Nos. 19-251 & 19-255

# In The Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

*Petitioner,*

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

and

THOMAS MORE LAW CENTER,

*Petitioner,*

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

*Respondent.*

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

## BRIEF *AMICUS CURIAE* OF GOLDWATER INSTITUTE AND RIO GRANDE FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Whether forcing organizations that engage in non-electoral speech and association to turn over to the government confidential information about their donors triggers *exacting* scrutiny, as the Ninth Circuit found, or *strict* scrutiny, instead.

2. Whether such a disclosure mandate violates these organizations', and their donors', freedom of association and speech, facially or as applied.

3. Whether the Ninth Circuit appropriately applied the elements of whatever level of scrutiny applies, given the conceded existence of a chilling effect here.

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## IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Goldwater Institute ("GI") is a nonpartisan public policy and research foundation devoted to advancing the principles of limited government, individual freedom, and constitutional protections through litigation, research, policy briefings and advocacy. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are directly implicated.

Among GI's priorities is the protection of the privacy rights of those who donate to nonprofit research and advocacy groups. GI scholars have also published research on the free speech issues raised by donor-disclosure mandates like those at issue here. *See* Matt Miller, *Privacy and the Right to Advocate: Remembering NAACP v. Alabama and its First Amendment Legacy on the 60th Anniversary of the Case* (Goldwater Institute, 2018);[2] Jon Riches, *The Victims of "Dark Money" Disclosure: How Government Reporting Requirements Suppress Speech and Limit Charitable Giving* (Goldwater Institute, 2015).[3]

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[1] Pursuant to Supreme Court Rules 37.3(a) and 37.6, counsel for amici affirm that all parties have consented to the filing of this brief, that no counsel for any party authored it in whole or in part, and that no person or entity, other than amici, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

[2] https://goldwaterinstitute.org/wp-content/uploads/2018/01/naacp-1-16-2018-1.pdf.

[3] https://goldwaterinstitute.org/wp-content/uploads/2015/08/Dark-Money-paper.pdf.

GI has also litigated or participated as amicus curiae in courts around the nation to defend the rights of those who are forced to disclose their personal information to the government when they contribute money to policy think tanks or advocacy organizations. GI attorneys, for example, represent amicus Rio Grande Foundation in a case now pending before the Tenth Circuit, *Rio Grande Foundation v. City of Santa Fe*, No. 20-2022 (10th Cir. Feb. 27, 2020) (pending).

But the questions presented here are also central to GI's own operations. GI, like Petitioner, received a demand from the California Attorney General ordering it to disclose private information of its donors to the state as a condition of fundraising in California. GI has so far refused to comply, because it believes it owes its many supporters a duty to defend their constitutional right to confidentiality, as well as its own. As this Court declared in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." GI submits this brief in defense of that privacy both as a private interest essential to its work and as one of the constitutional freedoms it is pledged to protect.

The Rio Grande Foundation (RGF) is New Mexico's only think tank dedicated to free markets and individual liberty. Founded in 2000, the Foundation participates in state, local, and federal debates on policy matters relating to free markets, lower taxation, and limited government. It also appears as amicus curiae

in this and other courts in cases touching on matters related to these interests. *See*, *e.g.*, *Empress Casino Joliet Corp. v. Giannoulias*, 556 U.S. 1281 (2009); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *D.C. v. U.S. Dep't of Agric.*, 444 F. Supp. 3d 1 (D.D.C. 2020).

But RGF is also affected by anti-privacy mandates like those at issue here. It is currently the plaintiff in the case pending in the Tenth Circuit, to defend the rights of its own donors against the city of Santa Fe ordinance described in this brief. RGF therefore submits this brief in defense of the principle of constitutionally limited government which it is RGF's mission to defend, but also on behalf of itself and its own donors, who face harassment, intimidation, and threats as a result of donor disclosure requirements.

## SUMMARY OF ARGUMENT

The Petitioners are correct that strict scrutiny, not exacting scrutiny, applies here, because this case involves organizations not engaged in political campaigns, and therefore outside the boundaries of cases such as *Buckley v. Valeo*, 424 U.S. 1 (1976), or *Citizens United v. FEC*, 558 U.S. 310 (2010). Instead, they fall within the strict scrutiny rule of *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and the disclosure mandate here fails under strict scrutiny, because California has not attempted any tailoring of that mandate, and the court below expressly admitted that

there are less restrictive means. Thomas More's Pet. App. (App.) at 22–23.

