No. 19-

In The
Supreme Court of the United States

INSTITUTE FOR FREE SPEECH,

Petitioner,

v.

XAVIER BECERRA,
Attorney General of California,

Respondent.

On Petition For Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF *CERTIORARI*

ALAN GURA
GURA PLLC
916 Prince Street, Ste. 107
Alexandria, Virginia 22314
P: (703) 835-9085
alan@gurapllc.com

ALLEN DICKERSON
Counsel of Record
ZAC MORGAN
INSTITUTE FOR FREE SPEECH
124 S. West Street, Ste. 201
Alexandria, Virginia 22314
P: (703) 894-6800
adickerson@ifs.org

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Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether a state official's demand for all significant donors to a nonprofit organization, as a precondition to engaging in constitutionally-protected speech, constitutes a First Amendment injury.

2. Whether official demands for membership or donor information outside the electoral context should be reviewed under strict or exacting scrutiny.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Plaintiff-Appellant below, is the Institute for Free Speech ("Institute" or "IFS"). The Institute is a Virginia corporation exempt from taxation pursuant to 26 U.S.C. § 501(c)(3). IFS is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with any ownership stake in the Institute.

Respondent, Defendant-Appellee below, is the Attorney General of California, Xavier Becerra.

STATEMENT OF RELATED PROCEEDINGS

- *Inst. for Free Speech v. Becerra*, No. 17-17403 (9th Cir.) (order issued and judgment entered Oct. 11, 2019, mandate issued Nov. 4, 2019)
- *Ctr. for Competitive Politics v. Harris*, No. 2-14-636 (E.D. Cal.) (opinion and final judgment issued Oct. 31, 2017)
- *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015) (denying petition for a writ of *certiorari*)
- *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir.) (opinion issued and judgment entered May 1, 2015)

There are no additional proceedings in any court that are directly related to this case.

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The Institute for Free Speech ("Institute" or "IFS") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's final opinion and order is reproduced in the appendix ("App.") at 1. The district court's order and opinion granting the Attorney General's motion to dismiss is reproduced at App. 2-24. Additionally, the Ninth Circuit's May 1, 2015 opinion, upon which both courts principally relied, is available at App. 26-50.

JURISDICTION

The United States District Court for the Eastern District of California had jurisdiction over the Institute's complaint pursuant to 28 U.S.C. §§ 1331 and 1343. The district court granted the Attorney General's motion to dismiss on October 31, 2017.

The Ninth Circuit had jurisdiction over IFS's appeal under 28 U.S.C. § 1291. On October 11, 2019, the Ninth Circuit granted the Attorney General's motion for summary affirmance, relying upon its May 1, 2015 decision denying Petitioner a preliminary injunction in this case. App. 1.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, as applied to the States by the Fourteenth Amendment, provides that California "shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I.

Other pertinent statutes and regulations are reproduced at App. 69-81.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Institute for Free Speech is a nonpartisan, nonprofit organization that does not and cannot engage in electoral advocacy. Nevertheless, California's Attorney General has demanded that the Institute reveal its principal donors before speaking with potential supporters.

The Ninth Circuit, relying almost exclusively upon inapplicable campaign finance precedents, upheld California's demand. The court categorically denied that the compelled disclosure of a group's supporters poses any First Amendment injury, and while claiming to

apply "exacting scrutiny," in fact held that the government's mere assertion of an interest that is not wholly irrational meets constitutional requirements.

Regardless of whether strict or merely exacting scrutiny applies in this case, the Ninth Circuit's new form of rational basis review is patently insufficient. Its effort to minimize the inherent constitutional harm imposed by compelled donor disclosure is incompatible with longstanding, landmark precedent.

Sixty-one years ago, this Court explained that all Americans enjoy the liberty to "pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Ala.*, 357 U.S. 449, 466 (1958) ("*NAACP*").[1] This is "a basic constitutional freedom that is closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*) (citations and quotation marks omitted).

To be sure, this right is not limitless. "[T]here are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the free functioning of our national institutions is involved." *Buckley*, 424 U.S. at 66 (citation omitted). But the presumption is to the contrary, and "when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First

[1] This Petition cites several cases where the NAACP was the petitioner. For ease of readability, this brief will refer to *NAACP v. Alabama* as "*NAACP*" and the other cases by the respondent's name.

Amendment." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Accordingly, associational privacy may only be constitutionally invaded when the Government carries its burden and specifically justifies the intrusion. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden").

The Ninth Circuit bypassed these fundamental principles, violating this Court's directives and creating splits with its fellow circuits. It also sowed additional confusion concerning the proper standard of review in cases infringing upon citizens' privacy of association and belief. *Certiorari* should be granted to reaffirm this Court's cornerstone associational liberty cases and to resolve these thorny questions. *Healy v. James*, 408 U.S. 169, 184-85 (1972) ("[D]iscounting the existence of a cognizable First Amendment interest and misplacing the burden of proof" are "fundamental errors").

STATEMENT OF THE CASE

1. Charities cannot operate in California unless they give the Attorney General their donor lists.

Before a charity may legally solicit donations in California, the Attorney General requires the organization to give him the unredacted contents of Internal Revenue Service Form 990, Schedule B, which

identifies the organization's principal donors.[2] Unless the charity complies, it will not be permitted to register with the Attorney General's Registry of Charitable Trusts and will not be licensed to fundraise in California. Calif. Gov't Code § 12585; 11 Code of Calif. Regs. § 301.

A. IRS Form 990, Schedule B.

Form 990 and its array of schedules make up a nonprofit charity's federal tax return. The Institute must annually file Form 990 and its accompanying schedules with the IRS. 26 U.S.C. § 6033(b). This case concerns one of those schedules, Schedule B ("Schedule of Contributors"), which requires organizations to list the name and address of "any one contributor, [that] during the year," made "total contributions of the greater of (1) $5,000; or (2) 2% of the" organization's total budget. IRS Form 990, Sch. B at 1.[3]

Form 990 and Schedule B are also filed by, *inter alia*, private foundations, labor organizations, and certain political committees. Unlike other groups, however, the § 501(c)(3) nonprofits targeted by the Attorney General are barred by law from engaging in electoral campaigns. While political committees must make

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[2] This case concerns the same policy challenged in *Americans for Prosperity Foundation v. Becerra* and *Thomas More Law Center v. Becerra*, Case Nos. 19-251 and 19-255, which are also pending before this Court. Unlike those cases, the Institute's litigation was limited to a facial challenge, and was resolved on a motion to dismiss without the benefit of discovery or trial.

