serve *a compelling state interest*.'" *Id.* at 192 n.12 (cleaned up) (emphasis added). In his concurring opinion, however, Justice Thomas faulted the majority for failing to apply strict scrutiny to each of the law's provisions. *See id.* at 206 (Thomas, J., concurring).

In several of the Court's other cases, exacting and strict scrutiny have been indistinguishable. For example, in *McIntyre v. Ohio Elections Commission*,

514 U.S. 334 (1995), the Court held that an Ohio law prohibiting the distribution of anonymous campaign literature targeting candidate and ballot measure campaigns was unconstitutional. *Id*. at 357. Because the case involved a "limitation on political expression," "we apply '*exacting scrutiny*,' and . . . uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *Id*. at 346–47 (internal citations and quotations omitted) (emphasis added); *see also Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015) ("[w]e have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest"); *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) ("[u]nder exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest"); *United States v. Alvarez*, 567 U.S. 709, 711, 724 (2012) (plurality opinion) (describing "exacting scrutiny" as "the 'most exacting scrutiny'" and requiring the government to use the "least restrictive means" of furthering its interest); *Burson v. Freeman*, 504 U.S. 191, 198 (1993) (stating that exacting scrutiny requires the government to "show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end'"); *Riley v. Nat'l Fed'n of the Blind,* 487 U.S. 781, 798 (1988) (applying exacting scrutiny to North Carolina's regulation of professional fundraisers soliciting charitable donations but holding that the law was not narrowly tailored).

In other cases, the Court has indicated that exacting scrutiny is a shifting standard contingent on the Court's perception of the burden imposed on First Amendment rights. *Davis v. FEC*, 554 U.S. 724, 744 (2008) (stating that under exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights"); *Reed*, 561 U.S. at 196 (same).

Exacting scrutiny, therefore, is sometimes a distinct standard, but then other times it transmutes into strict scrutiny depending upon the Court's assessment of whether the challenged law burdens rights. As Justice Thomas has noted, "a coherent distinction between severe and lesser burdens" is difficult to discern in the Court's cases. *ACLF*, 525 U.S. at 208 (Thomas, J., concurring); *cf. Reed*, 561 U.S. at 228 (Thomas, J., dissenting) (highlighting the inconsistency between the Court's previous associational rights cases and *Reed* and stating, "unlike the Court, I read our precedents to require application of strict scrutiny to laws that compel disclosure of protected First Amendment association").

"The Constitution protects against the compelled disclosure of political associations and beliefs." *Brown*, 459 U.S. at 91. A shifting standard of scrutiny is more malleable and less effective in preventing the chilling of those freedoms. "Precision . . . must be the touchstone" when it comes to "our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Compelled disclosure laws burdening associational rights should be subject to strict scrutiny review.

II. Strict Scrutiny Review Is Necessary to Forestall Further Chilling of First Amendment Associational Rights from the Dramatic Increase in Retaliation Against Those with Disfavored Political Views.

Toxic polarization and the mushrooming of "cancel culture" has catapulted the value of political anonymity to its apex. The threat to First Amendment associational rights from compelled disclosure equals the threat experienced by NAACP members in the civil rights era. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP*, 357 U.S. at 462. "[R]evelation of the identity of [NAACP] members [] exposed [them] to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462; *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) (noting that NAACP "members were subjected to economic reprisals" after the membership lists were filed). Strict scrutiny should be the consistent standard where laws compel the disclosure of protected First Amendment associations.

A. Harassment and Retaliation for Disfavored Political Views - a Recent Fixture of American Life.

A reasonable probability of harassment and retaliation against those associated with disfavored political views is increasingly the status quo. A recent Cato Institute Poll demonstrates that any previous societal consensus that such conduct is inappropriate has substantially eroded. Depending upon political affiliation, 31% to 50% of Americans supported the firing of a business executive who donated personal funds to Donald Trump's presidential reelection campaign.[1] On the other end of the political spectrum, from 22% to 36% "of Americans supported firing a business executive who personally donate[d]" to Joe Biden's presidential campaign.[2] Not surprisingly, the poll found that 62% of Americans believe that the current "political climate . . . prevents [them] from saying things [they] believe because others might find [those beliefs] offensive."[3] "Nearly a third (32%) of employed Americans say they are worried about missing out on career opportunities or losing their job if their political opinions became known," a percentage that cuts fairly strongly across demographic and partisan lines.[4]

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[1] Emily Ekins, *New Poll: 62% Say the Political Climate Prevents Them from Sharing Political Views*, CATO INST. (July 22, 2020), https://www.cato.org/blog/poll-62-americans-say-they-have-political-views-theyre-afraid-share.