But even assuming that exacting scrutiny does apply, the Ninth Circuit's application of exacting scrutiny was confusing, ambiguous, and self-contradictory, particularly with respect to the "interest" prong of the test. Under either strict *or* exacting scrutiny, the government must show something more than a merely "legitimate" interest—it must show a "strong" or "important" or "compelling" interest. *Buckley*, 424 U.S. at 64. Here, however, the government interest at issue is "'investigative efficiency,'" App. at 21a, which is only a "legitimate," not an "important" or "compelling" one. *See* below, Section I.A. That interest cannot logically satisfy either exacting or strict scrutiny. *Buckley*, 424 U.S. at 64 ("exacting scrutiny" "cannot be [satisfied] by a mere showing of some legitimate governmental interest.").

In addition to this "efficiency" interest, however, some prominent lawyers and activists have also argued that government should force nonprofit groups to disclose confidential information about their supporters based on the "informational interest." *See* below Section I.B. Outside the context of candidate elections, the informational interest is a problematic theory. In fact, forcing public disclosure of confidential information in an effort to educate the public is more likely to lead to bias and manipulation of the political process than to a better-informed electorate. This Court has countenanced the informational interest only in the context of *candidate* elections, *see*, *e.g.*, *Citizens United*,

558 U.S. at 913–14[4]—and it should take the opportunity of this case to make clear that it does not extend beyond that context.

Finally, the decision below erred in its analysis of the burden on Petitioners' speech. Chilling-effect analysis is *objective*—it does *not* require Petitioners to prove that they or their supporters were dissuaded from speaking, *Poole v. County of Otero*, 271 F.3d 955, 960 (10th Cir. 2001), only that a person of ordinary firmness would hesitate to speak under the circumstances. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1721 (2019). Yet the Court of Appeals—while simultaneously *admitting* that "some individuals who have or would support [Petitioners] may be deterred" from doing so due to the compulsory disclosure, App. at 30a (emphasis removed)—ruled that there was no First Amendment chill. And it ignored the objective analysis, and the longstanding principle that chill plaintiffs are not required to point to a specific example of self-censorship in order to prevail—concluding that the Petitioners "could not point to any contributor who had reduced or eliminated his or her support . . . due to the fear of disclosure." *Id.* at 29a. This confused and self-contradictory analysis conflicts with this Court's precedent and threatens the viability of free speech rights for advocacy organizations

[4] *Doe v. Reed*, 561 U.S. 186 (2010), declined to apply this interest in the context of initiative campaigns.

such as amici Goldwater Institute and Rio Grande Foundation.[5]

## ARGUMENT

### I. The government's interest in the personal identifying information of donors to organizations not engaged in direct political advocacy is minimal at best.

#### A. Administrative efficiency is a minimally legitimate government interest—not an important or compelling one.

The Court of Appeals held that exacting scrutiny applies. App. at 16a. That test requires: (1) a state interest that is either "compelling," *Janus v. AFSCME*, 138 S. Ct. 2448, 2465 (2018), or "'sufficiently important,'" *Reed*, 561 U.S. at 196 (citation omitted), and (2) tailoring, so that the law is either as narrow as

[5] The important consideration is whether the speech is controversial, not whether a court agrees with the viewpoint at issue. Yet the Ninth Circuit dismissed out of hand harassment directed against right leaning groups—for example, by claiming that the disclosure mandate at issue here is "a far cry from the broad and indiscriminate disclosure laws passed in the 1950s to harass and intimidate members of unpopular organizations." App. at 32a. Yet as the NAACP itself argued below in its amicus brief, the disclosure requirements in this case protect all groups that espouse controversial beliefs: "The Attorney General's position in this case, if adopted by this Court, would call well-established First Amendment protections into question and could substantially chill associational activities." Brief Amicus Curiae NAACP in Support of Appellants, *Americans for Prosperity v. Becerra*, 2017 WL 412295 at **1–2 (9th Cir., filed Jan. 27, 2017).

practicable, *Janus*, 138 S. Ct. at 2465, or is "'substantial[ly] relat[ed]'" to the government's interest. *Reed*, 561 U.S. at 196. The disclosure demand here fails both prongs of that test.[6]

The state asserts as its interest that obtaining this information helps it police nonprofit organizations—that is, it helps the state ensure that nonprofits are not engaged in malfeasance. App. at 19a. In other words, the demand serves the government's interest in "investigative efficiency." *Id*. at 21a.