[3] https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.

their donor lists available to the public, federal law permits most § 501(c) organizations to keep their supporters' identities private. 26 U.S.C. §§ 6104(b); 6104(d)(3)(A). In fact, in 2006, Congress explicitly prohibited the disclosure of § 501(c)(3) donor lists to State officials, such as the Attorney General of California, if the information was requested "for the purpose of . . . regulating the solicitation or administration of the charitable funds or charitable assets of such organizations." 26 U.S.C. § 6104(c)(3).

Donor privacy, then, is an artifact of federal law. 26 U.S.C. §§ 6103, 6104. In practice, this means that while a publicly available Schedule B provides the dollar amounts given by significant donors, the donor names and addresses are redacted. Of course, the donor names are revealed to the IRS itself. However, multiple provisions of the tax code make the disclosure of that information illegal. 26 U.S.C. §§ 7213(a)(1); 7213(a)(2); 7213A(a)(2); 7213A(b)(1); 7216; 7431.[4]

All other aspects of Petitioner's tax return, however, are publicly available. In fact, they are posted on its website.[5] They include forms detailing the Institute's financial arrangements with "interested persons" (such as substantial contributors) and any non-cash

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[4] Moreover, there are grounds for compelled disclosure in the IRS context that may survive constitutional scrutiny. These include cross-referencing Schedule B information against personal tax returns to identify fraudulent attempts to claim tax deductions for charitable gifts that were never made. No such interest is present here.

[5] https://www.ifs.org/financial-disclosure-and-annual-reports/.

contributions received (including works of art, real estate, securities, drugs, medical supplies, and even taxidermy). IRS Form 990, Sch. L.; IRS Form 990, Sch. M. Petitioner does not challenge those requirements, merely the Attorney General's requirement that it forfeit its well-established and long understood right to donor privacy before it may communicate with potential supporters in California.

B. The Institute's experiences with the Attorney General's scheme.

Pursuant to law, the Institute has regularly prepared and filed its Form 990, including Schedule B, with the IRS. From 2008 until 2015, under its former name (Center for Competitive Politics),[6] the Institute annually filed its Form 990 with the Attorney General's Registry of Charitable Trusts. These annual filings included the same Form 990 that Petitioner made available to any other member of the public, including a redacted version of Schedule B and an unredacted version of all other required schedules and attachments.

[6] The Center for Competitive Politics officially changed its name to the Institute for Free Speech on October 16, 2017. For clarity and consistency, even when discussing activities done under the name "Center for Competitive Politics," this brief will assign those actions to the Institute.

At some point in 2010, however, the Attorney General silently adopted a new policy of seeking unredacted Schedule B donor information as a precondition to Registry membership.[7] Neither the Institute nor, to the best of its knowledge, any other regulated charity, has a concrete understanding of the ends to which this policy was developed, how it came about, or how rigorously it was implemented.[8]

However, the Institute's experience with the Attorney General's policy is likely representative. Between 2010 and 2013, the Institute annually filed a redacted Schedule B with the Attorney General, and its Registry membership was approved without comment. Accordingly, on January 9, 2014, in keeping with this practice, and having received no notification of a change in the Attorney General's policy, the Institute submitted its Form 990 to the Registry.

This time, however, the Institute received a demand letter asserting that its "**filing [wa]s incomplete** because the copy of Schedule B, Schedule of Contributors, d[id] not include the names and addresses of contributors." App. 82 (bold in original,

[7] To be clear, this policy was not publicly announced to the regulated community. Until a series of lawsuits, including the Institute's, brought public attention to the Attorney General's regime, his office chose to enforce its policy through the issuance of delinquency letters to charities on a case-by-case basis. As a result, although this policy began sometime in 2010, IFS was not ensnared until 2014.

[8] This question was not addressed in the district court rulings in *Americans for Prosperity Foundation v. Becerra* or *Thomas More Law Center v. Becerra*, Case Nos. 19-251, 19-255 (U.S. 2019).

brackets supplied). The letter ordered the Institute to "submit a **complete** copy of Schedule B, Schedule of Contributors . . . as filed with the Internal Revenue Service," and to "address all correspondence to the undersigned." App. 83 (emphasis in original).[9]

Rather than forfeit its supporters' privacy, the Institute filed suit on March 7, 2014, in the United States District Court for the Eastern District of California.

C. The Institute's first attempt to obtain relief.

On March 20, 2014, the Institute moved for a preliminary injunction. Respondent argued that obtaining donor information "allows [the Attorney General] to determine, often without conducting an audit, whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons[,] or illegal or unfair business practices." *Ctr. for Competitive Politics v. Harris*, Def. Opp'n to Mot. for Prelim. Inj. at 13-14 (ECF No. 10) (internal citations omitted, brackets supplied). But the Attorney General's papers failed to explain how stockpiling Schedule B data did so.

Nevertheless, on May 14, 2014, the district court rejected the Institute's motion. In its written opinion, the court uncritically accepted the assertion "that the

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[9] The "undersigned" was an "Office Technician" for the Registry, named "A.B." *Id*. The Institute has never learned the actual identity of "A.B."

requested information allows [the Attorney General] to determine 'whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices.' " App. 66 (quoting Def. Opp'n to Mot. for Prelim. Inj. at 13-14 (internal citations omitted)).