[2] *Id.*

[3] *Id.*

[4] *Id.*

Other polls report similar findings. *See, e.g.,* Jamie Ballard, *Most Americans Say Cancel Culture Is a Big Problem*, YouGov (July 28, 2020), https://today.yougov.com/topics/entertainment/articles-reports/2020/07/28/cancel-culture-yahoo-news-poll-data (more than half of all Americans believe that cancel culture is a big problem); Ryan Lizza, *Americans Tune in to "Cancel Culture" — and Don't Like What They See,* Politico (July 22, 2020, 4:30 AM), https://www.politico.com/news/2020/07/22/americans-cancel-culture-377412 (finding that "[c]ancel culture is driven by younger voters" and that almost half of Americans believe that it has had a negative impact).

The seriousness of the burden on associational rights from disclosure requirements is no longer subject to debate as it was in *Reed*. *See* 561 U.S. at 200–01 (holding that referendum petition signers' facial challenge must fail because signers had not shown a reasonable probability of harassment against signers of all petitions regardless of the petition's subject matter); *id*. at 204–05 (Alito, J., concurring) (agreeing that signers' facial challenge must fail but stating that evidence of harassment and retaliation against supporters of a similar referendum in a neighboring state would likely suffice to sustain an as-applied challenge to the disclosure requirement); and *id*. at 242–43 (Thomas, J., dissenting) (stating that strict scrutiny should have been applied to the disclosure law because "the state of technology today creates at least some probability that signers of every referendum will be subjected to threats, harassment, or reprisals if their personal information is disclosed") (emphasis omitted).

B. The Pervasiveness of Harassment and Retaliation Against Those with Disfavored Political Views.

Retaliation and harassment are widespread among various segments of society, including major media outlets, corporations of all sizes, social media outlets, educational institutions, and governmental officials. A few examples of each suffice.

1. Major Media Outlets

- *New York Times*: The *New York Times* fired Donald McNeil Jr. a science and health reporter since 1976 for an informal reference to a third party's use of a racial slur.[5] On a 2019 *New York Times* trip, a student asked McNeil about whether a classmate should have been suspended for making a video in which the n-word was used.[6] To clarify the girl's question, McNeil asked the girl about the context in which the word was used, and in so doing, used the word itself.[7] Although none of the students present were from that minority, many

[5] Charles W. Cooke, *The* New York Times' *Internal Mob Takes Down Another of Its Own*, NAT'L REV. (Feb. 6, 2021, 10:07 AM), https://www.nationalreview.com/corner/the-new-york-timess-internal-mob-takes-down-another-of-its-own/.
[6] *Id.*
[7] *Id.*

students were appalled. [8] The *Times* investigated and issued a minor reprimand after determining that the word was not used maliciously.[9] An angry reaction from *Times* employees ensued. In response, the *Times* decided to fire McNeil even though it had submitted McNeil's journalism covering the Coronavirus pandemic for a Pulitzer Prize. [10] *Times* columnist Bret Stephens wrote an essay critiquing McNeil's firing for being the result of a "culture of cancellations," but the *Times* refused to publish it. [11] The essay was instead published in the *New York Post*.[12]

- *Forbes Magazine*: Randall Lane, chief content officer of Forbes Media and editor of Forbes Magazine, published an opinion

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[8] Sarah Ellison & Jeremy Barr, *A Star Reporter's Resignation, a Racial Slur and a Newsroom Divided: Inside the Fallout at the* New York Times, WASH. POST (Feb. 12, 2021, 3:31 PM), https://www.washingtonpost.com/lifestyle/2021/02/12/donald-mcneil-new-york-times-fallout/.