But efficiency is not a sufficiently weighty government interest to justify compulsory disclosure. It is only a "legitimate" interest, not a "compelling" or "important" one.

Granted, this Court has never provided exact criteria for distinguishing between "compelling" interests and merely "legitimate" interests. *See* Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. Rev. 917, 932 (1988) ("Unfortunately,

[6] The disclosure demand also fails the second prong, because any fraud by these nonprofits would be committed by the *organizations*, not by the *donors* whose information the state has demanded. Nor can such a demand be reconciled with the general principle that the state cannot compel the delivery of information without first having reasonable suspicion of wrongdoing. *See Boyd v. United States*, 116 U.S. 616, 627–28 (1886). The state has no constitutional authority to demand that an organization turn over confidential information simply to assure itself that the law is being followed. Thus the demand is not sufficiently related to the asserted state interest and is insufficiently tailored. The Ninth Circuit erred when it held that exacting scrutiny does not require *any* tailoring.

while decisions of the Supreme Court and opinions of various members of the Court have frequently described or treated governmental interests as compelling, few have explained why."); *cf. Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest.' ").

But a "compelling" interest must by definition be significantly more important than a merely "legitimate" one. A legitimate interest is one that satisfies the minimal test of constitutional justification—that is, it is not irrational. An interest is *legitimate* as long as it is not corrupt, self-dealing, etc. *See*, *e.g.*, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) ("taking of property . . . for no reason other than to confer a private benefit on a particular private party . . . could not withstand the scrutiny of the public use requirement [because] it would serve no legitimate purpose of government.").

A substantial or compelling interest, by contrast, rises to a higher level than mere legitimacy. It is an interest sufficiently important to justify some (properly tailored) burden on constitutional interests that would be impermissible absent such importance. *See further* Roy G. Spece, Jr. & David Yokum, *Scrutinizing Strict Scrutiny*, 40 Vt. L. Rev. 285, 299–306 (2015) (discussing elements of "compellingness").

Simply put, the different categories of government interests are like concentric circles: all government interests must be *legitimate* (in order to satisfy

rational basis scrutiny); some legitimate purposes are also *important* (and thereby satisfy exacting scrutiny); some important interests also rise to the level of *compelling* (and thus satisfy strict scrutiny).

Courts have repeatedly recognized the efficiency interest as "legitimate," but not "compelling" or "important." That means it satisfies the minimum test of constitutionality, but does not rise to the level of significance required to allow a substantial infringement of liberty. In case after case, this Court has held that efficiency is a legitimate interest, but is not sufficient to justify an intrusion on significant constitutional rights, which requires a weightier interest. *See*, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) (characterizing "[t]he State's pocketbook interest" as legitimate but "unimpressive when measured against the stakes for the defendant."); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 647 (1974) ("[A]dministrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law."); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974) (administrative efficiency was insufficient interest to permit state to deny taxpayer-funded medical care to people who had not resided in the state for a year); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) ("'[A]dministrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (efficiency was insufficiently important to allow denial of welfare payments to people who failed a residency requirement); *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939) (prohibiting distribution

of handbills helps prevent fraud but violates free speech). *See also Nadeau v. Helgemoe*, 561 F.2d 411, 417 (1st Cir. 1977) ("[T]he denial of a fundamental right . . . cannot be justified by reference to cost or convenience.").

State courts have ruled likewise. *See In re Adoption of Y.E.F.*, Nos. 2019-0420, 2019-0421, 2020 WL 7501962 *7, ¶ 31 (Ohio Dec. 22, 2020) ("the state interest proffered by the attorney general—the 'responsible management of taxpayer funds'—is a legitimate state interest. But it is not a compelling interest." (citation omitted)); *In re S.A.J.B.*, 679 N.W.2d 645, 650 (Iowa 2004) ("a state's pecuniary interest . . . is legitimate but not *compelling*."); *In re Adoption of K.A.S.*, 499 N.W.2d 558, 565 (N.D. 1993) (state's "interest in its finances" is "legitimate" but "is not a compelling one"); *Mills v. Reynolds*, 837 P.2d 48, 54 (Wyo. 1992) (state's interests in efficiency and cost reduction are legitimate but not compelling); *Gould v. Grubb*, 14 Cal.3d 661, 675 (1975) (efficiency was insufficiently compelling to justify law that placed incumbents' names automatically at the top of the ballot).

