No. 16-743

In The
Supreme Court of the United States

INDEPENDENCE INSTITUTE,

Appellant,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF THE PHILANTHROPY ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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QUESTION PRESENTED

Whether Congress may require organizations engaged in the genuine discussion of policy issues, unconnected to any campaign for office, to report to the Federal Election Commission, and publicly disclose their donors, pursuant to the Bipartisan Campaign Reform Act of 2002.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Philanthropy Roundtable is a leading network of charitable donors. Its 650 members include individual philanthropists, family foundations, and other private grantmaking institutions. *Amicus*'s mission is to foster excellence in philanthropy, to protect philanthropic freedom, to assist donors in achieving their philanthropic intent, and to help donors advance liberty, opportunity, and personal responsibility in the United States and abroad.

Amicus seeks to advance the principles and preserve the rights of private giving, including the freedom of individuals and private organizations to determine how and where to direct charitable assets—while also seeking to reduce or eliminate government regulation that would diminish private giving or limit the diversity of charitable causes Americans support.

As an organization whose members include individual charitable donors and private grantmaking institutions, *amicus* has a substantial interest in the outcome of this case, which implicates not only donor privacy, but also donor freedom to choose which organizations and causes to support.

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for appellant and appellee were timely notified of and consented to the filing of this *amicus* brief.

While many donors are happy to see their contributions publicized, a sizable number will not give unless they can keep their donations confidential. Their reasons are many and varied. Some follow the teachings of the 12th-century Jewish theologian Maimonides, who believed that the second highest form of giving was "to give to the poor without knowing to whom one gives, and without the recipient knowing from whom he received." Others take their lead from the Gospel of Matthew, where Jesus taught that "when you give to the needy, sound no trumpet before you" and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." Still others wish to shield their families or businesses from unwanted and potentially dangerous publicity, or to avoid being bombarded with unwelcome solicitations. And some want the freedom to support controversial issues without fear of reprisal or ostracism. Given these important concerns—each of which is implicated by the district court's decision in this case—*amicus* respectfully requests that jurisdiction be noted and the judgment reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

Privately funded efforts to solve social problems, enrich culture, and strengthen society are among the most significant American undertakings, and have been for hundreds of years. The United States is now among the most generous nations in the world when it

comes to charitable giving, with gifts by individuals (including bequests) totaling nearly $373 billion in 2015—a record-breaking sum. *Giving USA: 2015 Was America's Most-Generous Year Ever*, Giving USA (June 13, 2016), https://givingusa.org/giving-usa-2016/ (citing LILLY FAMILY SCHOOL OF PHILANTHROPY, INDIANA UNIVERSITY—PURDUE UNIVERSITY AT INDIANAPOLIS, GIVING USA 2015: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2015 (2016)). Over one million nonprofit organizations benefited from those donations, including religious organizations, schools, hospitals, foundations, food pantries, and homeless shelters. *Ibid.*

America's culture of charitable giving has flourished because its legal framework—including the individual deduction for charitable donations and the income tax exemption for charitable organizations—marks a critically important boundary between government and civil society. Traditionally included within the protection of this framework are non-profit groups whose purpose is to speak on issues of public importance. And even those charities that do not have issue-advocacy as a primary purpose may likely wish to speak from time to time on public policy concerns related to their mission—say, for example, a food bank that wishes to speak out on the subject of federal Supplemental Nutrition Assistance Program (SNAP) benefits. While this Court held in *Buckley* v. *Valeo*, 424 U.S. 1, 44 (1976), that the government may demand information about an organization's donors if the group exists for the primary purpose of electing or defeating candidates for public office, this expansion of state

power should not include groups that merely seek to inform or persuade the public on issues—the realm of many 501(c)(3) organizations.