[9] Maxell Tani & Lachlan Cartwright, *Star NY Times Reporter Accused of Using "N-Word," Making Other Racist Comments*, DAILY BEAST (Jan. 28, 2021, 8:48 PM), https://www.thedailybeast.com/star-new-york-times-reporter-donald-mcneil-accused-of-using-n-word-making-other-racist-comments.

[10] *Id.*

[11] Ellison & Bar, *supra* note 8.

[12] Bret Stephens, *Read the Column the* New York Times *Didn't Want You to See*, N.Y. POST (Feb. 11, 2021, 7:47 PM), https://nypost.com/2021/02/11/read-the-column-the-new-york-times-didnt-want-you-read/.

> piece following the January 6, 2021 events at the capitol, calling for consequences for Trump's press team.[13] The article argued that "[i]n this time of transition--and pain--reinvigorating democracy requires a reckoning. *A truth reckoning*."[14] The article accused Trump's press secretaries of "debas[ing] themselves," and called for "repercussions for those who don't follow the civic norms."[15] Lane urged companies to refuse to hire Trump's press secretaries, and released an ultimatum refusing to take seriously any company that employs them.[16]

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[13] Randall Lane, *A Truth Reckoning: Why We're Holding Those Who Lied for Trump Accountable*, FORBES (Jan. 7, 2021, 11:57 AM), https://www.forbes.com/sites/randalllane/2021/01/07/a-truth-reckoning-why-were-holding-those-who-lied-for-trump-accountable/?sh=1059bfc45710.

[14] *Id.* (emphasis in original).

[15] *Id.*

[16] *Id.*

> Let it be known to the business world: Hire any of Trump's fellow fabulists above, and *Forbes* will assume that everything your company or firm talks about is a lie. We're going to scrutinize, double-check, investigate with the same skepticism we'd approach a Trump tweet. Want to ensure the world's biggest business media brand approaches you as a potential funnel of disinformation? Then hire away.

Id.

- *Los Angeles Times*: The *Los Angeles Times* published a column [17] praising Representative Joaquin Castro's (D-TX) tweet of an image "list[ing] the names and businesses of 44 individuals in San Antonio" who were maximum donors to President Trump's 2020 campaign. [18] The column argued that "[b]y complaining that he's exposing those donors to public shaming, [conservatives are] effectively acknowledging that donating to Trump is shameful." [19] The article commended Castro's effort "to paint contributing to Trump as socially unacceptable," because "business boycott has a long and honorable tradition in America."[20]

- *MSNBC*: Joe Scarborough, host of MSNBC's Morning Joe and former Florida Congressman, defended Castro's strategy, tweeting that "[a]ny business that donates to Trump is complicit and endorses the

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[17] Michael Hiltzik, *Column: Shaming Trump Donors by Revealing They Donated to Trump? What's Wrong With That?*, L.A. TIMES (Aug. 8, 2019, 6:00 AM), https://www.latimes.com/business/story/2019-08-08/shaming-trump-voters-by-revealing-they-donated.

[18] Shane Croucher, *GOP Congressman Shot by Left-Wing Activist Slams Joaquin Castro over Trump Donor List: 'Lives Are at Stake. I Know This Firsthand'*, NEWSWEEK (Aug. 7, 2019. 3:55 AM), https://www.newsweek.com/joaquin-castro-steve-scalise-slams-trump-donor-list-1452945.

[19] Hiltzik, *supra* note 17.

