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.

THOMAS MORE LAW CENTER, *Petitioner*

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PROTECT THE 1ST AND PACIFIC RESEARCH INSTITUTE AS *AMICI CURIAE* SUPPORTING PETITIONER

C. DEAN MCGRATH, JR.
MCGRATH & ASSOCIATES
1025 Thomas Jefferson Street, NW, Suite 110G
Washington, D.C. 20007
(202) 295-2304
cdm7578@yahoo.com

GENE C. SCHAERR
ERIK S. JAFFE
(Counsel of Record)
HANNAH C. SMITH
KATHRYN E. TARBERT
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

QUESTION PRESENTED

Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent a showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest.

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

Before a charity can solicit even a single penny in California, it must first disclose all substantial donors' names and addresses to the California Attorney General's Office. Despite the lack of any law or regulation explicitly commanding such disclosure, the Attorney General's Office has nevertheless demanded it for over a decade. Noncompliance bars charities from soliciting any donations—constricting the lifeblood of all such nonprofit organizations.

This practice contravenes this Court's long recognition of the central importance of anonymity for those espousing unpopular or politically charged viewpoints. That importance is only heightened in a world where data is stored electronically and can be accessed remotely. Indeed, California itself has a checkered track record of playing fast and loose with highly sensitive donor information. Its carelessness has already exposed countless donors to abuse by state actors. And that says nothing of the danger that, by compiling donor information in one government location, California increases the risk of that information's being hacked and inappropriately used by online mobs.

Such risks have an inordinate chilling effect on association and free speech. And this carries high

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[1] All parties have consented to the filing of this brief. No counsel for a party authored it in whole or in part, nor did any person or entity, other than *Amici* and their counsel, make a monetary contribution to fund its preparation or submission. *Amici* are not publicly traded and have no parent corporations. No publicly traded corporation owns 10% or more of either *Amici*.

personal and societal costs, effectively depriving many Californians of their fundamental right to freely associate and further views they deem important by donating to those groups best suited to spread their views. By ignoring these profound dangers, the Ninth Circuit's decision below chips away at the First Amendment's bedrock.

These effects are of special concern to *Amici*. *Amicus* Protect the 1st (PT1) is a nonprofit nonpartisan 501(c)(4) organization that advocates for protecting First Amendment rights in all applicable arenas. PT1 is concerned about all facets of the First Amendment and advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views. Because of its commitment to the robust realization of the First Amendment, PT1 is concerned with the chilling effects of California's disclosure requirement, as well as the great potential that a centralized database could lead to doxxing.

Amicus Pacific Research Institute (PRI) is a nonprofit nonpartisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free-market policy solutions to the issues that impact the daily lives of all Americans. It demonstrates how free interaction among consumers, businesses, and voluntary associations is more effective than government action at providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and based in California, PRI is supported by private contributions.

Its activities include publications, public events, media commentary, invited legislative testimony, and community outreach.

Amici are interested in this case both as a matter of constitutional principle and for organizational concerns regarding their own donors' confidentiality. PRI's Center for California Reform develops policy solutions frequently at odds with those favored by the California government, and accordingly, many of its donors seek anonymity. Although PT1 is not currently subject to California's disclosure demands, it is concerned that the Ninth Circuit's lax constitutional analysis could lead to far more aggressive disclosure demands throughout the country, imposed at the whim of a current or future state attorney general or governor. Because the decision below significantly harms the First Amendment, this Court should require donor disclosure measures like California's to satisfy heightened scrutiny.

SUMMARY OF ARGUMENT

We live in sharply divided and increasingly violent times. Civil discourse over political disagreements is on the wane, and threats, harassment, demonization, and violence against perceived political enemies is growing across the political spectrum. This is not the first time we have lived through such times, and it will not be the last. But precisely because this is a recurring problem, this Court has recognized that persons may sometimes wish to engage in speech and association anonymously rather than risk the sometimes-severe dangers of exposure, whether from politically driven government officials or from overly self-righteous or unhinged members of the public.

Privacy of political association in such circumstances is essential, and genuinely exacting scrutiny should be applied from the outset to any attempt to breach such privacy.