The Institute timely appealed to the Ninth Circuit. Before the court of appeals, the Attorney General argued that "in the absence of any showing of harm, the law does not require the Attorney General to explain the necessity of the required disclosure." 9th Cir. Opp'n Br. at 29. Nevertheless, for the first time, counsel for the Attorney General proffered some explanation for her office's position at oral argument. She suggested a hypothetical example where Schedule B could be used to discover misconduct by a lightly capitalized charity disclosing over $2 million in donations, the vast majority of which came from inflating the value of a worthless painting. Oral Argument at 28:25, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. Dec. 8, 2014). The California law enforcement (as opposed to federal tax enforcement) interest served by knowing the names of donors to such an organization was not identified and remains unknown.[10]

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[10] Moreover, the public version of Form 990 would already provide the Attorney General with reason to be suspicious. It would show extremely low outlays and an extremely high professed income. Additionally, the public copy of Form 990 would list the amount of the painting donation, and that it was a noncash contribution. Finally, a separate schedule of the Form, open to public inspection, would also list a "[d]escription of noncash property given," in this case that the donation was a painting, and

The Ninth Circuit affirmed. Its opinion rested on two principal conclusions.

First, the court rejected the proposition that compelled disclosure itself constitutes a First Amendment injury, calling the Institute's argument "a novel theory . . . not supported by our case law or by Supreme Court precedent." App. 34.

Second, in two footnotes, the Ninth Circuit functionally overturned this Court's most relevant precedents. The court of appeals dismissed this Court's cornerstone cases regarding privacy of association as mere "as-applied challenges involving the NAACP . . . [which] are all inapposite." App. 34, n.3. (distinguishing *NAACP v. Alabama*; *NAACP v. Button*, 371 U.S. 415 (1963); *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); and *Bates v. City of Little Rock*, 361 U.S. 516 (1960)); *but see Button*, 371 U.S. at 444 ("That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is *constitutionally irrelevant* to the ground of our decision . . . [it] would apply as fully to those who would arouse our society against the objectives of the petitioner") (emphasis supplied).

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its "FMV" (fair market value). Form 990, Sch. B. at 3, (Part II) Form 990, Sch. M. at 1 (listing artwork as first reporting category for non-cash contributions). At that point, the Attorney General would be within his rights to subpoena additional information concerning the circumstances of that particular donation.

Next, the Ninth Circuit distinguished *Talley v. California*, 362 U.S. 60 (1960), where this Court facially invalidated a Los Angeles disclosure regime by applying *NAACP v. Alabama* and *Bates v. City of Little Rock*, even though the petitioner was not advocating for or on behalf of the NAACP. The court of appeals decided that the basis for the *Talley* decision "was the historic, important role that anonymous pamphleteering has had in furthering democratic ideals," rather than the First Amendment privacy right vindicated in *NAACP* or *Bates*. App. 42, n.8.

Having removed the impediments imposed by this Court's precedents, the court of appeals conducted what it claimed was an "exacting scrutiny" analysis. App. 36.

But while exacting scrutiny requires a court to "examine and balance the plaintiff's First Amendment injury against the government's interest," the Ninth Circuit held that it would be "incorrect" to believe that "compelled disclosure *itself* constitutes such an injury." *Id*. (emphasis in original). Thus, the Court determined it need not "weigh that injury when applying exacting scrutiny." *Id*. Accordingly, the Ninth Circuit held that because the Attorney General's "assert[ion] for the disclosure requirement" was not "wholly without rationality," the Institute's "First Amendment facial challenge to the Attorney General's disclosure requirement fail[ed] exacting scrutiny." App. 44-45 (citation and quotation marks omitted).

This Court denied the Institute's timely petition for *certiorari*. *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015). Lacking the First Amendment's protection, Petitioner has ceased soliciting contributions in California.

D. Subsequent regulatory developments.

On July 8, 2016, the Attorney General promulgated a new regulation codifying his donor disclosure regime. The new regulation, 11 Code of Calif. Regs § 310(b), is provided in the Appendix. It merely provides that Schedule Bs collected by the Attorney General shall generally not "be open to public inspection." 11 Code of Calif. Regs. § 310(a). It does not alter or amend the Attorney General's demand for donor lists as a precondition to Registry membership. 11 Code of Calif. Regs. § 310(b). Nor does it provide any penalty for improper disclosure or improper use of the information by public employees, even if they act intentionally. *Id*.

E. The Institute's second attempt to secure relief.

After the Ninth Circuit's ruling, the Institute amended its complaint, principally to include facts that had been found by the U.S. District Court for the Central District of California in a related challenge to the Attorney General's regime. *See Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1054 (C.D. Cal. 2016).

The Institute apprised the district court of that sister court's finding that, based on the Registry staff's own testimony, "out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section, only five instances involved the use of a Schedule B." *Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1054. This means that the Attorney General uses a Schedule B donor list perhaps once every two years, or in less than 1% of investigations. *Id*. And "even in" the rare "instance[] where a Schedule B was relied on," the Attorney General's own employee testified that "the relevant information it contained could have been obtained from other sources." *Id*.

The Institute renewed its motion for a preliminary injunction, and the Attorney General, in response, moved to dismiss. The district court initially scheduled oral argument for October 6, 2016. However, two days before the hearing, the court announced that it would consider the matter "submitted without oral argument." Over a year later, on October 31, 2017, the court granted the Attorney General's motion to dismiss without leave to amend and denied the Institute's motion for a preliminary injunction as moot.

The district court held that the Institute's facial challenge was foreclosed because "the appellate panel made it clear that compelled disclosure alone does not constitute a First Amendment injury." App. 7. Echoing the Attorney General's earlier arguments before the court of appeals that "in the absence of any showing of harm, the law does not require the Attorney General to explain the necessity of the required disclosure," 9th

Cir. Opp'n Br. at 29, the district court dismissed the complaint because it did not allege "'evidence to suggest that [the Institute's] significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirements.'" App. 7 (citation omitted).

The Institute timely appealed to the Ninth Circuit on March 9, 2018. Given the precedential nature of the Ninth Circuit's 2015 opinion, the Institute also petitioned for initial hearing en banc pursuant to Federal Rule of Appellate Procedure 35(b)(1). While that petition was under consideration, the Attorney General moved for summary affirmance. The Institute's Rule 35(b)(1) petition was denied on August 4, 2018. App. 25.