[20] *Id.*

white supremacy he espouse[s]. . . . Donors' names are . . . newsworthy."[21]

2. Corporate America

- *Disney*: Actress Gina Carano starred in the popular Disney show *The Mandalorian.*[22] After Carano engaged in controversial tweets and statements on social media, Disney fired her.[23] She tweeted that Democrats "recommend[] we all wear blindfolds along with masks so we can't see what's really going on."[24] Another tweet alleged fraud occurred in the 2020 election.[25] She also put the words "beep/bop/boop" in her twitter biography to make fun of the use of preferred pronouns, although she removed them after receiving backlash.[26]

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[21] Joe Scarborough (@JoeNBC), TWITTER (Aug. 6, 2019, 7:30 PM), https://twitter.com/JoeNBC/status/1158882969223946242.
[22] Aaron Couch, Tatiana Siegel, & Borys Kit, *Behind Disney's Firing of 'Mandalorian' Star Gina Carano*, HOLLYWOOD REP (Feb. 16, 2021, 2:46 PM), https://www.hollywoodreporter.com/heat-vision/behind-disneys-firing-of-mandalorian-star-gina-carano.
[23] *Id.*
[24] Gina Carano (@ginacarano), TWITTER (Nov. 14, 2020, 9:51 PM), https://twitter.com/ginacarano/status/1327806477923323904.
[25] Gina Carano (@ginacarano), TWITTER (Nov. 5, 2020, 11:18 AM), https://twitter.com/ginacarano/status/1324385598539399168.
[26] Jordan Moreau, *"Mandalorian" Star Gina Carano Under Fire for Controversial Social Media Posts*, VARIETY (Feb. 10, 2021,

- *Facebook*: Facebook fired Palmer Luckey, top executive and co-founder of Oculus, for making a $10,000 donation to an anti-Hillary Clinton group.[27] When his donation became known, corporate executives pressured Luckey to publicly support presidential candidate, Gary Johnson. [28] When he refused, Luckey was fired.[29]

- *Google*: Google fired Kevin Cernekee, a conservative engineer, in 2018.[30] In 2015, Cernekee was warned by human resources to avoid language "deemed disrespectful and insubordinate," after he made conservative comments in the company's communication forums.[31] For the next three years, Cernekee argued in internal communications and memos "that right-leaning employees were [] treated

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12:13 PM), https://variety.com/2021/tv/news/gina-carano-mandalorian-controversy-twitter-1234905140/.

[27] Kirsten Grind & Keach Hagey*, Why Did Facebook Fire a Top Executive? Hint: It Had Something to Do With Trump*, WALL ST. J, (Nov. 18, 2018, 8:16 PM), https://www.wsj.com/articles/why-did-facebook-fire-a-top-executive-hint-it-had-something-to-do-with-trump-1541965245.

[28] *Id.*

[29] *Id.*

[30] Rob Copeland, *Fired by Google, a Republican Engineer Hits Back: "There's Been a Lot of Bullying"*, WALL ST. J. (Aug. 1, 2019, 7:09 PM), https://www.wsj.com/articles/fired-by-google-a-republican-engineer-hits-back-theres-been-a-lot-of-bullying-11564651801.

[31] *Id.*

unfairly."[32] For example, he reported that no action was taken when a manager said of conservatives, "Can't we just fire the poisonous a***oles already?"[33]

- *The National Association of Realtors*: The 1.3 million member National Association of Realtors recently passed a "hate speech" policy that will likely ensure retaliation against those who transgress its vague boundaries.[34] Real estate agents feared that "the hate speech ban's vagueness is an invitation to censor controversial political opinions, especially on race and gender."[35] UCLA Law Professor Eugene Volokh agreed that the policy would be susceptible to abuse.[36] "What we're talking about is a new blacklist. . . . One of the things that's troubling about the National Association of Realtors' position is that it is trying to deploy the organized economic power of this group in order to suppress dissenting political views among members."[37]

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[32] *Id.*
[33] *Id.*
[34] John Morawski, *A Big Move to Ban Realtor "Hate Speech." At Work. Anywhere. 24/7*, REAL CLEAR INVESTIGATIONS (Jan. 8, 2021), https://www.realclearinvestigations.com/articles/2021/01/08/realtor_groups_big_move_to_ban_sales-agent_hate_speech_in_private_247_126671.html.
[35] *Id.*
[36] *Id.*
[37] *Id.*

- *Civics Analytics*: Civics Analytics fired David Shor, a data analyst, after he retweeted[38] a summary of a Princeton paper "arguing that nonviolent civil-rights protests had, in the 1960s, been more politically effective than violent ones." [39] The tweet coincided with mass protests over George Floyd's death, and a Twitter mob pressed for Shor's termination.[40]