I. Donor-disclosure requirements such as the one in this case give public officials enormous amounts of revealing information that can be abused. Faced with the risk of such abuse, many donors will simply choose not to make donations. Because the risk of such abuse is undeniably real and increasingly severe, disclosure measures should be subject to exacting scrutiny from the outset, both on their face and as applied.

Indeed, history shows repeated episodes of government officials at all levels abusing disclosed information to target and harass disfavored voices and political rivals. The reality of past examples and the risk of future misuse of information collected by the government chills protected speech and harms association. Such dangers are neither ethereal nor hypothetical. Governments have consistently compelled disclosure as a way of obtaining ammunition to target, harass, and ultimately silence unpopular voices and political enemies. Officials from the chief executive to civil servants have abused their positions by accessing citizens' sensitive information—obtained through disclosure requirements—to get them to kowtow to the government's whim.

Many of these breaches of public trust occurred under the false flag of legitimate purposes, as was the case in *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958). Throughout history, senatorial witch hunts, state disclosure regimes, and presidential

access to tax records have been abused to harm and often demonize pesky political opponents and to silence unpopular groups and viewpoints.

Faced with this demonstrable history and the continuing likelihood of government abuse, many would-be donors will understandably decline to exercise their rights to speech and association at all. To thaw this chilling effect, this Court should hold that donor-disclosure laws are subject to exacting scrutiny whereby the government must show that the means of achieving its legitimate ends are narrowly tailored to achieve those ends without chilling First Amendment rights.

II. In addition to the risk of abuse by government itself when it demands access to sensitive information on First Amendment speech and association, California's disclosure scheme also imposes the further risk of intentional or unintentional disclosure to the public and the severe consequences that can ensue in divided and intemperate times such as ours. By centrally compiling sensitive donor data, California has increased the risk not only that it may be intentionally leaked, but also that it could be hacked by non-governmental actors.

Online mobs, also known as "doxxers," have hacked into similar databases to publicly punish those they deem to lack—or perhaps even oppose—some preferred measure of ideological purity. Doxxing affects individuals across the political spectrum without regard for ideology or, often, truth. As with the risk of government abuse, the risk that information in governmental databases could be leaked or hacked will lead donors to question whether

it is worth it to speak and associate with California charities at all. For many donors, the high personal and social costs associated with doxxing will inevitably outweigh the benefits of associating with potentially disfavored charities.

ARGUMENT

I. Donor Information Disclosed to the Government Is Easily Misused for Political Ends.

As John Adams famously observed, "left to the natural Emotions of his own Mind, unrestrained and [unchecked] by other Power extrinsic to himself," "all Men would be Tyrants if they could."[2] This includes public officials and private online vigilantes whose actions chill speech and punish association. Constitutional safeguards, therefore, should bank and cool—or at least shield individuals against—these destructive natural propensities.

A. History shows that government officials often abuse donor or membership information to target and harass disfavored voices and political rivals.

Current concerns with donor-information-collection schemes formed not in a vacuum, but against the backdrop of a sadly repeating history. Time and again, government officials have abused similar information to suppress their enemies, silence their rivals, and stifle unpopular views. Because of this unfortunate history, this Court should require

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[2] John Adams, *VII. An Essay on Man's Lust for Power* (1763), https://founders.archives.gov/documents/Adams/06-01-02-0045-0008.

lower courts to subject such laws to genuinely exacting scrutiny, both facially and as applied.

1. *NAACP* v. *Alabama* ex rel. *Patterson*, 357 U.S. 449 (1958) provides a clear example of such abuse. There, Alabama's attorney general sought "the names and addresses of all [of the NAACP's] Alabama members and agents." *Id.* at 451. Detecting the obvious ruse, this Court acknowledged that, at trial, the NAACP irrefutably proved "that, on past occasions, revelation of the identity of its rank-and-file members *** exposed [them] to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462.

Based on that history, the Court held that, by requiring the NAACP to disclose its membership lists, Alabama threatened to undermine "the right of the members to pursue their lawful private interests privately and to associate freely with others[.]" *Id.* at 466; see also *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88, 99-101 (1982) (disclosure law unconstitutional because it threated to subject campaign contributors to "threats, harassment, and reprisals"). And the Court therefore invalidated the disclosure requirement.