The reason efficiency stands at the bottom tier of government interests is because it is a synonym for convenience or usefulness—meaning that it is entirely self-regarding on the part of the government. Something is "efficient" for the state if the state believes that that thing serves its *own* needs cost-effectively. The state's determination of mere efficiency does not include analysis of the needs of citizens, or of entities other than the government; nor does it include

consideration of other important social interests. *See*, *e.g.*, *Armour v. City of Indianapolis*, 566 U.S. 673, 682 (2012) (declining to return people's tax money was efficient because doing so would have been difficult for the government). On the other hand, *important* or *compelling* interests involve consideration of the rights or needs of individuals. National defense in wartime, for example, is a compelling interest because it involves protecting those whose care is the government's foremost responsibility. *See* Spece & Yokum, *supra* at 302–03 (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

As this Court has observed, "the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say [that] the Bill of Rights [was] . . . designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Something more than mere "efficiency" is required to justify an intrusion on such "fragile values" as free speech. *Id.*

It is undisputed here that the state's demand for this information intrudes on important First Amendment values. App. at 26a. That means a merely "legitimate" interest is *not* constitutionally adequate. *Buckley*, 424 U.S. at 64.

Yet the Court of Appeals' decision is rife with confusion about the weight of the government interest

here—confusion that led it to misapply the exacting scrutiny standard. For one thing, it alternately referred to the state's interest as "compelling," App. at 19a, "important," *id*. at 20a, and "strong," *id*. at 24a—even though it identified that interest as "'facilitat[ing] investigative efficiency,'" *id.* at 20a (citation omitted), which has never been placed that high on the hierarchy of government interests; it has always been viewed as a merely legitimate interest. *Armour*, 566 U.S. at 682. The Court of Appeals also purported to show that this interest was important or compelling by showing (based on speculation, extra-record evidence, and a violation of the rule of deference to the fact-finder[7]) that state officials find it convenient to have this information—information that it admitted the state can get through other channels. App. at 21a–22a. Yet this does not prove that the efficiency interest rises above the level of merely "legitimate."

For example, the court cited a statement to the effect that although the state could obtain the information through an audit, dong so "'is not the best use of [a state attorney's] limited resources'"; that using the audit process or issuing a subpoena would force the state's lawyers "'to wait extra days'" (although the court cited no reason to believe there was any urgency); and that state attorneys "found" the information

[7] *See* App. at 122a (Ikuta, J., dissenting from denial of reh'g en banc) ("As a general rule, appellate courts may not override the facts found by a district court unless they are clearly erroneous. . . . Here, the panel not only failed to defer to the district court, but reached factual conclusions that were unsupported by the record.").

"particularly useful." *Id*. at 22a–23a. But this language shows that the government interest at issue here is nothing so dramatic as the state's "compelling interest in enforcing its laws," *id*. at 79a—it is instead the mere convenience of demanding the information in *this* form instead of through other, more privacy-respecting channels that the state could also use.

Stripped of the rhetorical confusion found in the decision below, the state's interest here is nothing more than the efficiency interest—an interest that is "legitimate," but is not "important" or "compelling." Because both exacting scrutiny and strict scrutiny require something more substantial than a merely legitimate interest, the imposition on the Petitioners' First Amendment rights must, as a matter of logic, fail the constitutional test.

### B. The Court should take this opportunity to make clear that the "informational interest" does not apply.

Although the state has not asserted it here, recent cases involving disclosure mandates have also begun to rely on the so-called informational interest (i.e., educating the electorate) as justification for forcing organizations to publicize private information about their donors. This interest has been asserted not only in cases involving people running for office, but also in cases involving groups that take positions on ballot initiatives, including the case in which amici Goldwater Institute and Rio Grande Foundation are currently involved. *See*, *e.g.*, *Ctr. for Individual Freedom*

*v. Madigan*, 697 F.3d 464, 477–78 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 57 (1st Cir. 2011); *Rio Grande Found. v. City of Santa Fe*, 437 F. Supp. 3d 1051 (D.N.M. 2020). In a recent filing in this Court, several United States Senators complained that other amici curiae were "industry-tied" and "anonymous money groups" that ought to be forced to "disclose their funders" for just this reason. Brief Amicus Curiae of Sens. Sheldon Whitehouse, et al., *Cedar Point Nursery v. Hassid*, No. 20-107 (Feb. 12, 2021) at 11, 18. It is likely that if the anti-privacy mandate at issue here is upheld, states will expand their demands on the basis of this informational interest, too.

