No. 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
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE THE LEGACY FOUNDATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Legacy Foundation is a not-for-profit corporation based in Sioux City, Iowa, and organized under 501(c)(3) of the Internal Revenue Code. The Legacy Foundation's President and Executive Director is Christopher Rants, who served the people of Iowa as the Speaker of the Iowa House of Representatives. The Legacy Foundation educates the public about concepts that advance individual liberty, free enterprise, limited and accountable government, civil rights policy, and voting rights. It accomplishes this goal, in part, through engaging in independent, nonpartisan research on public policy matters and initiatives. The Legacy Foundation also accomplishes its goal through educational communications that focus on issues important to the Legacy Foundation.[1]

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[1]Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT AND INTRODUCTION

Amicus curiae, The Legacy Foundation, agrees with the Petitioners, Americans for Prosperity Foundation ("AFPF") and the Thomas More Law Center ("TMLC"), that state action compelling non-profits organized under 501(c)(3) of the Internal Revenue Code to disclose their donors must survive strict scrutiny. AFPF Br. 27-30; TMLC Br. 26. By contrast, state action compelling candidates, party committees, and political committees to disclose their contributors must survive exacting scrutiny. AFPF Br. 29; TMLC Br. 29. Amicus curiae urges this Court to hold that state action compelling 501(c)(3) organizations to disclose their donors must survive strict scrutiny.

If, however, this Court holds that exacting scrutiny applies to compelled disclosure of donors to 501(c)(3) organizations, this Court should hold that exacting scrutiny is a "strict test." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). A strict form of exacting scrutiny is needed because disclosure and free speech "exist in unmistakable tension." *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016). Although "[d]isclosure chills speech[,] … [s]peech without disclosure risks corruption." *Id.* With courts subjecting "robust" disclosure statutes to balancing tests and essentially rational basis scrutiny, disclosure and speech are "on an ineluctable collision course." *Id.* And these two values have collided in this case.

To guarantee associational rights under a strict view of exacting scrutiny, this Court should require an analysis of the fit—the substantial relation—between the state's asserted interest in compelled disclosure and, for example, the monetary threshold which the legislature chose to trigger disclosure. *See Buckley*, 424 U.S. at 64. This analysis should also include whether the threshold unnecessarily abridges First Amendment freedoms or, stated differently, whether the threshold is attenuated from the interest. *See McCutcheon v. FEC*, 572 U.S. 185, 199 (2014); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

As discussed below, if this Court does not choose to apply strict scrutiny and instead applies exacting scrutiny, this stricter formulation of exacting scrutiny is appropriate.

First, a stricter formulation more closely aligns with the Framers' respect for undisclosed speech. Withholding the speaker's identity was common during the Founding Era. Attempts to compel disclosure were met with "just Alarm."

Second, a stricter formulation comports with how this Court has historically reviewed disclosure statutes. Beginning in the early 20th century, this Court has upheld disclosure statutes only as conditions to federal subsidies, or to certain defined political groups, or to secret organizations that use secrecy to intimidate or cause physical harm to others. Later, during the McCarthy Era and Civil Rights Era, the pendulum swung back towards protecting privacy in one's associations and

recognizing the harm disclosure can cause to both speakers and society. To successfully compel disclosure, the government must introduce a compelling interest and use narrowly tailored means.

Third, a stricter formulation would comport with what *Buckley* articulated as "exacting scrutiny" being the "closest scrutiny." Unfortunately, lower courts have applied exacting scrutiny using balancing tests and analysis more akin to rationale basis scrutiny. A stricter formulation will provide lower courts with clearer guidance and will provide speakers with better predictability in assessing whether their associational privacy rights are harmed.

Fourth, a stricter formulation will better protect associational privacy, especially in the age of the Internet. Disclosure reports provide name, address, and employer information instantly to anyone with internet access. Government agencies have too often failed to provide adequate protection of confidential documents on their computers. Consequently, confidential data—even social security numbers—have been hacked or inadvertently disclosed. A stricter formulation of exacting scrutiny will ensure that governments only obtain information that will not unnecessarily abridge First Amendment interests.

ARGUMENT

I. During The Founding Era, Political Advocacy That Did Not Disclose The Speaker Was Common.

In interpreting the First Amendment to the U.S. Constitution, this Court ascertains its meaning by looking "on the words of the constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions … in the several states." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring) (alteration in original) (citation omitted). Important to ascertaining the meaning of the words is the contemporaneous understanding of the Framers as to what the First Amendment guarantees. *Id.* This includes the "practices and beliefs held by the Founders concerning anonymous" political speech. *Id.* at 360.

In the late 18th century, the common practice with written speech, whether in books, letters, pamphlets, or periodicals, was that the author signed the work with a pseudonym or left the work unsigned. *See A Note on Certain of Hamilton's Pseudonyms*, 12 Wm. & Mary Q. 282 (1955). For example, Thomas Paine's *Common Sense* was published unsigned, and he used the penname Common Sense "like a modern trade-mark for the rest of his life." *Id.* Alexander Hamilton too, the "most prolific pamphleteer among the leading statesmen of the young republic[,] … almost always wrote under nom de plumes." *Id.* at 283. Hamilton chose his pennames carefully "to match the thrust of

the argument in the pamphlet." *Id*. James Madison and John Jay both joined Hamilton in signing the Federalist Papers under the penname Publius. *McIntyre*, 514 U.S. at 343, n.6. Those opposed to Publius signed their writings under pennames such as Cato, Centinel, Brutus, and The Federal Farmer. *Id*. One such author "Junius" had his works published widely "in colonial newspapers and lent considerable support to the revolutionary cause." *Id*. (citation omitted). Benjamin Franklin also "employed numerous different pseudonyms" in his writings. *Id*. at 341, n.4. Chief Justice Marshall also wrote under the penname "a friend to the Republic" to defend some of the Supreme Court's decisions that were under attack by Spencer Roane. *The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil*, 70 Yale L.J. 1084, 1085 (1961).