2. Other examples of government officials—at all levels—abusing membership disclosure in a bid to suppress free speech and association are legion.

During the McCarthy-led "Red Scare," the government targeted alleged communists and others assumed to be sympathetic to them—or often, persons who simply were opposed to the Senator's political views. Through the Subversive Activities Control Act,

"Communist-action organizations" were forced to register with the Attorney General. *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 4, 8 (1961). Suspected organizations and their members were subject to stringent penalties as the government sought whatever information it could find about their members. *United States* v. *Robel*, 389 U.S. 258, 260-263 (1967) (members unable to apply for a passport or work at defense facilities). Paradoxically, resisting being listed as a communist-action organization increased the likelihood that an organization would be so branded. *Subversive Activities Control Bd.*, 367 U.S. at 14. When faced with the realities of these regimes, this Court had no difficulty finding that the assumption of "guilt by [actual or suspected] association alone" hindered "the exercise of First Amendment rights." *Robel*, 389 U.S. at 265.

Similarly, when faced with an Arkansas statute requiring a teacher to disclose "every organization to which he has belonged or regularly contributed within the preceding five years," this Court reached the same conclusion. *Shelton* v. *Tucker*, 364 U.S. 479, 480 (1960). Citing "the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny," this Court held the disclosure policy unconstitutional. *Id.* at 486. Although Arkansas no doubt had a "legitimate" general interest in the "fitness and competency of its teachers," its "comprehensive interference with associational freedom" went "far beyond what might be justified" to further that interest. *Id.* at 490.

3. Tax records have also regularly been used by government officials to identify and harass individuals on their "enemies list."

Richard Nixon, for example, was so notorious for using non-public IRS information to root out and punish his enemies that it became the impetus behind the House Judiciary Committee's second article of impeachment. The article alleged that Nixon "personally and through his subordinates and agents" sought from the IRS "confidential information" to "cause *** audits or other income tax investigations to be initiated or conducted in a discriminatory manner."[3]

The use of tax records to suppress or harass political opponents and personal enemies did not start or end with Nixon. President Franklin D. Roosevelt "may have been the originator of the concept of employing the [IRS] as a weapon of political retribution."[4] When expedient, Roosevelt targeted "his opponents and friends" alike through the IRS, such as when he famously targeted his political rival, Senator Huey Long.[5] Under FDR's direction, Treasury Secretary Henry Morgenthau dispatched dozens of IRS agents to Louisiana to investigate Long up until

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[3] Lewis Deschler, 3 *Deschler's Precedents of the House of Representatives* ch. 14, §15.13, https://www.govinfo.gov/content/pkg/GPO-HPRECDESCHLERSV3/pdf/GPO-HPREC-DESCHLERS-V3-5-5-2.pdf.

[4] Burton W. Folsom Jr., *New Deal Or Raw Deal?: How FDR's Economic Legacy Has Damaged America* 146-147 (2014).

[5] Elliott Roosevelt and James Brough, *A Rendezvous With Destiny: The Roosevelts Of The White House* 102 (1975).

Long's assassination in 1935.[6] Likewise, President John F. Kennedy and Attorney General Robert F. Kennedy targeted right-wing organizations by utilizing the IRS to discredit them and undercut their sources of support.[7]

These glaring abuses eventually led Congress to subject the IRS to stricter laws and limitations to minimize the dangers to privacy and free association.[8] These laws acknowledged "serious abuses of the rights" of past taxpayers and that "the potential for abuse *necessarily* exists in any situation in which returns and return information are disclosed." S. Rep. 94-938 at 345, 1976 U.S.C.C.A.N. 3438, 3775 (emphasis added). Congress thus created "definitive rules relating to the confidentiality of tax returns" and "strictly limit[ed] disclosure of information." *Id*. at 19, 1976 U.S.C.A.A.N. at 3455.

These very laws exemplify the types of less restrictive means that help ensure tax information is collected and used only for important but limited purposes, disclosed only to those advancing those narrow purposes, and protected by substantial measures to enforce such First-Amendment-

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[6] Folsom, *supra* n.4, at 149-150.