More than a year later, on October 11, 2019, after the filing of an urgent motion by Petitioner, the Ninth Circuit summarily affirmed the district court's October 31, 2017 ruling. App. 1.

As a result of the Attorney General's policy, and its approval by the lower courts, the Institute has been unable to solicit donors in the Nation's largest and wealthiest state for over four years.

REASONS FOR GRANTING THE WRIT

I. This Court And Other Circuit Courts Have Held That Compelled Disclosure Constitutes Inherent First Amendment Injury.

The court of appeals declared that "no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury." App. 42. It is mistaken.

1. "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." *NAACP*, 357 U.S. at 460. Therefore, "the immunity from state scrutiny" of donor lists is part and parcel of the First Amendment right of all Americans "to pursue their lawful private interests privately and to associate freely with others in so doing." *Id*. at 466.

Two years later, this Court prevented city governments from demanding "a statement as to dues, assessments, and contributions paid, by whom and when paid," *Bates*, 361 U.S. at 518, as "an adjunct of their power to impose occupational license taxes." *Id.* at 525. It did so, as Justices Black and Douglas jointly explained, because "freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right. . . . These are principles applicable to all people under our Constitution irrespective of their race, color, politics, or religion." *Id*. at 528 (Black, Douglas, JJ., concurring in the judgment).

NAACP and *Bates* were joined by other decisions of this Court, all of which sung in the same key. *Talley*, 362 U.S. at 65 ("[T]here are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified"); *Button*, 371 U.S. at 444-45 ("[T]he Constitution protects expression and association without regard to . . . the truth, popularity, or social utility of the ideas and beliefs which are offered"); *Gibson*, 372 U.S. at 558 ("[T]he constitutional privilege to be secure in associations" applies to "all legitimate organizations engaged in the exercise of First and Fourteenth Amendment rights"); *Shelton*, 364 U.S. at 486 (noting right to "free association, a right closely allied to freedom of speech and right which, like free speech, lies at the foundation of a free society"). Even this Court's campaign finance jurisprudence, which does not control in this non-electoral setting, recognizes the vitality of those storied precedents. *Buckley*, 424 U.S. at 64 ("[W]e have *repeatedly* found that compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment") (emphasis supplied).

Governments have no presumptive authority to root around private associations, even where "there can be no question of the relevance of a State's inquiry." *Shelton*, 364 U.S. at 485. Quite the opposite.[11] This

[11] Indeed, this Court has not hesitated to strike compelled disclosure regimes facially, even where it makes "no appraisal of the circumstances, or the substantiality of the claims of the litigants" and the "record is barren of any claim, much less proof"

Court has "repeatedly found," *Buckley*, 424 U.S. at 64, that "all legitimate organizations are the beneficiaries of" the Constitution's "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs." *Gibson*, 372 U.S. at 555-56.[12] Disclosure imposes a First Amendment injury, one that "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64.

To take a particularly trenchant example, this Court's opinion in *Talley* rests on the assumption that disclosure itself—not second-order harms specific to a particular plaintiff—is the relevant constitutional injury. 362 U.S. at 69 (Clark, J., dissenting) ("The record is barren of any claim, much less proof, that he will suffer any [other] injury whatever. . . ."). That position has been so obvious that there has been little need for courts to revisit it. *NAACP*, 357 U.S. at 466 (requiring a "controlling justification" from the State); *Buckley*, 424 U.S. at 64 ("*subordinating* interests of the State must survive exacting scrutiny") (emphasis supplied); *Calif. Bankers Ass'n v. Shultz*, 416 U.S. 21, 98 (1974) (Marshall, J., dissenting) ("The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or

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that disclosure would result in threats, harassments, or reprisals. *Talley*, 362 U.S. at 69 (Clark, J., dissenting) (emphasis removed).

[12] There is no distinction between the protection afforded by the First Amendment to membership lists versus donor lists. *Buckley*, 424 U.S. at 66 ("Our past decisions have not drawn fine lines between contributors and members but have treated them interchangeably").

contribute to the organization, absent a compelling governmental interest requiring disclosure") (collecting cases, including *NAACP v. Alabama*). The Ninth Circuit's startling conclusion to the contrary is made especially dangerous by its unambiguous language, as the opinion's application by the district court amply demonstrates. App. 13 ("[IFS] still fails to identify *any cognizable burden* on [its] freedom of association") (emphasis supplied). Under this newly-articulated rule, State officials will be emboldened to demand and permanently store the donor and membership lists of private associations upon the thinnest pretexts and without fear of effective judicial oversight. This holding alone presents a question of sufficient national importance to justify *certiorari*.

Worse still, the Ninth Circuit's rule prohibits associations from engaging in other, fully-protected First Amendment activities as the price for protecting their supporters' privacy. Right now, Petitioner is *banned* from speaking with potential donors in California unless it complies with the Attorney General's demand. As any direct limit on charitable solicitations would unquestionably be reviewed under strict scrutiny, the harm here is especially acute. *Williams-Yulee v. The Fla. Bar*, 575 U.S. 433, 442 (2015) (strict scrutiny applies to "laws restricting the solicitation of contributions to charity"); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) ("conducting fundraising for charitable organizations . . . [is] fully protected speech"); *Gaudiya Vaishnava Soc'y v. San*

Francisco, 952 F.2d 1059, 1063-64 (9th Cir. 1991) (holding same).

Certiorari should be granted to reaffirm what the court of appeals failed to understand: the disclosure of a donor list to the government, precisely what the Attorney General demands here, is itself a cognizable First Amendment harm. It may be that the State can justify such injury—there are constitutional disclosure regimes—but this Court should declare that whenever a state imposes upon private association the justification raised must survive a "strict test." *Buckley*, 424 U.S. at 66.