The Founders did debate the merits of speaking without disclosing the author. Both prior to and during the Founding Era, juries and legislators alike thwarted attempts to compel publishers to reveal the identities of undisclosed authors. *McIntyre*, 514 U.S. at 361-63 (Thomas, J., concurring). The Anti-Federalists then championed the right to advocate privately. *Id*. at 365. Responding to Federalist attempts to prohibit advocacy in private, the Anti-Federalists from Philadelphia, New York, Boston, and Rhode Island all viewed attempts to prohibit advocacy under a penname as an assault on the Freedom of the Press. *Id*. at 365-67. One Anti-Federalist explicitly noted that "the Federalist effort to suppress anonymity would 'REVERSE (sic) the important doctrine *of the freedom of the press*,' whose

'truth' was 'universally acknowledged.'" *Id*. at 365-66 (citation omitted). The Rhode Island Anti-Federalist also voiced concern that compelled disclosure gave "many of us a just Alarm." *Id.* at 366 (citation omitted). In the end, the Federalists retreated on their attempts to ban anonymity. *Id*. at 367.

In total, from 1789 to 1809, "no fewer than six presidents, fifteen cabinet members, twenty senators, and thirty-four congressmen published political writings" without disclosing their identities. *The Constitutional Right to Anonymity*, *supra*, at 1085. Undisclosed political advocacy during the Founding was indeed common, and it continued through ratification and past the first elections. *McIntyre*, 514 U.S. at 369 (Thomas, J., concurring).

Speaking without disclosing the author's identity established a "respected tradition of anonymity in the advocacy of political causes" and an "honorable tradition of advocacy and dissent" because anonymity provides a "shield from the tyranny of the majority." *McIntyre*, 514 U.S. at 343, 357. This tradition recognizes that "persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id*. at 342 (quoting *Talley v. California*, 362 U.S. 60, 64 (1960)). And although the potential for misuse is present, "our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357.

For their part, the authors of the Federalist Papers wrote without disclosing their identities to avoid having their political disagreements interfere with their non-political activities. *See* Bradley A. Smith, *In Defense of Political Anonymity*, City Journal at 7 (Winter 2010), https://www.city-journal.org/html/defense-political-anonymity-13257.html (last accessed Feb. 27, 2021). The Federalists also wanted their arguments considered and deliberated over on the merits, not based upon who wrote them. *Id* at 9. Indeed, in the history of the United States, pennames have "sometimes been assumed for the most constructive purposes." *Talley*, 362 U.S. at 65.

The pendulum of statutes compelling the production of the identity of the speaker has swung from striking such actions as violating free speech rights, to compelling disclosure under the amorphous interest of an informed electorate. The arc of disclosure law in the United States began with the Rhode Island Anti-Federalist's "just Alarm" at compelled disclosure and has peaked with Justice Brandeis' phrase "sunlight is the best of disinfectants." This Court should return to our Founding era's "just Alarm" at compelled disclosure.

II. The Pendulum Swings Towards Disclosure, Back To Privacy, and To Disclosure Again.

A. At The Beginning Of The Twentieth Century, Congress Enacted Disclosure Statutes That This Court Upheld.

In 1910, Congress enacted the first federal disclosure law which required national political committees, and other organizations that operated in two or more states, that sought to influence the election to disclose the names of all contributors who contributed $100 or more. *Buckley*, 424 U.S. at 61. Fifteen years later, disclosure was expanded to include those committees who sought to influence the Presidential or Vice-Presidential elections to disclose the names and addresses of all contributors who contributed $100 or more. *Id*. at 61-62.

In 1912, Congress enacted the Post Office Appropriation Act, requiring periodicals to identify the names and addresses of certain officers and directors. *Lewis Pub. Co. v. Morgan*, 229 U.S. 288, 296 (1913). This became the first challenged disclosure provision to reach the U.S. Supreme Court. *The Constitutional Right to Anonymity*, *supra*, at 1088. The Court upheld the disclosure statute, stating that Congress had the power to impose conditions on the second-class mail system. *Lewis Pub. Co.*, 229 U.S. at 315-16. As the Court made clear, it was concerned "solely and exclusively" with the publisher's ability to use the second-class mail system at the public's expense and upon

condition of compliance with regulations that Congress imposed. *Id.* at 316. The Court cabined its holding, noting that if the registration requirement were not part of the statutory conditions, the requirement would have been unconstitutional. *The Constitutional Right to Anonymity*, *supra*, at 1089 (citing *Lewis Pub. Co.*, 229 U.S. at 314).

Approximately 15 years later, another disclosure statute was challenged before this Court. In *New York ex rel. Bryant v. Zimmerman*, the Court considered a New York statute that required all membership organizations with 20 or more members, and which required an oath of their members, to register with the secretary of state and to file with the secretary a list of its current members. 278 U.S. 63, 66 (1928). A member of the Ku Klux Klan challenged this requirement, but the Court upheld the membership list requirement because the Klan was violent and had a "manifest tendency" to use secrecy to cloak their "acts and conduct inimical to personal rights and public welfare." *Id.* at 75. The Court also favorably cited the statute's exemptions provision that excepted from the statute's scope organizations like the Masonic fraternity and the Knights of Columbus. *Id.* at 73.