In fact, many attorneys and activists have already begun arguing that the informational interest justifies forcing nonprofits to publicize this confidential information even if they are not engaged in candidate advocacy. *See*, *e.g.*, Elizabeth Garrett, *Voting with Cues*, 37 U. Rich. L. Rev. 1011, 1040 (2003) (arguing that informational interest warrants forcing groups to disclose this information if they are engaged in speech "somehow related to a campaign or an election."); Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 Ga. L. Rev. 611 (2003) (advocating the rule that all tax-exempt "political organizations" be forced to disclose confidential donor information); *Note: The Political Activity of Think Tanks: The Case for Mandatory Contributor Disclosure*, 115 Harv. L. Rev. 1502, 1516 (2002) (arguing for forcing think tanks to disclose confidential donor information to serve the informational interest). This Court should

not allow that to happen. The informational interest is a dubious theory, and compulsory disclosure threatens important privacy interests, as well as being likely to chill speech.

### 1. Compelled disclosure can have distorting and misleading effects on the marketplace of ideas.

The theory behind the informational interest is that the public should know who is speaking, because that helps the public understand the speech. *See*, *e.g.*, *Madigan*, 697 F.3d at 478 ("'the identity of the source is helpful to evaluating ideas.'" quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). But forcing the publication of that information can also have a distorting effect.

The common refrain that requiring disclosure of more information invariably benefits the public is not always true. In fact, "[w]ith respect to information, less may be more." Cass R. Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 Fla. St. U. L. Rev. 653, 667 (1993); *see also* Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 Iowa L. Rev. 1847, 1849 (2013) ("disclosure does not necessarily inform voters. . . . Revealing sources of speech provides voters with information, but disclosure can also chill speech, and that takes information away.").

For example, emphasis on a speaker's identity can transform a debate about the merits of an issue into an

*ad hominem* distraction. *See Sampson v. Buescher*, 625 F.3d 1247, 1257 (10th Cir. 2010). Exaggerating the focus on a speaker's identity can detract from the message, or even overwhelm the public's consideration of the merits. Robert G. Natelson, *Does "The Freedom of the Press" Include A Right to Anonymity? The Original Meaning*, 9 N.Y.U. J. L. & Liberty 160, 184–85 (2015).

As Professor Natelson observes, the Anti-Federalist Mercy Otis Warren wrote essays about the Constitution under the pseudonym "A Columbian Patriot" because "[u]nder her own name, she might have been dismissed as 'just a woman.'" *Id*. at 185. In her case, and others like it, compulsory disclosure would have resulted in less speech, not more. *See also* Lear Jiang, *Note: Disclosure's Last Stand? The Need to Clarify the "Informational Interest" Advanced by Campaign Finance Disclosure*, 119 Colum. L. Rev. 487, 504 (2019) (mandatory disclosure can "distract from the core speech at issue" and "also send a symbolic message that the substantive speech at issue is irrelevant for democratic purposes—in other words, only the identity of the messenger matters, the quality of the message does not.").

There are other risks from compelled disclosure, even where the information disclosed is objectively true. For example, scholars have written extensively about "information overload"—the phenomenon whereby a person receives so much information that she is incapable of making effective use of it or placing it in context. *See*, *e.g.*, Kenneth Einar Himma, *The Concept of Information Overload: A Preliminary Step in*

*Understanding the Nature of a Harmful Information-Related Condition*, 9 Ethics & Info. Tech. 259 (2007);[8] Thomas Rachfall, et al., *The Information Overload Phenomenon: The Influence of Bad and (Ir)relevant Information*, 3 Int'l J. Research in Eng'g & Tech. 27 (2014).[9] Information overload can also cause people to tune out valuable information because they simply become tired of hearing so much.

Also, people often do not know how to make use of information that the law requires others to give them. *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. Pa. L. Rev. 647, 676–78 (2011). As a result, people often make worse decisions, rather than better ones, when the government requires disclosure of information—whether in the context of medical treatment, legal advice, products liability, environmental risks, or other things. *Id.* at 727.

Consider, for example, laws that require disclosure of information about "harmful" chemicals in consumer products. These laws sometimes result in worse outcomes for public health because they frighten consumers away from healthy choices. In the 1990s, the makers of Ken's Foods salad dressing petitioned Massachusetts to remove acetic acid from its list of toxic substances because acetic acid—that is, vinegar—is an ingredient in dressing, and, as Professor Alexander

[8] https://www.academia.edu/17700260/The_concept_of_information_overload_A_preliminary_step_in_understanding_the_nature_of_a_harmful_information_related_condition.