2. Right now, in the Ninth Circuit, the Court's foundational First Amendment privacy cases have been limited to their specific facts and their specific plaintiffs. App. 34, n.3 ("[IFS] cites extensively to these cases; however, because all of them are as-applied challenges involving the NAACP . . . these cases are all inapposite");[13] *id*. at n.8. It is now the law of that circuit that, unless an organization demonstrates that a compelled disclosure imposes *additional* second-order harms on a level substantially similar to those suffered by the NAACP in segregated Alabama, there is no right to donor privacy and the state need not even explain itself. App. 15 (district court opinion) (holding

[13] Incidentally, this statement is not accurate. *Shelton v. Tucker*, a case the Ninth Circuit dismissed as an inapposite "as-applied challenge," App. 34, n.3, is a facial ruling. *Shelton*, 364 U.S. at 490 ("The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry. . . .").

that those "groups so qualifying" as constitutionally injured "were generally subjected to both government-sponsored hostility and brutal, pervasive private violence both generally and as a result of disclosure").

Certainly, many, although not all, of the landmark cases establishing freedom of association stem from the legal and political fight conducted by the NAACP against segregationist Southern governments. But the Fourth Amendment rights won by Dollree Mapp do not apply only to individuals possessing obscene materials, *Mapp v. Ohio*, 367 U.S. 643 (1961), nor do the due process rights secured by Yaser Hamdi extend only to members of al Qaida or the Taliban. *Hamdi v. Rumsfeld*, 542 U.S. 507, 510 (2004). Those rights, rooted in the universal claims of the American experiment in self-government, apply universally.

After all, as this Court acknowledged in *Button*, a Petitioner's particulars are "constitutionally irrelevant. . . . The course of our decisions in the First Amendment area makes plain that its protections would apply as fully to those who would arouse our society against the objectives of the petitioner." 371 U.S. at 444.[14]

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[14] *See Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 208-09 (2d Cir. 2004) (noting that, while *NAACP* did not apply in that case, it was clear that "[s]ubsequent decisions of the Supreme Court have applied *NAACP v. Alabama* to prevent compelled disclosure of names in other contexts" than the NAACP's fight against racist Southern governments).

Yet, the Ninth Circuit has determined otherwise, limiting the Constitution's protections only to "qualifying" organizations. App. 15. This Court should remind the Ninth Circuit that *NAACP v. Alabama*, *Talley v. California*, *Shelton v. Tucker*, *Gibson v. Florida Legislative Investigation Committee*, and other foundational cases establish that compelled disclosure, in and of itself, constitutes irreparable injury.

3. In the campaign finance context, which is not implicated here,[15] compelled disclosure has sometimes been upheld on the grounds of providing information to the electorate.[16] But even in that well-trod area of the law, this Court has always first conceded that the required disclosure imposes inherent constitutional injury.

In *Buckley v. Valeo*, this Court's "seminal campaign finance case," *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 757 (2011) (Kagan, J., dissenting), this Court reiterated that it "long has recognized that significant encroachments on First

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[15] Section 501(c)(3) prohibits groups like Petitioner from involvement in any candidate campaign. 26 U.S.C. § 501(c)(3) (" . . . which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"); *see also Ams. for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1179 (9th Cir. 2019) (Ikuta, J., dissenting from denial of petition for rehearing en banc) (noting "the unique electoral context" that informs this Court's campaign finance jurisprudence).

[16] But not always. *E.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (facially invalidating Ohio disclosure statute in the electoral context).

Amendment rights of the sort that compelled disclosure *imposes* cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64 (emphasis supplied).[17]

The Ninth Circuit, however, rationalized away the *Buckley* Court's statement. It determined that *Buckley* really stands for the proposition that the injury "compelled disclosure imposes" is no injury at all, *id*. at 64, and any suggestion to the contrary is "a novel theory." App. 34. In order to arrive at this surprising conclusion, the court of appeals mangled a preceding sentence in the *Buckley* opinion. That sentence, to which the appellate court accorded great weight, App. 34, merely noted that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64.

The court of appeals emphasized the word "can" and suggested that this word choice disposed of any inherent constitutional injury. *Id*. ("Notably, the Court said 'can' and not 'always does'"). But in doing so, the lower court wrote the word "seriously" out of the sentence, ignoring the obvious context requiring governments to show that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes" are not, in the specific context being litigated, so "serious[]" as to render the disclosure

[17] This proposition, delivered in a decision resolving a facial First Amendment challenge, is sandwiched directly between two citations to *NAACP v. Alabama*, all but proving that case's relevance outside its specific time, place, and plaintiff.

unconstitutional. *Buckley*, 424 U.S. at 64. Correctly read, that sentence merely states that, in justifying the harm imposed, governments must prove that their actions are properly tailored to a more important end.[18] *Id.*

a. The Ninth Circuit's decision created a circuit split that only this Court can resolve.

The Ninth Circuit's wholesale rejection of this Court's freedom of association precedents places it wholly outside the holdings of other courts. Even the Second Circuit, which has allowed attorneys general to collect Schedule Bs from nonprofit corporations, *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018), has reversed district courts for "holding essentially that because the [plaintiff] had not made a showing that disclosure of those associated with it was likely to result in reprisals, harassments, or threats, the [Government] needed only to show that the information sought was relevant to the [Government's] investigation." *Fed. Election Comm'n v. La Rouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) (citations and quotation marks omitted).

Indeed, no other court has flatly denied that an inherent First Amendment harm is imposed whenever

[18] To make an analogy: it is unlawful to break someone's ribs in a bar brawl, but praiseworthy to do so, inadvertently, while performing the Heimlich maneuver.

the Government demands private donor information.[19] The Sixth and Eleventh Circuits, in fact, have joined the Second Circuit in expressly rebuking that proposition.