- *New York City Literary Agency*: A New York City Literary Agency terminated its employee, Collen Oefelein, after learning that she had used Parler and another conservative social media platform, Gab.[41] The agency's president, tweeted this explanation of the firing decision: "[O]ne of our agents has been using the social media platforms Gab and Parler. We do not condone this activity, and we apologize to

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[38] (((David Shor))) (@davidshor), TWITTER (May. 28, 2020, 9:29 AM), https://twitter.com/davidshor/status/1265998625836019712.

[39] Yascha Mounk, *Stop Firing the Innocent*, ATLANTIC (June 27, 2020), https://www.theatlantic.com/ideas/archive/2020/06/stop-firing-innocent/613615/.

[40] *Id.*

[41] Meghan Roos, *Agent Fired from Literary Agency for Using Parler and Gab*, NEWSWEEK (Jan. 26, 2021, 6:38 PM), https://www.newsweek.com/agent-fired-literary-agency-using-parler-gab-1564687.

anyone who has been affected or offended by this."[42]

3. Boycotts

- *Goya Foods*: In July of 2020, Goya Foods was the target of a massive boycott campaign after its CEO, Robert Unanue, attended a White House event in which President Trump signed the Hispanic Prosperity Initiative. [43] After the event, Unanue praised the president, saying, "We're all truly blessed at the same time to have a leader like President Trump, who is a builder." [44] Immediately thereafter, on social media, people began to urge boycotts and issue threats.[45]

- *Taking Care of Babies*: Cara Dumaplin is a baby sleep expert, known on the Internet under the name Taking Cara Babies. [46] Details of her donations to Trump's campaigns were spread across social

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[42] *Id.*
[43] Cache McClay, *Goya Foods: Hispanic Brand Faces Boycott for Praising Trump*, BBC NEWS (July 10, 2020), https://www.bbc.com/news/world-us-canada-53371392.
[44] *Id.*
[45] *Id.*
[46] Rebecca Jennings, *What Happened When a Beloved Mom Influencer Donated to Trump*, VOX (Jan. 27, 2021, 1:40 PM), https://www.vox.com/the-goods/22252360/taking-cara-babies-trump-instagram-donation-drama.

media.[47] Some parents found the Trump donation news "devastating."[48] In addition to demands for boycotts, a number of individuals demanded refunds from Dumaplin.[49] Vox magazine reported how "disappointed progressive parents are feeling."[50]

4. Educational Institutions

- Nathaniel Hiers, a math professor at University of North Texas, was fired after criticizing the dogma of micro-aggressions.[51]

- Sonya Duhé, the Dean of Arizona State University's Walter Cronkite School of Journalism and Mass Communication, was fired for "a tweet praying for 'the good police officers who keep us safe.'"[52]

- "Rae'Lee Klein, a [] journalist at the Walter Cronkite School's Blaze Radio," was

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[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] George Leef, *Math Professor Mocks a Leftist Belief and Gets Fired,* JAMES G. MARTIN CTR. FOR ACAD. RENEWAL, (May 1, 2020), https://www.jamesgmartin.center/2020/05/math-professor-mocks-a-leftist-belief-and-gets-fired/.
[52] Brian Anderson, *Cancel Culture Comes to Cronkite*, NAT'L REV. (Sep. 12, 2020, 6:30 AM), https://www.nationalreview.com/2020/09/cancel-culture-cronkite-school-journalism-caves-student-activists/?itm_source=parsely-api.

removed as station manager for a tweet providing the factual background for Jacob Blake's warrant after his death.[53]

- A Massachusetts High School fired David Flynn, its head football coach, after Flynn challenged the social justice curriculum being taught in place of a world history curriculum in his daughter's world history class.[54] Flynn was informed that he would no longer serve as football coach because of his "philosophical differences" with the school.[55]

- Evergreen Elementary School fired Amy Sacks who had served for 20 years as both a teacher and a principal.[56] During the civil