Six years later, the Court upheld the campaign finance disclosure provisions enacted in 1910 and broadened in 1925. *See Buckley*, 424 U.S. at 62 (citing *Burroughs v. United States*, 290 U.S. 534 (1934)). The plaintiffs in that case challenged the statute as infringing on the "prerogatives of the States." *Id.* The Court upheld the disclosure provision, ruling that Congress had the authority to

enact legislation to protect presidential elections from corrupt practices. *Id.*

B. Beginning In The McCarthy Era, This Court Recognized That Disclosure Infringes Rights That The First Amendment Guarantees.

This Court, however, changed course and recognized the merits of maintaining associational privacy. Beginning at the end of World War II, through the McCarthy Era, and into the Civil Rights Era, the Court declared disclosure statutes unconstitutional, quashed subpoenas demanding disclosure of organizations' members, and acknowledged the harms disclosure could have on the freedom of speech.

During this era, the Court recognized that compelled disclosure infringes the speaker's First Amendment rights to speech and association. *Thomas v. Collins*, 323 U.S. 516, 519, 540 (1945) (declaring unconstitutional a Texas statute requiring labor union organizers to obtain a license disclosing the identity of the speaker and labor union affiliation before speaking about lawful causes); *United States v. Rumely*, 345 U.S. 41, 49-54 (1953) (declaring unconstitutional government action demanding the disclosure of who made bulk purchases of certain books); *Watkins v. United States*, 354 U.S. 178, 185, 205, 215 (1957) (declaring unconstitutional congressional committee's inquiry into the identities of past members of the Communist Party); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 465-66 (1958) (declaring

unconstitutional Alabama's demand that the NAACP produce its Alabama membership list); *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (declaring unconstitutional two Arkansas city ordinances compelling the production of membership and contribution lists); *Talley*, 362 U.S. at 64-65 (1960) (declaring unconstitutional Los Angeles ordinance requiring that the authors of pamphlets be disclosed); *Shelton v. Tucker*, 364 U.S. 479 (1960) (declaring unconstitutional an Arkansas statute that required teachers to disclose all of their affiliations and contributions from the previous five years); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557-58 (1963) (declaring unconstitutional a state legislative committee's inquiry demanding the production of the NAACP's membership list).

The Court recognized that the First Amendment protected associations because "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP*, 357 U.S. at 460. Furthermore, "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id.* at 462; *Talley*, 362 U.S. at 64; *Shelton*, 364 U.S. at 485-86.

The Court also recognized that disclosure risks several harms including harassment, economic reprisals, job loss, and threats of physical harm. *See, e.g.*, *NAACP*, 357 U.S. at 462; *Bates*, 361 U.S. at 524. In *Thomas*, the appellant argued that disclosure "would sometimes deter speech since disclosure may subject organizers to employer reprisals." *See The*

Constitutional Right to Anonymity, *supra*, at 1094, 1094 n.76. Accordingly, in his concurrence, joined by Justice Black and Justice Murphy, Justice Douglas observed that such economic threats, especially when used to influence the First Amendment rights of others, were not protected under the First Amendment. *See Thomas*, 323 U.S. at 543 (Douglas, J., concurring); *see also Shelton*, 364 U.S. at 486-87 (recognizing that disclosure of a teacher's associations could bring "public pressure upon school boards to discharge teachers who belong to unpopular or minority organizations," such as the ACLU, and would impair "constitutional liberty").

Disclosure can also lead to First Amendment activity never entering the marketplace of ideas. *Rumely*, 345 U.S. at 57 (Douglas, J., concurring) (disclosure of who is reading what could make individuals "fear to read what is unpopular, what the powers-that-be dislike[,]" and the governmental power of subpoena "will hold a club over speech and over the press."); *Watkins*, 354 U.S. at 197-98 (stating that because disclosure places one in the public spotlight and subject to public scorn, those who have not yet been disclosed may think twice before speaking due to the public harassment of those who have already been disclosed); *see also Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (recognizing that when a speaker chooses to abstain from speaking society is harmed because it is "deprived of an uninhibited marketplace of ideas.").

In recognizing the importance of privacy in one's association for effective advocacy, and in acknowledging the harms disclosure can cause, the

Court ruled that, to protect the First Amendment guarantees, disclosure statutes must survive the "closest scrutiny." *NAACP*, 357 U.S. at 460-61. To compel disclosure, a state must adduce a compelling interest. *Id*. at 463; *Bates*, 361 U.S. at 516; *Gibson*, 372 U.S. at 556-57; *Talley*, 362 U.S. at 66 (Harlan J., concurring). The State must then use means that "bear a crucial relation" to the interest asserted. *Gibson*, 372 U.S. at 549; *Shelton*, 364 U.S. at 488 (holding that, even if the state adduces a legitimate interest, the state cannot "broadly stifle fundamental personal liberties when the end can be more narrowly achieved" and requiring that, for a state to achieve its goals, it must use more narrow or "less drastic" means). Although evidence of threats of reprisals or actual reprisals is part of the analysis, *see, e.g.*, *NAACP*, 357 U.S. at 462-63, it is not a necessary component of the analysis. *See Talley*, 362 U.S. at 69 (Clark, J., dissenting) (stating that the majority declared Los Angeles' ordinance unconstitutional despite the record lacking any evidence of harassment, reprisals, or threats). What is necessary is that the reviewing court analyze whether there is a crucial relationship between the government's compelling interest and the means it chose to achieve that interest. *Id.* at 63-64; *id*. at 66-67 (Harlan, J., concurring) (stating that means chosen to achieve the government's interest was "too remote" to withstand scrutiny); *Shelton*, 364 U.S. at 488.[2]

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[2] Importantly, the Court in *Shelton* contrasted that case from *NAACP* and *Bates* in that the information Arkansas sought from teachers was "relevant" to determining the competency of teachers. *Shelton*, 364 U.S. at 485.

