NOS. 19-251, 19-255

In The
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
v.
XAVIER BECERRA, California Attorney General,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
XAVIER BECERRA, California Attorney General,
Respondent.

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

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Did the court of appeals err in applying this Court's campaign finance precedents to as-applied challenges in a context lacking any connection to electoral advocacy?

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Free Speech is a nonpartisan, nonprofit organization that works to defend the rights to free speech, assembly, press, and petition. Over the last decade, the Institute has represented individuals and civil society groups in cases at the intersection of political regulation and First Amendment liberties. *Amicus* has refused to comply with the Attorney General's Schedule B disclosure regime and has ceased soliciting charitable contributions within California. The Institute will be filing a petition for writ of *certiorari* next month, arguing that the Attorney General's program is facially unconstitutional.

SUMMARY OF THE ARGUMENT

The First Amendment protects the right of all Americans to "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). This Court has issued ruling after ruling re-affirming that cardinal principle, repeatedly striking down donor disclosure regimes.

There is one limited exception: in the context of money given and spent on political campaign advocacy, some donor disclosure has been found constitutional. The Ninth Circuit, however, has

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, financially contribute to preparing or submitting this brief. All Parties have consented to the filing of this brief.

messily grafted that narrow exception onto the Attorney General's dragnet demand for the major donors to all federally-registered nonprofit organizations operating in California. *Certiorari* should be granted so that this Court may return its campaign finance precedents to their proper context and restore the general rule that the compelled disclosure of donors to nonprofit organizations can rarely be squared with the First Amendment.

ARGUMENT

I. *Certiorari* Should Be Granted So The Court Can Clarify That Its Campaign Finance Jurisprudence Is Limited To Campaign Finance Cases.

This case is not a campaign finance case. But it cannot be understood independently of this Court's campaign finance jurisprudence, which the Ninth Circuit relied upon below. Am. for Prosperity Found. App. 23a, 24a, 28a, 30a. Those decisions, however, were fashioned to address the unique concerns posed by American electioneering, and are a poor fit for the regulatory oversight of donations to charities and civil society groups.

A. This Court's campaign finance decisions concerning donor disclosure are a narrowly-drawn exception to this Court's longstanding and unwavering defense of the First Amendment right to associational privacy.

Campaign finance statutes, and the rulings of this Court interpreting them, are relatively recent innovations. For most of the nation's history, regulation of political spending was modest, and judicial review often proceeded without reliance on the First Amendment. *Newberry v. United States*, 256 U.S. 232 (1921); *Burroughs v. United States*, 290 U.S. 534 (1934); *United States v. Classic*, 313 U.S. 299 (1941).

It was not until the 1970s, in the aftermath of the Watergate scandal, that Congress enacted a comprehensive regime of contribution and expenditure limits, registration requirements, donor disclosure, and—to oversee this vast federal apparatus—a "[u]nique" body "among federal administrative agencies, the Federal Election Commission," which "has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak[,] and associate for political purposes.'" *Am. Fed'n of Labor-Congress of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)).

In 1976, the Court reviewed this statutory structure under the First Amendment. That case, *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*),

remains 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); *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 485 (2007) (Scalia, J., concurring op.) ("I begin with the seminal case of *Buckley v. Valeo*"). It was also the precedent the court of appeals regularly relied upon below.

While *Buckley* kept some of the structure of Congress's speech and association regulations intact, it clipped the wings of federal authority and laid down a series of standards for judicial review of future efforts to regulate the giving and spending of money in contested political campaigns. 424 U.S. at 24-25, 64-65, 79-81. Of particular importance here, the *Buckley* Court carved out a narrow exception to the general rule that forced disclosure of donor or membership data to the government, regardless of whether that information is later made public, must survive the "closest scrutiny." *NAACP*, 357 U.S. at 461.

This general doctrine protecting Americans' right "to pursue their lawful private interests privately and to associate freely with others in so doing," *id.* at 466, is longstanding. While the contexts varied, this Court's precedents consistently preserved the freedom to associate in private for public purposes.

The Court has protected associational privacy whether disclosure was public or not: It has voided a production order requiring financial supporters to be produced to a government in discovery, *id.*, struck down an effort to force similar disclosure in a legislative proceeding, *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963), and

facially prohibited the private disclosure of associational information directly to the state as a condition of employment. *Shelton v. Tucker*, 364 U.S. 479 (1960). And the Court has protected associational privacy regardless of whether there was evidence of threats or reprisals: it has both invalidated a Los Angeles ordinance requiring financial disclosures on the face of written materials despite "neither allegation nor proof that…any group sponsoring [the petitioner] would suffer economic reprisal, loss of employment, threat of physical coercion or other manifestations of public hostility," *Talley v. Calif.*, 362 U.S. 60, 69 (1960) (Clark, J., dissenting) (citation and brackets omitted), and ruled against a donor disclosure regime enacted by the City of Little Rock that served as a targeted attack on the NAACP. *Bates v. City of Little Rock*, 361 U.S. 516 (1959).