This is true even if the 501(c)(3) mentions a particular public office holder or candidate in the course of highlighting its cause to the general public. After all, the organization—as a condition of its tax-deductible gifts—cannot engage in political advocacy for a particular candidate. The IRS can strip tax-exempt status from 501(c)(3)s that violate the prohibition on campaign activity. There is, therefore, no need to apply the disclosure requirement of the Bipartisan Campaign Reform Act (McCain-Feingold) to 501(c)(3)s, and doing so prevents those groups from engaging in speech that should be protected. To hold otherwise runs afoul of this Court's precedent and contrary to the associational rights of organizations and the donors or members that comprise them. See *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

In *NAACP* v. *Alabama*, this Court unanimously ruled 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." *Ibid.* The Court therefore held that the State of Alabama could not compel the NAACP to reveal the names and addresses of its members because doing so would expose its supporters "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" and thereby restrain "their right to freedom of association." *Id.* at 462. This case implicates the

same concerns—and the same vital interests are at stake.

Most important is that many donors will not give unless they can keep their donations confidential. Many donors, for example, give anonymously out of deeply held religious convictions. Some do so to live a more private life and avoid broadcasting their wealth to the world. Others do so for the same reasons articulated by this Court in *NAACP* v. *Alabama*—to avoid "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" associated with supporting unpopular or controversial causes. *Ibid.* And still more—the majority, in fact—do so to avoid unwanted solicitations by other organizations to which they would rather not contribute. Forced disclosure of donor names threatens serious unintended consequences for individual donors and non-profit organizations across the nation.

This Court should note probable jurisdiction to restore the critical boundary between government and non-profits, and to avoid the harmful consequences that are likely to flow if the district court's decision is permitted to stand—*i.e.*, chilling activity that is stringently protected by the Constitution and exceedingly important to American civil society.

ARGUMENT

I. The Forced Disclosure Of Non-Profit Donor Names Implicates Serious Constitutional And Practical Concerns.

The disclosure of donor names compelled by the government here is not only contrary to this Court's teaching on genuine "issue" speech, see Jur. Statement 10-23, but also harmful to a significant component of charitable giving—donor anonymity. The intrusion into individuals' charitable giving has both constitutional dimensions—by unnecessarily impinging on the freedom of religion, speech, and association—and serious practical implications.

Donors may have any number of legitimate reasons for desiring to remain anonymous—including motivations that implicate deeply held moral or religious beliefs. For example, Jewish donors may request anonymity according to Maimonides's teaching that the second highest form of tzedakah ("charity" or "righteousness") is to give anonymously to an unknown recipient, and the third highest is to give anonymously to a known recipient. See, e.g., JULIE SALAMON, RAMBAM'S LADDER: A MEDITATION ON GENEROSITY AND WHY IT IS NECESSARY TO GIVE 6-7, 109-26, 127-46 (2003). Christian donors may request anonymity consistent with Matthew's admonition that "when you give to the needy, do not announce it with trumpets" and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." *Matthew* 6:2. Muslims have a similar concept, called sadaqah. Qur'an, *Surat Al-Baqarah* 2:271 ("If ye disclose (acts

of) charity, even so it is well, but if ye conceal them, and make them reach those (really) in need, that is best for you."). And Hindu donors may choose to give an anonymous gift, or *gupt dān*, as an act of both self-renunciation and generosity. See ERICA BORNSTEIN, DISQUIETING GIFTS: HUMANITARIANISM IN NEW DELHI 26-27 (2012).

Donors may also prefer to give anonymously for the same important reasons articulated by this Court in *NAACP* v. *Alabama*—to avoid the threat of public censure, condemnation, and even physical harm to themselves and their families that can be associated with giving to unpopular or controversial causes. This Court ruled in that case that the Fourteenth Amendment protected the NAACP's right to keep its membership list confidential. Revealing that information, the Court warned, "[was] likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *NAACP* v. *Alabama*, 357 U.S. at 462-63. And as the Court recognized long before, under our Constitution the government cannot direct private associations to implement the government's preferred policies. *Trs. of Dartmouth Coll.* v. *Woodward*, 17 U.S. 518, 660 (1819) (rejecting attempt by the State of New Hampshire to seize control of Dartmouth College, a private university established by charitable contributions).