By the end of the 1960s, the Court had established a strict test to evaluate the constitutionality of disclosure statutes and to protect First Amendment rights.

III. The Origins and Bases Of Exacting Scrutiny

In the wake of the Watergate scandal, the pendulum began to swing back in favor of disclosure. In *Buckley v. Valeo*, the seminal case interpreting campaign finance law and disclosures related to campaign spending, the Court approved a disclosure statute and stated, apparently for the first time, that disclosure statutes are subject to exacting scrutiny. 424 U.S. at 64. Citing *NAACP* and its progeny, the court ruled that to justify disclosure, a state must adduce a sufficiently important interest and use means that are closely drawn. *Id.* at 25. For disclosure statutes, one is closely drawn when there is a "substantial relation" between the sufficiently important interest and the means chosen to achieve that interest. *Id.* at 64. The Court reiterated the importance of associations as enhancing "effective advocacy" and stated that effective advocacy necessarily requires associations to "pool money through contributions." *Id.* at 65. Privacy of association is key, particularly with contributions because "financial transactions can reveal much about a person's activities, associations, and beliefs." *Id.* at 66.

Despite the Court's repeated assurance that exacting scrutiny is strict, lower courts have infused exacting scrutiny with a balancing test and grafted

elements of the easily surpassed rational basis test. *See id.* at 66, 68 (describing the test as "strict" and disclosure as the "least restrictive means"), *McIntyre*, 514 U.S. at 347 (stating that under exacting scrutiny a state action will be upheld "only if it is narrowly tailored to serve an overriding state interest."); *McCutcheon*, 572 U.S. at 197 (describing exacting scrutiny as requiring the state to adduce a compelling interest and use the least restrictive means).

Although lower courts have frequently articulated the appropriate elements of exacting scrutiny, *see, e.g., Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 55 (1st Cir. 2011) (requiring a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest. (citation omitted)), courts have improperly infused exacting scrutiny with a balancing test. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312 (9th Cir. 2015) (stating that disclosure requirements are subject to exacting scrutiny which "encompasses a balancing test" and, for the government's action to survive, "the strength of the governmental interest must reflect the seriousness of the *actual* burden on First Amendment rights." (citation omitted) (emphasis in original)).

As with all balancing tests, balancing jettisons "relative predictability" inviting "complex argument." *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995); *see also FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 469 (2007). The rules for First Amendment speech must be clear and

predictable. *See, e.g., Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015) (holding "a clear and firm rule … is an essential means of protecting the freedom of speech"). Balancing tests inject an element of unpredictability.

A. Lower Courts Infused Exacting Scrutiny With A Balancing Test.

Compounding the dilution of protection afforded to membership lists and contribution lists, lower courts apply a balancing test. This has led to less predictability and varying results, depending on how courts weigh the various factors.

For example, the en banc panel of the U.S. Court of Appeals for the Eighth Circuit reviewed Minnesota's disclosure regime as applied to corporations that make independent expenditures. *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 867-68 (8th Cir. 2012). Minnesota required corporations to register an independent expenditure fund and then "for the life of the political fund" to file reports in perpetuity, even when the committee had no activity. *Id.* at 869, 873. The majority properly applied exacting scrutiny in holding that Minnesota's ongoing reporting requirement failed exacting scrutiny because it was "untethered from continued speech." *Id.* at 876; *cf. Shelton*, 364 U.S. at 488-90 (holding that, although Arkansas had a sufficiently important interest in judging the competency of their teachers, its disclosure requirement was completely untethered and indiscriminate to support the interest). Less problematic avenues are available to achieve

Minnesota's goal of identifying sources of corporate speech, deterring corruption, and detecting campaign finance violations. *Minn. Citizens Concerned for Life*, 692 F.3d at 876. To the majority, Minnesota had not adduced "any plausible reason why *continued* reporting from nearly all associations, regardless of the association's major purpose, is necessary to accomplish these interests." *Id.* at 877 (emphasis in original).

By contrast, the five judges in dissent conducted balancing and found that there was no harm in filing a short report and any harm was outweighed by the government interest in maintaining an informed electorate and preventing corruption or its appearance. *Id.* at 882-83 (Melloy, J., concurring and dissenting in part). Once the dissenting judges identified these interests, they turned to the burden placed on the speakers by the reporting requirements. *Id.* at 883. The dissenters thought the burden light, *id.* at 883, despite the majority finding that the three appellants in the case had abandoned planned speech to avoid the reporting requirements. *Id.* at 874. In fact, to the dissenters, the ongoing reporting requirement's burden was not "out of proportion with the state's important interests in disclosure." *Id.* at 884 (Melloy, J., dissenting). In the dissenting judges' formulation, "exacting scrutiny analysis, unlike strict scrutiny analysis, is designed precisely to allow courts to acknowledge burdens laws impose, and consider whether those burdens are sufficiently offset by state interests." *Id.* at 885. To the dissenting judges, the burden to continuously file reports, even when the committee was not

speaking, was not burdensome and was outweighed by the state's interest.