[7] John A. Andrew III, *Power to Destroy: The Political Uses of the IRS from Kennedy to Nixon* 19-27 (2002).

[8] 26 U.S.C. §6103 (governing the confidentiality of tax returns and imposing penalties for unauthorized use and disclosure); 26 U.S.C. §6104(d)(1)(A)(i), (3)(A); Matthew A. Melone, *A Leg to Stand On: Is There A Legal And Prudential Solution To The Problem Of Taxpayer Standing In The Federal Tax Context?*, 9 Pitt. Tax Rev. 97, 146 n.282 (2012) (describing changes to the tax code "in the aftermath of the Watergate scandal").

protective safeguards. California, by contrast, seeks an end-run around those very safeguards, demanding disclosure of sensitive information contained in IRS filings without any genuine need or use for such information, and eschewing the hard-won protections for such information adopted at the federal level.

Nixon's, Roosevelt's, and Kennedy's egregious (though commonplace) conduct show that the abuse of confidential information is a bipartisan practice. But they are not the only Presidents who have employed dubious means to harm rivals.[9] Nor is this type of behavior used by the President alone. At all levels, government officials' tendency to abuse power "has been the rule, not the exception."[10] And given the evidence in this case, Pet. Br. (No. 19-251) at 9, 51, it appears that some state government officials see

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[9] See, *e.g.*, Steve Usdin, *When the CIA Infiltrated a Presidential Campaign*, Politico (May 22, 2018), https://www.politico.com/magazine/story/2018/05/22/cia-fbi-spy-presidential-campaign-trump-goldwater-218415/ (describing how President Lyndon B. Johnson used CIA resources to infiltrate Berry Goldwater's campaign).

[10] Tim Murphy, *Shocking IRS Witch Hunt? Actually, It's a Time-Honored Tradition*, Mother Jones (May 14, 2013), https://www.motherjones.com/politics/2013/05/irs-witch-hunts-tea-party-history-mother-jones/; Kelly Brewington, *NAACP refuses IRS demand for documents*, The Baltimore Sun (Feb. 1, 2005), https://www.baltimoresun.com/maryland/bal-te.md.naacp01feb01-story.html; Peter Overby, *IRS Apologizes For Aggressive Scrutiny Of Conservative Groups*, NPR (Oct. 27, 2017), https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups (describing how the IRS used "heightened scrutiny and inordinate delays" against conservative groups seeking tax exempt status).

Nixon's misuse of tax information as a model to emulate rather than to avoid.

These are just a few examples among many that reveal an all-too-common tendency for government officials to identify and target potential opponents and ideological adversaries. Because of the unfortunate, repeated governmental abuse of sensitive information in government databases, Petitioners and others have ample cause to fear California's disclosure regime.

B. The risk of such misuse chills protected speech.

While such disclosure regimes may not chill speech directly, they do chill association, which amounts to the same thing. Indeed, this Court has long recognized the close connection between the freedoms of speech and association. As the Court put it in *NAACP* v. *Alabama*, 357 U.S. at 460, it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Ibid.* Whatever the reason that people associate—whether for social, cultural, political, or religious reasons—protecting those rights is an essential function of this Court. *Ibid.* And even seemingly neutral laws can chill these fundamental liberties without adequate justification or tailoring, thereby violating the First Amendment. *Id.* at 460-461.

For example, when Alabama attempted to force the NAACP to reveal its members' names and addresses, the NAACP refused to comply for precisely this

reason. *Id*. at 451, 460. Upholding that refusal, this Court reasoned that the "indispensable liberties" of "speech, press, or association" make it crucial that possible infringement be closely scrutinized even when infringement is unintended. *Id.* at 461. Accordingly, the Court held that any legislation that "would have the practical effect of discouraging the exercise of constitutionally protected political rights" is extremely concerning. *Ibid.* (cleaned up).

Because of the well-known and often state-supported oppression NAACP members had experienced, this Court acknowledged that Alabama NAACP members could not fully exercise their First Amendment rights if the organization was forced to disclose their identities to the state. *NAACP*, 357 U.S. at 462-463. Holding otherwise could have had dire consequences for the organization—some members, facing harassment and abuse from a discriminatory government, may well have withdrawn from membership; others may have decided to never join. *Ibid*. This Court agreed and struck down Alabama's disclosure requirement.