Indeed, there are strong historical reasons for protecting donor privacy and freedom—both for the donors' sake as well as the public good. When President

Andrew Jackson was inflamed by abolitionist successes, for example, he tried to use postmasters to expose abolitionist sympathizers to public ridicule, pressure, and threats. See Jennifer Rose Mercieca, *The Culture of Honor: How Slaveholders Responded to the Abolitionist Mail Crisis of 1835*, 10 RHETORIC & PUBLIC AFFAIRS 51, 66 (2007).

And the history of philanthropy in America is rich with examples of individuals and organizations acting where government has refused to act, or in ways the government simply does not like. It was charitable giving by individuals that educated Native Americans at Dartmouth and Hamilton colleges; that set up thousands of schools for African-Americans during the Jim Crow era; and that eliminated hookworm in the United States when some state governments refused to acknowledge that the parasites were endemic among their residents. See Alexander Reid, *Renegotiating the Charitable Deduction*, 71 TAX ANALYSTS 21, 27 (2013).

In addition to exercising their freedom of religion, speech, and association, donors may also choose to give anonymously for important practical reasons. For example, during times of economic recession, anonymous giving increases significantly as donors "who have suffered little, or even prospered, during the downturn" may not want to appear insensitive to the plights of others less fortunate. Ben Gose, *Anonymous Giving Gains in Popularity as the Recession Deepens*, THE CHRONICLE OF PHILANTHROPY (Apr. 30, 2009), https://philanthropy.com/article/Anonymous-Giving-Gains-in/162627. During the recent severe downturn, for instance, the North

Texas Food Bank—which distributes food to charities in 13 counties—received its first-ever $1 million gift in December 2009 from a woman who asked to remain anonymous. *Ibid.* "'She said she would not have been able to look herself in the mirror over the holidays had she not made the gift,'" the food bank's chief executive was quoted as saying about the anonymous donor. *Ibid.*

Donors may also choose to give anonymously out of concern that the identity of the donor might overshadow the efforts of the charity. See, e.g., Claire Cain Miller, *Laurene Powell Jobs and Anonymous Giving in Silicon Valley*, NY TIMES, BITS (May 24, 2013, 8:05 AM), http://bits.blogs.nytimes.com/2013/05/24/laurene-powell-jobs-and-anonymous-giving-in-silicon-valley/?_r=0 (quoting Ms. Powell Jobs, the widow of Apple founder Steve Jobs, as saying "[w]e're really careful about amplifying the great work of others in every way that we can, and we don't like attaching our names to things").

Anonymity also may encourage giving by donors who might otherwise be uncomfortable making a public showing of wealth and who desire to lead a more private life. Chuck Feeney, for example, donated nearly his entire fortune of around $4 billion anonymously. See CONOR O'CLERY, THE BILLIONAIRE WHO WASN'T 327-28 (2007). As Feeney has explained, "'I had one idea that never changed in my mind—that you should use your wealth to help people. I try to live a normal life, the way I grew up * * * * I set out to work hard, not to get rich." *Id.* at 324. In fact, Feeney did not reveal his billion-dollar philanthropy until years later,

and then only reluctantly, when the release of documents associated with a business transaction would likely have disclosed his donations. *Ibid.*

And, of course, giving anonymously protects donors from unwanted solicitations from organizations to which they would rather not donate. A study by the Center on Philanthropy at Indiana University identified the desire to minimize solicitations from other organizations as the most frequently cited motivation for giving anonymously (followed by "deeply felt religious conviction," and next by "a sense of privacy, humility, [or] modesty"). ELEANOR T. CICERCHI & AMY WESKEMA, SURVEY ON ANONYMOUS GIVING, CENTER ON PHILANTHROPY, INDIANA UNIVERSITY—PURDUE UNIVERSITY AT INDIANAPOLIS 9-10 (1991); see also U.S. TRUST & INDIANA UNIVERSITY LILLY FAMILY SCHOOL OF PHILANTHROPY, 2016 U.S. TRUST STUDY OF HIGH NET WORTH PHILANTHROPY REPORT 40 (Oct. 2016), http://www.ustrust.com/publish/content/application/pdf/GWMOL/USTp_ARMCGDN7_oct_2017.pdf (noting that 83 percent of high net-worth donors consider privacy and anonymity important in their giving).