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[53] *Id.*

[54] Chrissy Clark, *High School Football Coach Fired For Privately Questioning Black Lives Matter Curricula,* DAILY WIRE (February 19, 2021), https://www.dailywire.com/news/high-school-football-coach-fired-for-privately-questioning-black-lives-matter-curricula?utm_campaign=dw_newsletter&utm_medium=email&_hsmi=111900241&_hsenc=p2ANqtz-8PtbvERpmsU4toJxuKAXCVeZpSUxeDVgL_S9U8kHP7Qq_7VTF_4Sebz73dXVDKaqTxijnRfiG8FJL9gwkaiZNB2zv0hA&utm_content=insiders&utm_source=housefile.

[55] *Id.*

[56] James Gordon, *Elementary School Principal is Suing School District After Being Fired for Sharing Conservative Memes on Her Facebook Page Where She Said She'd Rather Vote for a Potato Than Joe Biden*, DAILY MAIL (Dec. 8, 2020, 10:22 PM), https://www.dailymail.co.uk/news/article-9033021/Elementary-school-principal-tells-fired-sharing-anti-Biden-conservative-memes.html.

unrest of the summer of 2020, she posted a variety of political memes to Facebook, such as a post declaring Democrats Chuck Schumer and House Speaker Nancy Pelosi as being "The Virus." [57] Another post declared her preference to vote for a potato rather than Joseph Biden. [58] The school district superintendent told Sacks the posts were "offensive, unacceptable, and unprofessional" and terminated Sacks.[59]

5. Retaliation by Government Officials

Officials at the highest levels of American government have promoted harassment and retaliation against those with disfavored political views.

- Doxing by the Obama 2012 Reelection Campaign.

Former President Obama's 2012 reelection campaign created a website entitled "Keeping GOP Honest," which publicly revealed the names of "eight private citizens who had given money to [Mitt Romney], accusing them all of being 'wealthy individuals with less-than-reputable records.'"[60] The site "singled out" each of the men, "subject[ing them]

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Kimberly Strassel, *The Intimidation Game: How The Left Is Silencing Free Speech*, 314 (2016).

to slurs and allegations," after "bluntly claim[ing] that [they] were 'betting against America.'"[61] The site even went so far as to "outright accuse[] 'quite a few' of the men as having been 'on the wrong side of the law' and succeeding at 'the expense of so many Americans.'"[62]

Frank VanderSloot, a sixty-three-year-old businessman from Idaho Falls, was accused of being "litigious, combative and a bitter foe of the gay rights movement." [63] Shortly thereafter, VanderSloot discovered that an investigator was "digging to unearth his divorce records." [64] A month later, VanderSloot was "selected for examination" by the IRS, and two weeks following this, he received a notice from the Department of Labor, informing him that it was going to audit his business. [65] As reporter, Kimberly Strassel, concluded, the clear message that was sent to current or potential donors: "Donate money to Romney, and you are fair government game."[66]

- IRS Retaliation Against Tea Party Groups

Tea Party groups were "fair government game" for retaliatory treatment by the IRS in 2010. On May 14, 2013, the Inspector General of the U.S. Treasury

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[61] *Id.* at 314–15.
[62] *Id.* at 315.
[63] *Id.*
[64] Kimberly A. Strassel, *Strassel: Obama's Enemies List — Part II*, WALL ST. J. (July 19, 2012, 7:20 PM), https://www.wsj.com/articles/SB10000872396390444464304577537233908744496.
[65] *Id.*
[66] *Id.*

released a report that detailed how the IRS had "singled out" conservative groups who had applied for tax-exempt status.[67] The report found that in early 2010, the IRS "began using inappropriate criteria" "that identified for review Tea Party and other organizations . . . based upon their names or policy positions." [68] Additionally, several of these "organizations received requests for additional information . . . that included unnecessary, burdensome questions (*e.g.*, lists of past and future donors)." [69] Although initially reported as only involving "low-level employees at an office in Cincinnati," it became evident that IRS officials in "Washington, D.C., and two other offices" were jointly involved in the effort to target conservative groups.[70]

Further, the IRS developed a "Be On the Look Out" list, which served to "flag" certain applications, including those that mentioned "patriots," those that

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[67] *New Documents Reveal Top Obama IRS Official Admitted Cincinnati Office Targeted Groups Based on 'Guilt by Association'*, JUD. WATCH (Nov. 16, 2016), https://www.judicialwatch.org/press-releases/new-documents-reveal-top-obama-irs-official-admitted-cincinnati-office-targeted-office-targeted-groups-based-guilt-association.