In sum, before *Buckley*, the Court had repeatedly affirmed the constitutional principle of associational liberty and held that "all legitimate organizations are the beneficiaries of [its] protections." *Gibson*, 372 U.S. at 556; *cf. Cousins v. Wigoda*, 419 U.S. 477, 489 (1975) (striking down "abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association"); *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 to or

contribute to the organization"). *Buckley* did not disturb those rulings.[2]

Rather, the *Buckley* Court accepted limited donor disclosure in the campaign context only after it was presented with a substantial record that suggested that such disclosure was essential to preventing official corruption and providing the electorate with information about the financial constituencies of candidates for office, so that voters could use this information when casting ballots. *Buckley*, 424 U.S at 79-81. Specifically, the Court limited disclosure to organizations whose major purpose is electoral advocacy, and the direct funders of activity that is "unambiguously campaign related." *Id*. at 81.

Furthermore, the Court explained that these donor disclosure regimes were aimed, in part, at fighting the danger of *quid pro quo* corruption presented when large sums of money are secretly given to candidates and parties. This risk is *sui generis*, grounded in the specific fear that officeholders will sell public acts for private gain. *Buckley*, 424 U.S. at 27, n.28; *Buckley*, 519 F.2d at 838 ("Contributions to both parties were made in 1972 by

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[2] In fact, acting on those precedents, the D.C. Circuit in the *Buckley* case facially struck a separate disclosure requirement that sought "to compel disclosure by groups that do no more than discuss issues of public importance on a wholly nonpartisan basis," reasoning that "the terms of th[at] statute inhibit the free and robust discussion of issues." *Buckley v. Valeo*, 519 F.2d 821, 832 (D.C. Cir. 1975) (*en banc*) (quotation marks omitted). The Government accepted that ruling and declined to seek review before this Court. *Buckley*, 424 U.S. at 10, n.7 ("No appeal has been taken from that holding"). Indeed, that portion of the D.C. Circuit opinion in *Buckley* remains good law today.

Gulf Oil (illegal contributions - to President Nixon, Senator Jackson, and Congressman Mills), and by American Milk Producers, Inc., a large dairy cooperative whose legal and illegal contributions were made to Nixon, Mills, and Humphrey") (parentheses in original);[3] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 129-132 (2003) (summarizing findings of the 1998 Senate Committee on Governmental Affairs into "elected officials' practice of granting special access in return for political contributions," such as "the courtesies extended to an international businessman named Roger Tamraz, who candidly acknowledged that his donations of about $300,000 to the DNC and to state parties were motivated by his interest in gaining the Federal Government's support for an oil-line project in the Caucasus").

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[3] During the period from April 1973 to August 1974 alone:

> a former Republican congressman from Pennsylvania was convicted of federal mail fraud, the president of the Newark city council pled guilty to income tax fraud, a sitting Democratic congressman from New York was indicted for helping a Mafia figure obtain government contracts, one Republican member of the Senate Watergate committee gave up re-election to fight an indictment for bribery, the mayor of Camden, New Jersey was indicted for corruption and perjury, the lieutenant governor of California was indicted for perjury.

David Frum, How We Got Here 29 (Basic Books 1st ed. 2000).

It is noteworthy that, despite this atmosphere, the *Buckley* Court painstakingly preserved as much untouched civic space as possible.

Thus, in those few cases where this Court has declared that limited forms of donor disclosure can be justified under the First Amendment, it tread carefully. Evidence was assembled, scrutinized, and found capable of clearing the bar of heightened judicial review—"[t]he strict test established by *NAACP vs. Alabama*." *Buckley*, 424 U.S. at 66.

B. This case demonstrates the dangers of grafting the unique work this Court has undertaken in the context of official corruption and public interest in elections onto different circumstances, and counsels in favor of cabining the Court's campaign finance jurisprudence.

Despite this Court's careful efforts to limit the First Amendment harm done by campaign finance statutes in *Buckley* and its progeny, the courts of appeal have not always been so attentive. *See, e.g., Del. Strong Families v. Denn*, 136 S. Ct. 2376, 2378 (2016) (Thomas, J., dissenting from denial of *certiorari*) ("Here, the Third Circuit's 'exacting scrutiny' analysis compared the finer details of the Disclosures Act with the federal disclosure requirements. Delaware's scheme as applied to Delaware Strong Families, however, bears little resemblance to the federal disclosure requirements that this Court has considered") (internal citation omitted).