The decision to give anonymously usually reflects a number of motivations. One prominent example is the establishment of a New York City charity to aid immigrants in the late nineteenth and early twentieth centuries. See Susan Hertog, *Partners Against Misery* 25, PHILANTHROPY (Fall 2016), http://www.philanthropyroundtable.org/file_uploads/PHIL_FALL16_24.pdf. Philanthropist Jacob Schiff—one of America's most successful financiers—formed an alliance with Lillian

Wald, a debutante turned nurse, to provide home health solutions to families living in egregious conditions in the City's tenements. Schiff's support was anonymous both because of his religious convictions, which were tied to the teachings of Maimonides, and the social and legal constraints of the time that discouraged men from entering into partnerships with women. See *id.* at 24-26. Although Schiff's partnership with Wald and his financial support were unknown until decades after their deaths, "the work he made possible was admired across the country * * * and Wald was held in broad esteem." *Id.* at 27-28. The financial platform Schiff provided enabled Wald to command the attention of male politicians and leaders who normally would not have listened to a woman. *Ibid.* "Cutting through the complex social and political diversity * * *, their partnership remains an enduring paradigm for effective private philanthropy." *Id.* at 28.

Of course, many donors choose to give publicly for similarly compelling reasons. See, e.g., GIVING WELL: THE ETHICS OF PHILANTHROPY 202-17 (Patricia Illingworth et al. eds., 2011) (explaining that public giving helps create a culture of giving); see also Paul G. Schervish, *The sound of one hand clapping: the case for and against anonymous giving*, 5 VOLUNTAS: INT'L J. OF VOLUNTARY & NONPROFIT ORGS. 1, 3 (1994) (noting that donors recognize reasons both for and against anonymous giving). But that is precisely the point—it is a choice for *donors* to make.

And the freedom enjoyed by private individuals and associations in giving for public benefit has been a

hallmark of American civil society since the Founding. Writing in 1831, Tocqueville observed that "[t]here is nothing, in my opinion, that merits our attention more than the intellectual and moral associations of America." ALEXIS DE TOCQUEVILLE, 3 DEMOCRACY IN AMERICA 902 (1840). Rather than wait for government to act in the public interest, Americans have long created nonprofit associations to act in furtherance of those interests. "In democratic countries," Tocqueville wrote, "the science of association is the mother science; the progress of all the rest depends upon its progress," he concluded. *Ibid.*

Today, through charitable contributions, Americans exercise some of their most cherished constitutionally protected rights—creating organizations that engage in freedom of speech, freedom of association, and freedom of religion. In this way, charitable giving is not just a "sweetener" of our quality of life. It is, as Tocqueville saw, fundamental not only to our civil society but also to our republican form of government. Just as the principles of federalism constrain the federal government's power to tax the states and the states' power to tax the federal government, so too do the individual freedoms of speech, association, and religion that the Constitution guarantees to Americans constrain government's unwarranted intrusion into charitable giving without a compelling interest and narrow tailoring.

If the district court's decision is permitted to stand, it will needlessly erode donor freedom and privacy, and

thereby put an important component of charitable giving at serious risk. Additionally, a dangerous precedent will be set for government intrusion into charitable organizations across the board.