During the McCarthy era, this Court further developed the chilling-effect doctrine in a series of cases involving regulations and legislation designed to inhibit suspected communists from advocating their ideas. In *Lamont* v. *Postmaster General*, 381 U.S. 301, 303 (1965), this Court held unconstitutional a statute that required the Post Office to detain and destroy any unsealed mail, from foreign countries, suspected of containing communist propaganda. The statute allowed an exception if an individual indicated to the Post Office a desire to receive such mail. *Id.* at 302-

304. This Court found that exception was "almost certain to have a deterrent effect," and that it was "at war with the uninhibited, robust, and wide-open debate and discussion that are contemplated by the First Amendment." *Id.* at 307 (cleaned up).

Similarly, in *Dombrowski* v. *Pfister*, 380 U.S. 479, 492-493 (1965), decided the same year as *Lamont*, this Court examined a Louisiana law that required civil rights groups to register as communist-front organizations. When a group refused, its leaders were arrested and threatened with prosecution. *Id.* at 487-488. They convincingly explained "the chilling effect on free expression of prosecutions initiated and threatened." *Id.* at 487. Ultimately, this Court deemed the statute too broad, recognizing that it threatened to "create[] a 'danger zone' within which protected expression may be inhibited." *Id.* at 494. The Court ruled that, even if potential prosecutions were futile, they nevertheless threatened to chill protected speech. *Ibid.*[11]

The backdrop of history, combined with this wide array of cases, validates this Court's long-standing and well-founded concern with legislation and

[11] Even where groups are compelled to disclose non-personal and less sensitive information, the potential for chilling speech and association has rendered a disclosure law unconstitutional. In *Riley* v. *Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988), this Court held unconstitutional a law requiring professional fundraisers to disclose certain fundraising and spending data to potential donors. That requirement violated the First Amendment because its "predictable result" was that professional fundraisers would either "quit the State or refrain from engaging in solicitations that result in an unfavorable disclosure." *Id.* at 800.

regulations that have even the potential to chill free speech and association through threatened government misuse of disclosed information. Congress' decades-old finding that "the potential for abuse *necessarily* exists in any situation in which returns and return information are disclosed," S. Rep. 94-938, 345, 1976 U.S.C.C.A.N. at 3775, applies as much or more at the State level, and has only gained more empirical support over time. That risk compels exacting First Amendment scrutiny of all such disclosure requirements.

II. Compiling Donor Information in Government Hands Makes It Vulnerable to Public Disclosure that Would Subject Donors to Significant Harms Like Doxxing.

In addition to the threat of government misuse of private information to target disfavored groups, speech and association also can be chilled by the intentional or unintentional release of such private information gathered by the government. While this danger has long existed in various forms—in *NAACP*, much of the threat was from the State disclosing to hostile private parties the names of NAACP members—the more modern version of this phenomenon is called "doxxing."

1. Doxxing, which emerged from online hacking culture, is the process of "obtaining and posting private documents about an individual, usually a rival or enemy."[12] Sometimes referred to as "online

[12] Nellie Bowles, *How 'Doxxing' Became a Mainstream Tool in the Culture Wars*, N.Y. Times (Aug. 30, 2017),

vigilantism," doxxing often occurs as people feel the need to impose justice on those with whom they disagree through online and sometimes physical harassment.[13] Internet trolls and even average internet users can unravel clues to identify a person, release that information to the public (usually through social media), and then encourage others to harass or stalk that person. In extreme cases, doxxers have used the personal identifying information of another to call a SWAT team to that person's house under false pretenses. At least once, that process resulted in a person's death.[14] With time, doxxing has evolved from a tool of sophisticated hackers into a mainstream tactic for fighting the current political and culture wars.[15]

In an era where nearly everyone is online, the risk of doxxing is enormous. Calls to dox government employees (such as Immigration and Customs Enforcement agents, state and local elections officials, and judges, among others),[16] journalists, and even

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https://www.nytimes.com/2017/08/30/technology/doxxing-protests.html.