In *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), the Sixth Circuit reviewed a law which barred "candidates in Kentucky . . . from selling a campaign button or bumper sticker for one-dollar-or-less without receiving the purchase/contribution price for the item in the form of a negotiable instrument which identifies both the donor and recipient." *Anderson*, 356 F.3d at 671. After finding "that this cash prohibition is essentially a disclosure requirement," the Sixth Circuit applied *Buckley* and invalidated the statute. *Id*. at 671-72. The *Anderson* court did not require an additional showing on top "of the significant encroachment on First Amendment rights that compelled disclosure imposes." *Id*. at 671 (citation omitted, cleaned up). Instead, it placed the burden on the State to prove the statute's constitutionality and determined that Kentucky was unable to overcome the "common sense" decision that the law was "not closely drawn to avoid

[19] The D.C. Circuit, however, has also suggested, albeit in *dicta*, that disclosure may not impose an inherent constitutional injury. *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 22, n.16 (D.C. Cir. 2009). But even there, the court first looked to the *Government's* asserted interest, and only then did it determine that "because the only governmental interest proffered was the enforcement of unconstitutional requirements, there was no need for the plaintiffs to show specific injury." *Id.* (emphasis supplied). In other words, the D.C. Circuit, in requiring the Government to justify its interest *before* looking to any specific harm to plaintiffs, took the opposite tack to the one chosen by the Ninth Circuit here.

unnecessary infringement of associational freedoms." *Id*. at 672.

Similarly, Jacksonville, Florida "require[d] corporate applicants for adult business licenses to disclose the names of 'principal stockholders'" that would otherwise have been kept private, *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366 (11th Cir. 1999). The Eleventh Circuit did not require the adult businesses to place any further evidence in the record, beyond the statute itself, to demonstrate "actual" First Amendment harm. Nor did it require that Lady J. Lingerie, Inc. demonstrate that the ordinance was designed merely to harass businesses or that its stockholders would suffer threats, harassments, or reprisals as a result of the disclosure. Instead, the Eleventh Circuit assumed that compelled disclosure to the government itself was a First Amendment harm. *Id.* at 1366 (citing *Buckley v. Valeo* and *NAACP v. Alabama*).

Indeed, before this case broke faith with this Court's prior precedents, the Ninth Circuit agreed with its sister circuits. The *City of Jacksonville* court relied on Ninth Circuit precedent, specifically *Acorn Investments v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). There, the City of Seattle enacted a compelled disclosure law as part of a similar business licensing regime. Like the Attorney General's Schedule B program, Seattle's regime compelled the applicant to disclose its funders, in that case by listing the business's shareholders. *Acorn Invs.*, 887 F.2d at 225. Like the Attorney

General's Schedule B program, the data collected by this regime was not made public.[20]

Yet, the *Acorn Investments* court, relying on *Talley v. California*, *NAACP v. Alabama*, and *Buckley v. Valeo*, did not require a showing of additional harm, but rather assumed that compelled disclosure, by itself, imposed First Amendment injury and facially invalidated the law. *Acorn Invs.*, 887 F.2d at 225 ("[T]he Supreme Court has recognized [that] forcing an association engaged in protected expression to disclose the names of its members may have a chilling effect. . . . This chilling effect exists even when it is not the government's intention to suppress particular expression"); *see also Perry v. Schwarzenegger*, 591 F.3d 1126, 1137 (9th Cir. 2010) ("One injury to Proponents' First Amendment rights *is the disclosure itself*") (emphasis supplied).

Certiorari should be granted to restore the Ninth Circuit's conformity with its sister circuits.

II. This Court Should Clarify Whether First Amendment Infringements Require Strict Scrutiny Outside The Campaign Context.

Strict scrutiny should be the default when a government intrudes upon an enumerated right, such as speech or assembly. *Cf. Calzone v. Summers*, No. 17-2654, 2019 U.S. App. LEXIS 32776 at *20 (8th Cir. Nov. 1, 2019) (en banc) (Grasz, J., concurring op.) ("the

[20] At a minimum, the *Acorn Investments* court made no mention that the disclosure regime was a public one, and that possibility played no role in its analysis.

baseline rule is that laws that burden political speech are subject to strict scrutiny") (internal quotation marks and brackets omitted).

The "Constitution's protection is not limited to direct interference with fundamental rights . . . [f]reedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Healy*, 408 U.S. at 183 (citations and quotation marks omitted); *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 488 (D.C. Cir. 2016) ("Disclosure chills speech"). The intervening decades have sown confusion on this point, and the Court should clear things up.

In the past, when confronted with infringements upon First Amendment rights, this Court has insisted government action be properly "designed to safeguard a vital national interest." *United States v. Harriss*, 347 U.S. 612, 626 (1954). Even *Buckley v. Valeo*, the principal decision of this Court applying the First Amendment to a campaign finance law, calls for "exacting scrutiny" of disclosure regimes, but refers to that standard as both a "strict test" and the "closest scrutiny." 424 U.S. at 25, 66 (citations and quotation marks omitted).

Yet here, the court of appeals held that if a government imposes a "disclosure" regime, it gets the benefit of the doubt. "Allowing states to sidestep scrutiny by simply placing a 'disclosure' label on laws risks transforming First Amendment jurisprudence into a legislative labeling exercise." *Missourians for Fiscal*

Accountability v. Klahr, 892 F.3d 944, 949 (8th Cir. 2018) (citation omitted, cleaned up). The Court should not let legislatures and lower courts replace rigorous constitutional analysis with word games. Instead, a default rule that State "action which *may* have the effect of curtailing the freedom to associate *is* subject to the closest scrutiny" ought to apply. *NAACP*, 357 U.S. at 460-61 (emphasis supplied).

This case provides an opportunity for this Court to finally establish that when a government acts against the First Amendment rights of speech and assembly, it must be prepared "to demonstrate that the regulation was necessary to serve a compelling state interest and [is] narrowly drawn to achieve that end." *United States v. Nat'l Treas. Emps. U.*, 513 U.S. 454, 490 (1995).

III. The Ninth Circuit's Ruling Exacerbates A Circuit Split Regarding The Application Of Exacting Scrutiny.

However, even assuming that "exacting scrutiny" is the proper test to review the compelled disclosure of members and donors outside the campaign finance context, the Petition should still be granted to restore inter-circuit harmony.

The court of appeals called its analysis "exacting scrutiny," App. 36, but there is a significant divide among the circuits as to the "rigor[]" required by this "strict test." *Buckley*, 424 U.S. at 29, 66. At the present time, there are several different standards of "exacting

scrutiny" across the Nation.[21] *Certiorari* should be granted so that the Court may bind the lower courts to a single standard.