This is the approach the U.S. Court of Appeals for the Ninth Circuit took in this case. In Judge Fisher's opinion concurring in the denial of rehearing en banc, Judge Fisher contrasted strict scrutiny with exacting scrutiny, stating that while "strict scrutiny requires a compelling interest and narrow tailoring in every case, the interest and tailoring required under exacting scrutiny *varies from case to case*." *Ams. For Prosperity Found. v. Becerra*, 919 F.3d 1177, 1190 (9th Cir. 2019) (Fisher, J., concurring in denial of rehearing en banc) (emphasis added). In his concurrence, Judge Fisher conducted no analysis as to whether obtaining confidential donor data from non-profits was substantially related to the government's interest in combating charity fraud. *Id* at 1191; *see also* 903 F.3d 1000, 1004 (9th Cir. 2018). Instead, Judge Fisher analyzed the threat of harm and reprisals to AFPF and TMLC, and discounted them. 919 F.3d at 1191-92; 903 F.3d at 1012. Judge Fisher downplays much of the evidence of reprisals and harassment as attenuated. 903 F.3d at 1015-16. The court concluded that, because there was no First Amendment burden, the government's interest in disclosure was sufficient in itself to uphold the disclosure regulation. *Id*. at 1019-20.

B. Lower Courts Purporting To Apply Exacting Scrutiny Are In Fact Applying Rational Basis Scrutiny.

The U.S. Court of Appeals for the Third Circuit in *Delaware Strong Families* applied an even lower

threshold of exacting scrutiny. The district court there declared unconstitutional Delaware's statute requiring disclosure of all donors who donated more than $100 in an election cycle to an organization that made more than $500 in electioneering communications. *Del. Strong Families v. Biden*, 34 F. Supp. 3d 381, 382, 395 (D. Del. 2014), *rev'd and remanded* 793 F.3d 304 (3d Cir. 2015). There, the district court analyzed the state's purported interest in an informed electorate and determined whether disclosure of all donors who donated more than $100 to Delaware Strong Families, a 501(c)(3), was substantially related to the interest. *Id*. at 394-95. The court, like this Court in *Shelton* and the majority in *Minnesota Citizens Concerned for Life*, concluded that the relationship between the disclosure and an informed electorate was too tenuous. *Id*. at 395. Delaware Strong Families, as a 501(c)(3), was prohibited from partisan electioneering and therefore could only make neutral voter guides. *Id*. at 395. Its voter guide would be unrelated to the electoral process because the voter guide was merely educating the electorate, not trying to influence it. *Id*. at 395 n.20. Requiring disclosure would result in opening the floodgates, drowning the electorate in disclosure reports from such groups as Delaware Strong Families, American Civil Liberties Union of Delaware, or Common Cause. *Id*. at 395 n.21.

The Third Circuit then reversed. The parties agreed that Delaware's interest in having an informed electorate was "sufficiently important." 793 F.3d 305, 309 (3rd Cir. 2015). Therefore, the Court's

analysis focused on the substantial relation prong of exacting scrutiny. *Id*. at 310-13.

In its analysis, the Third Circuit broke from *Buckley*'s closest scrutiny test and applied a weakened exacting scrutiny test, and did so against an organization prohibited from electioneering. *See Buckley*, 424 U.S. at 64-65. The court said that even though exacting scrutiny applied, it would apply a "less searching review to monetary thresholds—asking whether they are 'rationally related' to the State's interest." 793 F.3d at 310. On the basis of campaign costs in Delaware, namely robocalls costing approximately $500 to call all in-state residents, and because it was just one filing, not continuous reporting, the Court upheld the disclosure requirement as substantially related to Delaware's interest in an informed electorate. *Id*. at 312. To the Third Circuit, the statute covers media used by Delaware candidates, including over the Internet, which is how the voter guides were to be disseminated. That fact made its disclosure provision substantially related to Delaware's interest in an informed electorate. *Id*. at 311. No analysis was conducted of the greater-than-$100 donor disclosure threshold. *See Del. Strong Families v. Denn,* 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of cert.) ("By refusing to review the constitutionality of the Delaware law, the Court sends a strong message that 'exacting scrutiny' means no scrutiny at all.").

That the donor disclosure threshold was not analyzed is not uncommon. In *Nat'l Org. for Marriage*, the Appellants contended that Maine's

$100 reporting threshold lacked a substantial relation to a sufficiently important interest. 649 F.3d at 60. The court did not provide any analysis as to why, in Maine, that $100 threshold was substantially related to an interest in an informed electorate. *See id*. Instead, the court held that the disclosure limit was constitutional because it mirrored the federal regime. *Id*. As to the precise threshold, the court reverted to terms better associated with rational basis scrutiny stating the court would grant "'judicial deference to plausible legislative judgments' as to the appropriate location of a reporting threshold," and would uphold "such legislative determinations unless they are 'wholly without rationality.'" *Id*. (citation omitted).

In the end, courts have claimed to apply exacting scrutiny while in fact applying something more akin to rational basis scrutiny and not intermediate closely drawn scrutiny. *Compare Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that *it might be thought* that the particular legislative measure was a rational way to correct it." (emphasis added)); *Nat'l Org. for Marriage*, 649 F.3d at 60 (stating that the court would give deference to the disclosure threshold "unless they are wholly without rationality."[3]); *Del. Strong Families*, 793

[3] Although this quote comes from *Buckley*, 424 U.S. at 83, lower courts relying on it have unmoored *Buckley*'s language from its context. *First*, the *Buckley* plaintiffs conceded that disclosure was the "least restrictive means" of preventing actual or apparent corruption. *Id*. at 68. *Second*, the plaintiffs brought an unconstitutional overbreadth challenge to the monetary thresholds, not a claim that the threshold fails under First

F.3d at 310 (same); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1251-52 (11th Cir. 2013) (same); *Family PAC v. McKenna*, 685 F.3d 800, 811 (9th Cir. 2012) (same); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 133 (2d Cir. 2014) (same); *with NAACP*, 357 U.S. at 461, 463 (requiring courts review state action compelling disclosure under "closest scrutiny"); *Buckley*, 424 U.S. at 64-68 (requiring compelled disclosure statutes be reviewed under a strict test).