[68] Treasury Inspector Gen. for Tax Admin., 2013-10-053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, (May 14, 2013), https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf.

[69] *Id.*

[70] Meghashyam Mali, *Report: IRS Officials in Washington Involved in Targeting Tea Party*, HILL (May 14, 2013, 11:19 AM), https://thehill.com/blogs/blog-briefing-room/news/299495-report-irs-officials-in-washington-involved-in-targeting-tea-party.

"advocated education about the U.S. Constitution and the Bill of Rights," those that "advocat[ed] . . . to 'make America a better place to live,'" and those that "criticized how the country [was] being run."[71] IRS screeners were also "instructed to treat 'progressive' groups differently from 'tea party' groups," which allowed "applications of progressive groups [to] be approved on the spot by line agents, while those of tea-party groups could not."[72] Following a series of a lawsuits, the IRS eventually issued an apology to the plaintiffs,[73] but the chilling effect of the IRS's conduct cannot be gainsaid.

- Members of Congress Endorse Harassment

  - *Congresswoman Maxine Waters (D-CA)* – told a crowd during a 2018 rally in Los Angeles that "if you see anybody from [President Trump's] Cabinet in a restaurant, in a department store, at a gasoline station, you get out and you create a crowd. And you push back on them. And

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[71] Dana Bash & Chelsea J. Carter, *Obama Says Some IRS Employees 'Failed,' Orders Accountability*, CNN (May 15, 2013, 9:00 AM), https://www.cnn.com/2013/05/14/politics/irs-conservative-targeting/index.html.

[72] Eliana Johnson, *'Lookout List' Not Much Broader than Originally Thought, Contrary to Reports*, NAT'L REV. (June 25, 2013, 3:01 AM), https://www.nationalreview.com/corner/lookout-list-not-much-broader-originally-thought-contrary-reports-eliana-johnson.

[73] Emily Cochrane, *Justice Department Settles with Tea Party Groups After I.R.S. Scrutiny*, N.Y. TIMES (Oct. 26, 2017), https://www.nytimes.com/2017/10/26/us/politics/irs-tea-party-lawsuit-settlement.html.

> you tell them they're not welcome anymore, anywhere." [74] Waters later appeared on MSNBC "saying [that] she ha[d] 'no sympathy' for members of the Trump Administration" and that "[t]he people are going to . . . absolutely harass them until they decide that they're going to tell the President, 'No, I can't hang with you.'"[75]

In that timeframe, several high-level government officials, including the Secretary of Homeland Security, a White House adviser, and the President's press secretary were the targets of public harassment and threats.[76]

- *Representative Joaquin Castro (D-TX)* posted on Twitter the names and businesses

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[74] James Ehrlich, *Maxine Waters Encourages Supporters to Harass Trump Administration Officials*, CNN (June 25, 2018, 2:02 PM), https://www.cnn.com/2018/06/25/politics/maxine-waters-trump-officials/index. html.

[75] *Id.*

[76] *E.g.* Matt Richardson, *Sarah Sanders Heckled by Red Hen Owner Even After Leaving, Mike Huckabee Says*, FOX NEWS (June 25, 2018), https://www.foxnews.com/politics/sarah-sanders-heckled-by-red-hen-owner-even-after-leaving-mike-huckabee-says; Jessica Chasmar, *Protestors Descend on Kirstjen Nielsen's Home: 'No Justice, No Sleep',* WASH. TIMES (June 22, 2018), https://www.washingtontimes.com/news/2018/jun/22/protesters-descend-kirstjen-nielsens-home-no-justi/; Nikki Schwab, *Protestor Yells 'Fascist' at Stephen Miller Dining in Mexican Restaurant*, N.Y. POST (June 20, 2018, 4:15 PM), https://nypost.com/2018/06/20/protester-yells-fascist-at-stephen-miller-dining-in-mexican-restaurant/.