1. The Ninth Circuit held that disclosure regimes, even outside the campaign finance context, can survive exacting scrutiny if the government "assert[s]" "reasons that . . . are not wholly without rationality." App. 44 (citation and quotation marks omitted). In this case, the Attorney General claimed, without evidence, that "disclosing the names of significant donors 'is necessary to determine whether a charity is actually engaged in a charitable purpose.' " App. 17 (quoting App. 30). Applying the Ninth Circuit's not-wholly-irrational standard, the district court found that this mere "representation [wa]s sufficient to survive exacting scrutiny." *Id.*

This makes exacting scrutiny little more than a lessened form of rational basis review, which the government may overcome with a mere declaration of need. *Cf. Shrink Mo. Gov't PAC*, 528 U.S. at 392 ("We have *never* accepted mere conjecture as adequate to carry a First Amendment burden") (emphasis supplied); *Bates*, 361 U.S. at 525 ("[G]overnmental action does not automatically become reasonably related to

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[21] As *amicus curiae* this Term, Petitioner thoroughly discussed this division. Br. of Inst. for Free Speech at 12-18, *Thompson v. Hebdon*, No. 19-122 (U.S. Aug. 26, 2019). As that brief argued, the circuit split regarding the contours of exacting scrutiny is "not merely 'Januslike, pointing in two directions,' *Van Orden v. Perry*, 545 U.S. 677, 683 (2005), but more 'Cerberuslike,' facing in at least three." *Id*. at 13 (brackets removed).

the achievement of a legitimate and substantial governmental purpose by mere assertion. . . .").

2. In the Second, Fourth, Seventh, and Tenth Circuits, exacting scrutiny is explicitly considered to be intermediate scrutiny. *Compare Real Truth About Abortion v. Fed. Election Comm'n*, 681 F.3d 544, 549 (4th Cir. 2012) ("Accordingly, an intermediate level of scrutiny known as 'exacting scrutiny' is the appropriate standard. . . ."); *Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014) ("Disclosure rules are reviewed under intermediate scrutiny, which though less rigorous than strict scrutiny, nonetheless requires close judicial review") (internal citations omitted); *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788, 793 (10th Cir. 2014) (quoting *Real Truth About Abortion v. Federal Election Commission* for the proposition that exacting scrutiny is an "intermediate level of scrutiny"); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 136 (2d Cir. 2014) (same).[22]

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[22] In addition, the Federal Election Commission appears to have adopted this view of exacting scrutiny. *See* Br. of Fed. Election Comm'n at 20, *Indep. Inst. v. Fed. Election Comm'n*, 816 F.3d 113 (D.C. Cir. 2016) ("The District Court Followed the Supreme Court's Application of Intermediate Scrutiny to the Challenged Disclosure Provisions") (capitalization altered for clarity); Br. of Fed. Election Comm'n at 21, *Free Speech v. Fed. Election Comm'n*, 720 F.3d 788 (10th Cir. 2014) ("Disclaimer and Disclosure Requirements Are Subject to Intermediate Scrutiny"), despite this Court's apparent rejection of that position in *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 218 (2014) ("Even when the Court is not applying strict scrutiny, we still require . . . a means narrowly tailored") (cleaned up).

3. In the Sixth, Eighth, and Eleventh Circuits, however, the courts have suggested that exacting scrutiny may rise to the level of strict scrutiny.[23] *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 413 (6th Cir. 2014) ("'Exacting scrutiny,' despite the name, does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may"); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) ("Though possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp") (citation and quotation marks omitted); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (en banc) ("Though *possibly* less rigorous than strict scrutiny, and requiring the government to use the least restrictive means to accomplish its compelling interests. . . .") (citations and quotation marks omitted) (emphasis supplied); *Iowa Right to Life, Inc. v. Tooker*, 717 F.3d 576, 590 (8th Cir. 2013) (describing exacting scrutiny and strict scrutiny as separate tests, but leaving open the overall question as to whether strict scrutiny can apply to a disclosure statute); *Calzone*, at *11 (under exacting scrutiny, the State's "burden is to show, *at a minimum*, that the law has a substantial relationship

[23] Members of this Court have suggested this may be the case. *Williams-Yulee*, 575 U.S. at 442-44 (Roberts, C.J., controlling op.) ("using "strict scrutiny" and "exacting scrutiny" interchangeably); *id.* at 457-58 (Ginsburg, J., concurring) ("I would not apply exacting scrutiny. . . ."); *id.* at 464 (Scalia, J., dissenting) ("We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny. . . . Canon 7C(1) fails exacting scrutiny and infringes the First Amendment").

to a sufficiently important governmental interest") (cleaned up, emphasis supplied).[24]

4. The First, Third, and Fifth Circuits, however, have treated exacting scrutiny as a special standard standing apart from "the familiar tiers of scrutiny." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Rev.*, 460 U.S. 575, 585 n.7 (1983); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 56-57 (1st Cir. 2011) (" . . . we will consider a law constitutional under exacting scrutiny standards where there is a substantial relation between the law and a sufficiently important governmental interest") (citations and quotation marks

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[24] Before this Court's decision in *Citizens United v. Federal Election Commission*, this was a more common opinion among the circuits. *Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) ("The strict or exacting scrutiny standard requires that a state must show the regulation in question is substantially related to a compelling government interest and is narrowly tailored to achieve that end") (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984) (under exacting scrutiny, "the government must demonstrate that the means chosen to further its compelling interest are those least restrictive of freedom of belief and association") (citation and quotation marks omitted); *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 (5th Cir. 1980) ("Even when related to an overriding, legitimate state purpose, statutory disclosure requirements will survive this exacting scrutiny only if drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than is absolutely necessary"); *Nat'l Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521, 1528 (10th Cir. 1994) ("To overcome the deterrent effect on association rights resulting from compelled disclosure of membership lists, the government must demonstrate a compelling interest and a substantial relationship between the material sought and legitimate governmental goals") (emphasis removed).

omitted); *Del. Strong Families v. Att'y Gen. of Del.*, 793 F.3d 304, 309 (3d Cir. 2015) ("[E]xacting scrutiny . . . is a heightened level of scrutiny, which accounts for the general interest in associational privacy by requiring a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (citations and quotation marks omitted); *Justice v. Hosemann*, 771 F.3d 285, 297 (5th Cir. 2014) ("[E]xacting scrutiny . . . means that the government must show a sufficiently important governmental interest that bears a substantial relation to the requirement") (citation and quotation marks omitted).