It is therefore no surprise that the exacting scrutiny test offers a judge "almost limitless flexibility" allowing her to consider "all rights and interests, and the potential universality of scope and applicability." R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC. L. Rev. 207, 230

Amendment strict or exacting scrutiny. *Id*. at 82. Finally, the *Buckley* court noted that Congress's thresholds were "indeed low" and little legislative history was developed to support the thresholds. The court, in upholding the thresholds, noted that it did so "on this bare record." *Id*. at 83. Without a record, an overbreadth challenge would fail because an overbreadth claimant "bears the burden of demonstrating from the text of the law *and from actual fact*, that substantial overbreadth exists." *Hicks*, 539 U.S. at 122. (emphasis added). Overbreadth also requires a showing that the law's application to protected speech be "substantial" in relation to the law's plainly legitimate application. *Id*. at 119-20. Lower courts relying on this quote have unmoored *Buckley*'s language analyzing an overbreadth claim and grafted it into an analysis that masquerades as exacting scrutiny when these courts are, in reality, applying rational basis scrutiny. Here, Petitioners bring claims that are analytically distinct from *Buckley*'s overbreadth claim. Furthermore, Petitioners here are non-profits not engaged in campaign-related speech. Strict scrutiny should therefore apply. AFPF Br. 27-30.

(2016). The adaptability of exacting scrutiny "reduces it to almost limitless malleability." *Id.* at 230-31. Accordingly, exacting scrutiny "comes uncomfortably close" to granting judges the permission "to do the right or best thing." *Id.* at 231. That is not the appropriate scrutiny for statutes that infringe First Amendment rights. *See, e.g., Reed*, 576 U.S. at 155 (applying strict scrutiny to content-based law); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (content-neutral regulations must be narrowly tailored to serve a significant governmental interest and leave "ample alternative channels for communication of the information."); *McCutcheon*, 572 U.S. at 197 (contribution limits must serve a sufficiently important government interest and must be closely drawn "to avoid unnecessary abridgment of associational freedoms."). When it comes to Free Speech, the Constitution commands that the government permit "the widest room for discussion [and] the narrowest range for its restriction." *Thomas*, 323 U.S. at 530 (1945).

Because of the favorable standard of review, states have reacted to this Court's decisions in *Citizens United* and *McCutcheon* by enacting broad disclosure and registration regimes. *See generally* Jason Torchinsky and Ezra Reese, *State Legislative "Responses" To Citizens United: Five Years Later*, 66 Syracuse L. Rev. 273, 274 (2016) (observing that states have responded to *Citizens United* with, among other things, "expanded disclosure rules for entities that are not political committees."). These statutes impose low monetary thresholds to

disclosure.[4] Now states are improperly applying them to non-profits for non-electioneering activity, as is the case with AFPF and TMLC. *See Del. Strong Families*, 793 F.3d at 308-09 (concluding disclosure requirements could reach a non-profit's neutral voter guide); *Citizens United v. Schneiderman*, 882 F.3d 374, 379 (2d Cir. 2018) (upholding statute requiring disclosure of donor data "*before* permitting such organizations to ask for money" in New York).[5]

For these states, disclosure has become a speaker's price of admission, not just into the coliseum of electoral politics, but into the broader marketplace of ideas.

IV. The Risks Of Disclosure In The Age Of The Internet Require Courts To Review Disclosure Statutes Under More Restrictive Means.

In his concurring opinion in *Vieth v. Jubelirer*, Justice Kennedy recognized that the assistance of computer technology in redistricting was both a "threat and a promise." 541 U.S. 267, 312 (2004) (Kennedy, J., concurring). The same can be said of disclosure in the age of the Internet. It is because of these risks that the scrutiny applied to disclosure statutes must be higher.

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[4] By the end of 2010, approximately 40 states required the disclosure of the name and address of those contributors who contributed $100 *or less*. Bradley A. Smith, *In Defense of Political Anonymity*, at 4.

[5] Solicitation of donations is protected First Amendment speech requiring the state to use narrowly tailored means to restrict it. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 788 (1988).

A. States That Promise To Keep Donor Information Confidential Frequently Fail To Do So.

Even though California promises to maintain as confidential contributor name and address information, the risks of inadvertent disclosure remain high. As the evidence has shown in this case, TMLC Br. 14, AFPF Br. 9-10, and as AFPF noted, the NAACP has observed that providing California with confidential donor information is providing California with "a loaded gun that a future administrat[ion] (sic) might decide to fire." AFPF Br. 44. Disclosure that states promise to keep confidential do not always remain confidential, especially when motivated people try to obtain it. *See, e.g., Shelton*, 364 U.S. at 486, n.7. Substantial harm can come from such disclosure.

As amicus curiae Hispanic Leadership Fund noted in this case, government employees and contractors can make nefarious use of data that is protected as confidential. For example, the National Organization for Marriage's confidential contributor list that it filed with the IRS was disseminated "to a gay rights activist, who turned it over to the Human Rights Campaign (HRC), which in turn provided it to the Huffington Post." Hispanic Leadership Fund Amicus Br. 13-14 (Sept. 25, 2019). Although the IRS admitted error in releasing the information, the illegal release led to the resignation of a CEO of a prominent software company because of his contribution. *Id*.