[13] *Ibid.*

[14] Emma Grey Ellis, *Swatting Is a Deadly Problem—Here's the Solution*, Wired (Aug. 22, 2019, 7:00 AM), https://www.wired.com/story/how-to-stop-swatting-before-it-happens-seattle/ (listing examples of false reports designed to trigger a SWAT Team response against a disfavored innocent individual).

[15] Bowles, *supra* n.12.

[16] Vegas Tenold, *To Doxx a Racist*, The New Republic (Jul. 26, 2018), https://newrepublic.com/article/150159/doxx-racist.

online gamers are common and often destructive. And such calls are by no means limited to noxious targets that may command little sympathy: Recent studies show that cyber-harassment disproportionately affects women and minority populations.[17]

2. Indeed, people of all political views are at risk of doxxing. On one side, for example, supporters of California's ballot initiative Proposition 8—a constitutional amendment making only traditional marriages legal in California—were identified in 2008 in publicly available sources and, as a result, faced extensive harassment.[18] At the time, California required the disclosure of those who donated $100 or more to support or oppose ballot measures. It then published the donors' information online, enabling anyone with internet access to see comprehensive donor reports.[19] With that information readily available, several websites were designed to simplify the identification of Proposition 8 proponents, thereby ensuring that they could be more easily harassed.[20] Those identified from these online sources experienced intimidation, hostility, vandalism, slurs, threats, and actual violence.[21] Religious houses of worship were

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[17] Julia M. MacAllister, *The Doxing Dilemma: Seeking a Remedy for the Malicious Publication of Personal Information*, 85 Fordham L. Rev. 2451, 2459 n.57 (2017).

[18] Thomas Messner, *The Price of Prop 8*, The Heritage Foundation, (Oct. 22, 2009), https://www.heritage.org/marriage-and-family/report/the-price-prop-8.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

egged, toilet-papered, and had their windows smashed.[22] Some supporters of Proposition 8 received harassing phone calls, emails, and mail, often with vulgar and threatening language.[23] Members of The Church of Jesus Christ of Latter-day Saints were "systematically targeted" by a doxxing website that focused specifically on Latter-day Saints.[24] Similarly, one threat promised that anyone identified as a Prop 8 supporter was in danger of "being shot or firebombed."[25]

Liberal groups are also regularly the targets of doxxing. A website called "The Nuremberg Files" identified roughly 200 abortion providers—together with their personal information, including their "home addresses, phone numbers, and photographs."[26] Calling these doctors "baby butchers," the site used computer simulations to depict graphic images of the doctors and aborted babies.[27] Many of the doctors listed on the site reported feelings of fear, with one physician wearing a wig in public to hide her true

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[22] *Ibid.*

[23] *Ibid.*

[24] *Ibid.*

[25] *Ibid.*

[26] David S. Cohen & Krysten Connon, *Strikethrough (Fatality)*, Slate (May 21, 2015 3:38 PM), https://slate.com/news-and-politics/2015/05/neal-horsley-of-nuremberg-files-died-true-threats-case-reconsidered-by-supreme-court-in-elonis.html.

[27] Rene Sanchez, *Abortion Foes' Internet Site on Trial*, Washington Post, (Jan. 15, 1999), https://www.washingtonpost.com/wp-srv/national/longterm/abortviolence/stories/website.htm.

identity and another spending thousands of dollars purchasing and installing home security.[28] The Ninth Circuit eventually found—correctly—that the website constituted a "true threat" to physicians. *Planned Parenthood of Columbia/Willamette, Inc.* v. *Am. Coal. of Life Activists*, 290 F.3d 1058, 1077 (9th Cir. 2002), *as amended* (July 10, 2002).

More recently, supporters of Black Lives Matter protests have also faced doxxing and harassment. Users of the (anti-)social media website 4chan, for example, tried to infiltrate secure channels used by Black Lives Matter activists to "meddle in protesters' online operations."[29] Throughout the process, they encouraged others to "trawl the [Black Lives Matter] channels for as much personal, identifying, and organizational information as they can about people in the groups."[30] Once the personal data was collected, they acted swiftly, "post[ing] the phone numbers of volunteers organizing food and water for protesters," and even including the addresses of some homes that they branded as "Antifa safehouses."[31]

3. The concern with doxxing is particularly heightened when governments compile sensitive information that matches political, economic, and social association and donations with names and

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[28] *Ibid.*

[29] Ali Breland, *Alt-Right Trolls Are Trying to Sabotage Black Lives Matter Chatrooms*, Mother Jones (June 8, 2020), https://www.motherjones.com/anti-racism-police-protest/2020/06/black-lives-matter-4chan-telegram/.