> of 44 individuals in San Antonio who were maximum donors to President Trump's 2020 campaign.[77] The tweet read: "Sad to see so many San Antonians as 2019 maximum donors to Donald Trump — the owner of @BillMillerBarBQ, owner of the @Historic Pearl, realtor Phyllis Browning, etc. Their contributions are fueling a campaign of hate that labels Hispanic immigrants as 'invaders.'"[78]

One of the donors targeted, Israel Fogiel, stated that the release of his information felt like an "attack" on those who contributed to President Trump's 2020 campaign and that he felt "scared" that "people [were] going to come to attack [him and his wife]."[79] Donald Kuyrkendall, another named donor, shared similar concerns for the "safety of [his] three grandchildren."[80] Rep. Castro did not back down, tweeting that what he said was "true," and that the

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[77] Croucher, *supra* note 18.

[78] Joaquin Castro (@Castro4Congress), TWITTER (Aug. 5, 2019, 11:13 PM), https://twitter.com/Castro4Congress/status/1158576680182718464.

[79] Weekend Edition Sunday, *Trump Donor Responds to Name Being Publicized*, NPR at 1:20 (Aug. 11, 2019, 8:04 AM), https://www.npr.org/2019/08/11/750244752/trump-donor-responds-to-name-being-publicized.

[80] Fredreka Schouten, *Uproar Over Trump Donations Sparks Fresh Debate About Disclosure*, CNN (Aug. 10, 2019, 11:14 AM), https://www.cnn.com/2019/08/09/politics/equinox-joaquin-castro-trump-donors.

donor's contributions are "dangerous" for "brown-skinned immigrants."[81]

- *Representative Rashida Tlaib (D-MI)* supported Castro's doxing, tweeting that "[t]he public needs to know who funds racism."[82]

- *Julian Castro, former Obama cabinet minister and presidential candidate,* endorsed the boycott campaign against Goya Foods. He said Americans should "think twice before buying their products" given that their CEO had praised "a president who villainizes and maliciously attacks Latinos for political gain."[83]

- *Representative Alexandria Ocasio-Cortez (D-NY)* – endorsed the Goya boycott.[84]

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[81] Joaquin Castro (@Castro4Congress), TWITTER (Aug. 6, 2019, 5:57 PM), https://twitter.com/Castro4Congress/status/1158859581063389190.

[82] Rashida Tlaib (@Rashida Tlaib), TWITTER (Aug. 6, 2019, 5:49 PM), https://twitter.com/rashidatlaib/status/1158902885532540930?lang=en.

[83] Julian Castro (@JulianCastro), TWITTER (July 9, 2020, 6:09 PM), https://twitter.com/JulianCastro/status/1281349684754370561.

[84] Alexis Benveniste, *Goya CEO Names Alexandria Ocasio-Cortez "Employee of the Month," Claiming Her Tweets Boosted Sales*, CNN BUS. (Dec. 8, 2020, 1:45 PM), https://www.cnn.com/2020/12/08/business/goya-aoc-employee-of-the-month/index.html; McClay, *supra* note 43.

This is just a sampling of what could easily be a far more lengthy list. It is undeniable that, nowadays, exposure as a donor or supporter of disfavored causes or persons, particularly those on the conservative or traditional side of the spectrum, is like having a target painted on one's back.

During the reconstruction era, Blacks and Republicans were targets. *See United Brotherhood of Carpenters & Joiners v. Scott*, 463 U.S. 825, 836 (1983). Later, it was civil rights activists. *See NAACP v. Button*, 371 U.S. 415, 430–31 (1963). Today it is conservatives. But no matter who the victims may be, the First Amendment must stand as a bulwark against the exposure of all citizens to such reprisals.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests this Court to reverse the Ninth Circuit.

Respectfully submitted,

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