This can be seen by examining the tax deduction. Charitable gifts are not consumption because the donor receives nothing in return for the gift; such gifts are therefore excluded from the economic definition of income. See William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 365-66 (1972) (noting that the charitable-contribution deduction is necessary to ensure accurate measurement of a donor's income). But the deduction does not exist to "subsidize" philanthropy, though its good effects are many—rather, it exists to shield private donations from government interference (through taxation) with individual choices about how best to further the public interest. See John E. Tyler III, *So Much More Than Money: How Pursuit of Happiness and Blessings of Liberty Enable and Connect Entrepreneurship and Philanthropy*, 12 INT'L REV. OF ENTREPRENEURSHIP 51, 68-74 (2014); Reid, *Renegotiating the Charitable Deduction*, *supra*, at 27.

So too with donor confidentiality, which, as this Court recognized in *NAACP* v. *Alabama*, similarly protects individuals from government overreach and interference with the exercise of constitutional rights. The ability to give anonymously—much like the ability to vote anonymously—serves as an important check on government power. The government's claim of entitlement to donor identities thus implicates the same

fundamental concerns articulated in *NAACP* v. *Alabama*, and this Court's jurisdiction is needed to keep government within its proper bounds, protect donor freedom and privacy, and prevent further unwarranted incursions into private charitable giving that will chill the exercise of First Amendment freedoms and upset long-settled donor expectations of privacy and confidentiality.

II. Breaching Donor Anonymity For 501(c)(3) Organizations Is Unconstitutionally Overbroad.

As the jurisdictional statement explains (at 23-35), the government has failed to articulate a reason for the disclosure of donor names that matches the interest at stake here. In the absence of a compelling interest and the least restrictive means of accomplishing that interest, no government agency should compel a non-profit organization to identify its donors.

Amicus recognizes the government's legitimate interest in allowing the IRS to identify substantial contributors to certain non-profits on a confidential basis through limited disclosure requirements, using these transparency measures to help prevent donors from claiming fraudulent deductions, protect charities against self-dealing, and ensure that charitable grants support genuinely charitable organizations. Donor names, for instance, are required to ensure compliance with discrete, technical provisions of the Internal Revenue Code. This is a far cry, however, from applying

McCain-Feingold to 501(c)(3) organizations seeking only to speak on genuine public issues, treating those organizations as if they were campaigns or PACs. Cf. *FEC* v. *Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007) (Roberts, C.J., controlling opinion) (upholding as-applied challenge to McCain-Feingold criminal provision that sought to prevent electioneering advertisements made within a certain time before an election because the ads at issue were "issue advocacy" and not the "'functional equivalent' of express campaign speech"); *McConnell* v. *FEC*, 540 U.S. 93, 206 n.88 (2003) ("[W]e assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads.").

Indeed, under the decision below, a non-profit focused on free-speech rights would have been subject to disclosure if, in 2016 when Senators McCain and Feingold were running for office, the non-profit simply communicated with the public in Arizona or Wisconsin regarding the McCain-Feingold Act and its impact on free speech, or if the non-profit merely used the term "McCain-Feingold"— even if the communication were otherwise utterly devoid of anything that might be construed as connected to the election.

The government overreach here is not only impermissible, but also unnecessary. As a 501(c)(3) organization, Independence Institute—unlike a campaign or a PAC—cannot engage in political campaign advocacy. See Jur. Statement at 33-35. While a 501(c)(3) could misuse its privilege and advocate directly for the election or defeat of a political candidate for office, that

would be punishable by the IRS. If the organization is not engaged in such activity, there would be no point for the McCain-Feingold disclosure. Forcing groups such as the Independence Institute to disclose donors to the FEC—and therefore to the public at large—is thus unnecessary and cannot survive the appropriate level of scrutiny under this Court's precedent.

Because the district court failed to apply that level of scrutiny properly, and because that failure has serious practice implications for charitable giving throughout the country, this Court's jurisdiction is needed now to prevent government overreach, protect donor privacy, and preclude the chilling of First Amendment rights.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the District Court.

Respectfully submitted,

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