Data may also be obtained through hacking or other unauthorized access. In 2018, a government computer containing the sensitive personal data of approximately 75,000 people was hacked. *Id*. at 14. The California Department of Insurance web server was also hacked, potentially revealing the social security numbers and addresses of approximately 24,450 people. *Id*. at 15. In 2019, an employee at Oregon's tax collection agency downloaded to their personal account the tax data, including social security numbers, of 36,000 people. *Id*. In late 2018, an independent contractor for the Missouri Department of Health and Senior Services obtained and retained the personal information of more than 10,000 people. *Id*. at 16. He stored this data—including names, dates of birth, state identification numbers, and social security numbers—on an unprotected electronic file. *Id*. In early 2019, an employee at a California Veterans Affairs Medical Center stole health information on more than 1,000 patients. *Id*. This theft was only uncovered because the police stopped his vehicle and discovered that he had prescriptions and social security numbers belonging to fourteen patients. *Id*. When the police searched his computer, they found that he had private health information for 1,030 patients. *Id*. at 16-17.

Even if California were able to keep the donor name and address information confidential, the associational rights of donors are still chilled. *See, e.g., Shelton*, 364 U.S. at 486 (recognizing that even if public disclosure was prohibited, the burdens on associational rights would still be great); *see also Rumely*, 345 U.S. at 57 (Douglas, J., concurring)

(stating that disclosure to the government, combined with the government's subpoena power, could make individuals "fear to read what is unpopular, what the powers-that-be dislike."). But as both the record in this case and these other examples show, confidentiality in government filings is not guaranteed.

B. The Internet Has Exacerbated The Harms To Disclosure.

Public disclosure in the age of the Internet has only exacerbated the harms disclosure brings to an association.

When FECA was passed in the 1970s, one had to travel to the FEC's offices in Washington, D.C. in order to review disclosure reports. Once there, that intrepid individual was required to sort through the disclosure reports manually. Bradley A. Smith, *Doxing Trump Donors Is Just The Beginning, National Review*, (Aug. 9, 2019), https://www.nationalreview.com/2019/08/doxxing-trump-donors-is-just-the-beginning (last accessed Feb. 27, 2021). In the 1930s, disclosure reports were stored in a closet in the Capitol and "piled on the floor in no particular order." *See* Bradley A. Smith, *In Defense of Political Anonymity*, at 3.

When it comes to disclosure requirements, the proliferation of the Internet presents both a blessing and a curse. *See Citizens United v. FEC*, 558 U.S. 310, 481 (Thomas, J., dissenting) (observing that some opponents of California's Proposition 8 that amended California's Constitution to provide "that

only marriage between a man and a woman is valid or recognized in California" compiled campaign finance reports "and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters."). In the wake of the Proposition 8 campaign, nonprofit groups formed with the plan to "confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions." *Id.* at 482. The goal? To "go for the jugular" by pre-emptively striking potential contributors with warning letters saying that a contribution could subject the contributor to "a variety of potential dangers, including legal trouble, public exposure and watchdog groups digging through their lives." *Id.* at 482-83. *see also Shelton*, 364 U.S. at 486 n.7 (describing that the Capital Citizens Council was dedicated to obtaining disclosures "with a view to eliminating from the school system persons who supported organizations unpopular with the group, including the ACLU)").

Other Proposition 8 contributors were forced to resign from their jobs upon disclosure of their contributions. *Citizens United*, 558 U.S. at 482 (Thomas, J., dissenting). The director of the Los Angeles Film Festival contributed $1,500 to Proposition 8 and was forced to resign when "opponents threatened to boycott and picket the next festival." *Id.* The long-time manager of a family-owned restaurant was forced to resign after her $100 contribution was disclosed because "throngs of angry protesters repeatedly arrived at the restaurant and shouted 'shame on you' at customers." *Id.* (alterations omitted). On one occasion, the police

were required to come to the restaurant in riot gear to quell a mob. *Id.*

Websites that aggregate contributor data have only since multiplied. The Huffington Post's Fundrace website compiles campaign finance data and links that data to Google Maps "so viewers can see who in their neighborhood has made political contributions." David M. Primo, *Full Disclosure: How Campaign Finance Disclosure Laws Fail To Inform Voters and Stifle Public Debate* at 6 (2011). The negative effects of this technology are not only a risk to supporters of controversial issues but also to supporters of major presidential candidates. For example, during the 2004 presidential campaign, a woman contributed $500 to John Edwards' campaign. Because the contribution was greater than $200, the campaign was required to disclose her employer. 52 U.S.C. §§ 30101(13)(A), 30104(b)(3)(A).

An organization called "Stop Huntington Animal Cruelty" wanted to put out of business "an animal-testing lab called Huntington Life Sciences" using any lawful or unlawful means. Primo, *supra*, at 7. The organization used campaign finance filings to search for the home addresses of anyone affiliated with the lab, which included the donor Gigi Brienza. Stop Huntington Animal Cruelty then published her address in a "list of 'targets'" which it posted "under the ominous heading 'Now you know where to find them.'" Primo, *supra*, at 7.

Employers have also used FEC data to influence hiring decisions. In 2008, the Department of

Justice's Office of Inspector General released a report detailing that Office of Attorney General personnel, used campaign finance data when reviewing candidates for non-political career positions. *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General* at 22 (July 28, 2008), https://oig.justice.gov/sites/default/files/legacy/special/s0807/final.pdf (last accessed Feb. 27, 2021). Some candidates for career positions were even asked about their history of political contributions. *Id*. at 59. Political contribution history was part of the "political screening process" for career immigration judges. *Id*. at 84, 103-04, 121, 137.