Lax approaches to heightened judicial review are troubling enough when relegated to the campaign finance context. But, as this case demonstrates, the narrow exception to the First Amendment fashioned for the campaign finance cases has begun to leak into

other First Amendment matters. The Court ought to grant *certiorari* so that it may hold that outside of that limited context, the pre-*Buckley* presumption that donor disclosure regimes are unconstitutional still reigns.

Compared to those storied precedents, this case is an obvious outlier. California claims a right to compel donor disclosure under *Buckley* and its progeny, but fails to invoke any governmental interests that this Court has blessed in that context. There is no public informational interest at issue, as the Attorney General claims that he will keep the information confidential. Nor does the Attorney General argue that disclosure of donor lists will fight the corruption of the electoral process—federal law already makes it illegal for charities to intervene in political campaigns. 26 U.S.C. § 501(c)(3); *see also Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (upholding Congressional limitation on § 501(c)(3) spending).

The *Buckley* Court, by contrast, relied on an extensive record documenting the dangers Congress sought to avoid, and the ways in which the challenged law was tailored to that end. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) (describing the *Buckley* record) ("…we referred to a number of the abuses detailed in the Court of Appeals's decision, which described how corporations, well-financed interest groups, and rich individuals had made large contributions, some of which were illegal under existing law, others of which reached at least the verge of bribery") (citation and quotation marks omitted). Likewise, when this Court twice reviewed aspects of the Bipartisan Campaign Reform Act's donor disclosure requirements, it relied, in part, on an

"extensive record, which was 'over 100,000 pages' long" before upholding the statutory regime. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 332 (2010) (quoting *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 209 (D.D.C. 2003) (three-judge court)). That record reflected similar dangers to those posed in *Buckley*. *McConnell*, 540 U.S. at 129-132.

By contrast, not only has Respondent failed to assemble a record demonstrating the strength of the government's interests, it has failed to even articulate clearly what that interest is.[4] To the extent that the Attorney General has articulated a general interest in fighting fraud or self-inurement, he has not managed to demonstrate how his Schedule B disclosure regime is tailored to that end. Indeed, he could accomplish much of what he wishes by simply reviewing publicly available documents, such as the public Form 990 schedules that detail a charity's financial transactions. *See* Internal Revenue Service Form 990, Schs. J, L, M. These forms, which document, *inter alia*, funds paid to key employees, loans to interested persons, and the valuation of in-kind contributions, should provide more than enough information for the Attorney General to secure an administrative subpoena upon suspicion of wrongdoing. *Cf. City of Los Angeles v. Patel*, 576 U.S. __; 135 S. Ct. 2443 (2015); *Williams-Yulee v. The Fla. Bar*, 576 U.S. __; 135 S. Ct. 1656, 1664-1665 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest" because "[a]pplying a lesser

[4] Pointedly, it is the *Petitioners* who, by and large, assembled the relevant record here.

standard of scrutiny to such speech would threaten 'the exercise of rights so vital to the maintenance of democratic institutions'") (quoting *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 161 (1939) (brackets supplied)).

The Court should take the opportunity to explain that this approach to defending a First Amendment claim is insufficient, and that its campaign finance cases both relied upon particularly thorough records and required the government to prove that the particulars of its disclosure regime were proportional to a sufficiently important interest. Additionally, the Court should re-affirm that novel disclosure demands outside of the campaign finance context must survive the "closest scrutiny." *NAACP*, 357 U.S. at 461.

Had the court of appeals applied a sufficiently rigorous standard of review, the outcome likely would have been different. As the district court found, it appears as though Schedule B information is unnecessary to further the government's law enforcement interests. Ams. for Prosperity Found. Pet. 13 ("Indeed, less than 1% (5 out of 540) of the Attorney General's investigations of charities over the past ten years had even implicated Schedule B, and, even in those five investigations, the investigators were able to obtain the pertinent Schedule B information from other sources"). Under heightened judicial review, the Ninth Circuit should have struck the Schedule B disclosure regime once it was clear that the government's tailoring argument was all tip and no iceberg.

Instead, a relaxed review of the record has blessed the Attorney General's decision to archive the donor lists of every charity nationwide that raises

funds in California, chilling fundraising for charitable purposes throughout the largest and wealthiest state in the Union. *Amicus*, for instance, has ceased soliciting contributions in California rather than forfeit the privacy of its donors. Under the First Amendment, this is a decision that no charitable organization should be forced to make. Fundamental liberties should not be threatened absent a clear and vital reason, and California has not demonstrated that it has one.

CONCLUSION

For the foregoing reasons, the Court should grant the writ.

Respectfully submitted,

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