[30] *Ibid.*

[31] *Ibid.*

addresses of donors who would prefer to keep their associations private. Personal data compiled in a central location increases the risk that the data will be hacked (or leaked) and used for inappropriate purposes. Because charities and other nonprofits represent a range of views, anyone who donates to a California charity will be at risk for such broader disclosure given that hackers and leakers operate across the political spectrum.

As with the fear of government abuse described in Section I, concerns that donor data could be easily hacked or leaked—and then distributed online—are also grounded in experience. As Judge Ikuta noted in dissent in this case, the evidence below showed that "California's computerized registry of charitable corporations was *** an open door for hackers." Pet.92a (No. 19-251). "[E]very confidential document in the [R]egistry—more than 350,000 confidential documents" including Schedule B donor forms—could be accessed "merely by changing a single digit at the end of the website's URL." Pet.92a. Thankfully the database apparently hasn't yet been hacked, but the risk remains given that Schedule Bs in California, with all the personal donor information they contain, are "effectively available for the taking." Pet.89a. And even apart from external hacking, Petitioner (in No. 19-251) describes situations of supposedly unintentional leaking of Schedule B information collected in California. Pet. Br. at 46.

The fact that California's database is so readily hackable and prone to leaks makes it all the more likely that many donors will opt out of exercising their constitutional rights rather than subject themselves

to the threats, abuse, hostility, and actual violence that so often accompanies political speech and association. California's donor disclosure scheme makes the risk of speaking out too high.

4. The danger of chilling speech through government misuse of information or private harassment based on hacks or leaks requires rigorous First Amendment scrutiny from the outset when analyzing disclosure requirements. Rather than demand individualized proof of threats, harassment, and actual chilling of speech and association, this Court has accepted the general risk of chilling, deduced from general facts and circumstances, as sufficient to trigger heightened First Amendment scrutiny. See, *e.g., Shelton*, 364 U.S. at 488; *Riley*, 487 U.S. at 800. Only after a statute has survived such scrutiny on its face has this Court concerned itself with individualized proof of a greater or more immediate burden of harassment as a path to an as-applied exception to an otherwise valid law. *E.g., United States* v. *Stevens*, 559 U.S. 460, 473 (2010). But the possibility of such exceptions to otherwise valid measures does not obviate the need for exacting First Amendment scrutiny of a statute or regulation on its face.

For these reasons, *Amici* agree with Petitioners that heightened and exacting scrutiny should apply in a facial challenge and that the disclosure requirements at issue here fail such scrutiny on their face and, if necessary, as applied. Pet. Br. (No. 19-251) at 20-24, 30-49. California's disclosure requirement does not even remotely serve a compelling interest and is grossly overbroad even for the deficient interest

asserted. Far more tailored approaches could more than satisfy any occasional and legitimate law enforcement needs. Pet. Br. (No. 19-251) at 43-45. This Court should hold that heightened and exacting scrutiny, including a strict means-ends tailoring analysis, are required and that the disclosure requirements in this case fail such scrutiny.

CONCLUSION

The Ninth Circuit's decision seriously undermines the rights of speech and association. Considering the historical constancy of governmental abuse and how donors are exposed to significant doxxing risks, this Court should hold that disclosure laws and regulations must be subjected to exacting scrutiny, including a meaningful requirement of narrow tailoring.

Respectfully submitted,

C. DEAN MCGRATH, JR.
MCGRATH & ASSOCIATES
1025 Thomas Jefferson
Street, NW Suite 110G
Washington, D.C. 20007
(202) 295-2304
cdm7578@yahoo.com

GENE C. SCHAERR
ERIK S. JAFFE
(Counsel of Record)
HANNAH C. SMITH
KATHRYN E. TARBERT
JOSHUA J. PRINCE
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

Counsel for Amici Curiae

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