More recently, Congressman Joaquin Castro publicly identified the names, addresses, and employers of 44 residents of San Antonio, Texas who contributed the maximum allowable amount to President Donald Trump's reelection campaign. Joaquin Castro (@Castro4Congress), Twitter (Aug. 5, 2019, 11:13 PM), https://twitter.com/Castro4Congress/status/1158576680182718464. In the body of the Tweet, Congressman Castro singled out the owner of Bill Miller's BBQ, the owner of Historic Pearl, and the real estate agent, Phyllis Browning. *Id*. Castro stated that the contributions of these contributors "are fueling a campaign of hate that labels Hispanic immigrants as 'invaders.'" *Id*. Congresswoman Rashida Tlaib defended Castro's tweet saying, "The public needs to know who funds racism." Maura Barrett and Ben Kamisar, *Joaquin Castro Defends Tweets Naming San Antonio Trump Donors*, NBC News (Aug. 6, 2019),

https://www.nbcnews.com/politics/2020-election/joaquin-castro-defends-tweets-naming-san-antonio-trump-donors-n1039846 (last accessed Feb. 27, 2021). *See Watkins*, 354 U.S. at 197, 199 n.32 (citing a report from the House Committee on Un-American Activities justifying the committee hearings, stating that while Congress could not prohibit people from believing in or teaching communism or fascism, it could "focus the spotlight of publicity on their activities."); *Shelton*, 364 U.S. at 486-87 and n. 7.

Within one week, the Bexar County Democratic Party was considering a resolution to boycott Bill Miller's BBQ. Ultimately, it tabled the resolution. David Martin Davies, *By Not Boycotting Bill Miller BBQ, Bexar County Democrats Earn Judge Wolff's Praise,* Texas Public Radio (Aug. 14, 2019), https://www.tpr.org/news/2019-08-14/by-not-boycotting-bill-miller-bbq-bexar-county-democrats-earn-judge-wolffs-praise (last accessed Feb. 27, 2021). Others were not so lucky. Within approximately 48 hours of Congressman Castro's Tweet, Justin Herricks, President and CEO of Precision Pipe Rentals, had received 25 calls to his business from people "who wanted to tell him he was a white supremacist for donating money to President Trump." Kate Rogers and Annie Karni, *Trump's Opponents Want to Name His Big Donors. His Supporters Say Its Harassment*, N.Y. Times (Aug. 8, 2019), https://www.nytimes.com/2019/08/08/us/politics/ trump-donors-joaquin-castro.html (last accessed Feb. 27, 2021). Mr. Herricks also received calls stating that the caller wanted to use his company, "but we found out you're a racist." *Id*. The caller continued, "We hope that you burn in hell and

your business will go with you." *Id*. Worse still, one of the Trump donors that Castro identified received the wrath of one caller who intentionally spammed the voicemail box of the donor with the following message:

> I think you're a scumbag and I f***ing despise everything you stand for … That's why I'm calling you and filling your voicemail with a bunch of bullsh*t. So, enjoy that. **I will make sure to post this number and extension all over the Internet**.

Bradley A. Smith, *Doxing Trump Donors Is Just The Beginning*, *supra* at 27.

Elected officials have also misused campaign finance reports. Disclosure reports "make[] it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped." *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*). Between 1995 and 2006, congressional and senate Republicans executed the infamous "K Street Project" and used disclosure reports to "compile a list of the 400 largest political action committees and their giving patterns." Bradley A. Smith, *In Defense of Political Anonymity*, City Journal at 5. Republican leaders then informed lobbyists that, based upon their contribution patterns, they were categorized as either friendly or unfriendly. *Id*. The idea behind the project was to "pressure the business community into hiring GOP lobbyists, supporting GOP causes, and giving money to GOP candidates." Kimberley A. Strassel, *The K*

Street Project, Part Blue, Wall Street Journal (July 25, 2008), https://www.wsj.com/articles/SB121694153870182785 (last accessed Feb. 27, 2021) Then, once the Democrats retook the House of Representatives after the 2006 elections, the "Democrats quickly put out the word that 'if you have an issue on trade, taxes, or regulation, you'd better be a donor and you'd better not be part of any effort to run ads against our freshmen incumbents.'" Bradley A. Smith, *In Defense of Political Anonymity* at 5. Some elected officials are quite candid about this attitude. Recently, Mick Mulvaney explained that, when he was a congressman representing South Carolina, "[i]f you were a lobbyist who never gave us money, I didn't talk to you. If you were a lobbyist who gave us money, I might talk to you." Renae Merle, *Mulvaney Discloses 'Hierarchy' For Meeting Lobbyists, Saying Some Would Be Seen Only If They Paid*, Washington Post (April 25, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/25/mick-mulvaney-faces-backlash-after-telling-bankers-if-you-were-a-lobbyist-who-never-gave-us-money-i-didnt-talk-to-you (last accessed Feb. 27, 2021).

For the past 17 years, the Internet has shown that the harms that flow from compelled disclosure are exacerbated and unpredictable. To protect against these harms, compelled disclosure statutes, whether public or to state government officials alone, should be subject to strict scrutiny. AFPF Br. 27-30; TMLC Br. 26. But, if this Court decides to apply exacting scrutiny, then it should apply the "closest scrutiny" form of exacting scrutiny.

CONCLUSION

This Court has held that compelled disclosure can violate associational rights guaranteed under the First Amendment to the U.S. Constitution. To protect these rights, this Court has developed a test that it described as strict. The lower courts, however, and the U.S. Court of Appeals for the Ninth Circuit here, have applied a diluted version of this Court's test, permitting compelled disclosure in nearly all circumstances. To respect the Framers' defense of speaking without disclosing the identity of the speaker, to restore the Framers' view of compelled disclosure with "just Alarm," to provide clarity and predictability to states, courts, and speakers, and because compelled disclosure has recently caused harm to First Amendment associational rights, this Court should, as Petitioners urge, apply strict scrutiny.

Respectfully submitted,

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