5. This confusion is understandable. Any of these circuits can justify their approach by pointing to a decision of this Court.

Exacting scrutiny used to be strict scrutiny. As discussed *supra*, in *Buckley v. Valeo*, exacting scrutiny was described as the "strict test established by *NAACP vs. Alabama*," 424 U.S. at 66, which in turn applied "'the closest scrutiny.'" *Id*. at 25 (quoting *NAACP*, 357 U.S. at 461). That same Term, "[i]n *Elrod v. Burns*, [427 U.S. 347 (1976)] Justice Brennan set forth principles governing First Amendment analysis." *Spencer v. Herdesty*, 571 F. Supp. 444, 452 (S.D. Ohio 1983). Justice Brennan's characterization of exacting scrutiny is worth quoting at length:

> [E]xacting scrutiny . . . is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the

> government's conduct. Thus, encroachment *cannot be justified upon a mere showing* of a legitimate state interest. The interest advanced *must be paramount, one of vital importance*, and the burden is on the government to show the existence of such an interest. . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end. The gain to the subordinating interest provided by the means must outweigh the incurred loss of protected rights, and the government *must employ means closely drawn* to avoid unnecessary abridgment.

Elrod, 427 U.S. at 362-63 (Brennan, J., plurality op.) (cleaned up, emphasis supplied).[25]

Justice Brennan's standard is clearly strict scrutiny, albeit a wordier version than the one presently employed by this Court. Today, strict scrutiny "'requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (quoting *Bennett*, 564 U.S. at 734 (2011)). Yet, while it was clear in 1976 that the "strict test established by *NAACP vs. Alabama*," *Buckley*, 424 U.S. at 66, was "strict" after all, subsequent opinions by this Court have suggested otherwise.

In *Citizens United*, the Court indicated that strict scrutiny and exacting scrutiny were two different forms of review—as it expressly applied "strict

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[25] *Cf. Library of Congress*, 750 F.2d at 94 (applying *Elrod*'s version of exacting scrutiny).

scrutiny" to the federal ban on corporate electioneering communications, 558 U.S. at 340, and what it termed "exacting scrutiny" to that law's attending disclosure provisions. *Id*. at 366-67.

Yet, just four years later in *McCutcheon v. Federal Election Commission*, the Court described exacting scrutiny as classic strict scrutiny, notwithstanding *Citizens United*. 572 U.S. at 197 ("Under 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"); *Calzone* at *17, n.9 (Grasz, J., concurring) ("And the Supreme Court's recent articulation of the exacting scrutiny standard suggests it is not far from strict scrutiny") (citing *McCutcheon*, 572 U.S. at 197).

Worse still, the Court has also described exacting scrutiny in language that mirrors, almost precisely, the standard for intermediate scrutiny. *Compare Doe v. Reed*, 561 U.S. 186, 196 (2010) (exacting scrutiny in the compelled disclosure context "'requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest'") (quoting *Citizens United*, 558 U.S. at 366-67) *with Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective").

Yet, at other times, this Court has suggested that exacting scrutiny is less a fixed standard than a sliding scale. *Shrink Mo. Gov't PAC*, 528 U.S. at 391 ("The

quantum of empirical evidence needed to satisfy heightened judicial scrutiny . . . will vary up or down with the novelty and plausibility of the justification raised"). [26]

Just this month, Judge Wilkinson of the Fourth Circuit acknowledged the difficulty of applying the exacting scrutiny standard, lamenting that "First Amendment analyses can get bogged down in terminology and tier-chasing." *Wash. Post v. McManus*, No. 19-1132, 2019 U.S. App. LEXIS 36245, at *35 (4th Cir. Dec. 6, 2019). Only this Court is empowered to set the record straight. *See Riddle v. Hickenlooper*, 742 F.3d 922, 930 (10th Cir. 2014) (Gorsuch, J., concurring) ("I confess some uncertainty about the level of scrutiny the Supreme Court wishes us to apply. . . ."). It should do so.

IV. This Case Is An Excellent Vehicle To Answer These Questions.

This case is an ideal vehicle to sort out the contours of First Amendment disclosure doctrine.

The Ninth Circuit committed purely legal errors, both in finding that compelled disclosure was not a First Amendment injury and in applying an extraordinarily deferential form of scrutiny to the law itself. And because the case was resolved on a motion to dismiss,

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[26] If exacting scrutiny is a sliding scale, then who is to say that the Ninth Circuit cannot bend exacting scrutiny into rational basis review?

there is no need for the Court to parse a substantial record while insisting that lower courts apply a particular standard in this and future cases. Accordingly, this case presents a clean opportunity to resolve these important national questions regarding the scope of a constitutional right that "lies at the foundation of a free society." *Shelton*, 364 U.S. at 486.

CONCLUSION

This Court once instructed that governmental "action which may have the effect of curtailing the freedom to associate [must be] subject to the closest scrutiny." *NAACP*, 357 U.S. at 460-61. The writ should be granted so this Court may reaffirm that ruling, quiet dissent among the circuits, and provide clear guidance to the lower courts and those whose causes they judge. *Id*.

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Respectfully submitted,

ALAN GURA
GURA PLLC
916 Prince Street, Ste. 107
Alexandria, Virginia 22314
P: (703) 835-9085
alan@gurapllc.com

ALLEN DICKERSON
Counsel of Record
ZAC MORGAN
INSTITUTE FOR FREE SPEECH
124 S. West Street, Ste. 201
Alexandria, Virginia 22314
P: (703) 894-6800
adickerson@ifs.org

Counsel for Petitioner