[9] https://pdfs.semanticscholar.org/84d6/6b2441671ebf9482b961b704d918c575e0d8.pdf.

Volokh points out, "[w]hile acetic acid may be harmful in some forms, as a component of salad dressing it is not harmful to human health—and may be beneficial, since it makes lettuce taste better and thus increases the consumption of salad." *The Pitfalls of the Environmental Right-to-Know*, 2002 Utah L. Rev. 805, 824 (2002). Compulsory disclosure could harm public health by deterring people from eating vegetables. Likewise, litigants in California sued to compel the disclosure of the possibility that fish may have traces of mercury in it, even though the amounts involved were infinitesimally small and disclosure of that information may cause people to eat far less healthy food instead of fish—thus, again, proving counterproductive. *Id.* at 825–26.

Information scholars often characterize these outcomes as examples of the "availability bias" or "availability heuristic," whereby people who receive information about a potential risk overestimate the likelihood or impact of that risk, just because the information about that minor risk is "available"—i.e., can be readily imagined. Paula J. Dalley, *The Use and Misuse of Disclosure As A Regulatory System*, 34 Fla. St. U. L. Rev. 1089, 1114 (2007). The classic example is plane crashes, which are extremely rare, but are highly publicized, leading some consumers to fear plane crashes more than they fear car crashes, which are vastly more likely.

A related phenomenon is the "affect" heuristic, which refers to the way people who feel strong emotions in relation to a perceived risk will also

overestimate that risk relative to other more likely threats that lack that emotional punch. *See* Thorsten Pachur & Ralph Hertwig, *How Do People Judge Risk: Availability Heuristic, Affect Heuristic, or Both?*, 18 J. Experimental Psych. 314, 315–16 (2012). Terrorist attacks, for example, can cause emotional trauma that leads people to overestimate their likelihood.

For these and other reasons, Ben-Shahar and Schneider observe in their comprehensive article on the subject that "mandated disclosure repeatedly fails to accomplish its ends." *Supra* at 665. *See also* Jiang, *supra* at 501–06 (observing that the "informational interest" theory must address problems of informational overload and bias).

Such biases can be manipulated in ways that harm the public. Professor Sunstein observes that political leaders often try to take advantage of the "availability bias" and other biases. He calls these actors "availability entrepreneurs" because they "attempt to trigger availability [biases] likely to advance their own agendas." Cass R. Sunstein, *Risk and Reason: Safety, Law, and the Environment* 92 (2002). By "fixing people's attention on specific problems, interpreting phenomena in particular ways, promoting group polarization, attempting to raise the salience of certain information," and so forth, they seek to distract the public from an objective assessment of the costs and benefits of policy proposals. *Id.*

Moreover, the very fact that information is mandatorily disclosed can distort the recipient's processing

of that information, by giving it undue emphasis. Information about "who is speaking"—like other kinds of information—may be true in itself, but forcing it onto the stage of a public debate can make it appear more significant than it actually is—especially when its compulsory disclosure is done in a manner that implies that it reveals some wicked motivation on the speaker's part. Someone asked to decide between X and Y is likely to give undue weight to evidence about X's supporters when the form of its disclosure gives the impression that they are operating for a deceptive purpose. *See* Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. Chi. L. Rev. 111, 131 (2006) ("by putting the government into the fray, there is always the risk that debiasing will take the form of rebiasing, by overstating . . . risks.").

In fact, mandatory disclosure privileges a specific narrative about political debate that can indeed take advantage of such biases. That sophomoric narrative holds that one side of the political spectrum represents the genuine will of the people, whereas the other side represents the secretive and selfish interests of wealthy private actors usurping democracy. *See*, *e.g.*, Brief of Sen. Whitehouse, *supra* at 13 & n.2. Far from ensuring a properly functioning public debate, a disclosure requirement that shifts the focus of discussion toward an *ad hominem* argument accentuates this reductionist conception of politics—which means that it serves one side over another in the marketplace of ideas, while masquerading as an objective or neutral policy.

Such manipulation of *ad hominem* has become commonplace in public debates nowadays. In the U.K., for example, the now-defunct "Who Funds You?" campaign pressured think tanks to disclose the identities of their contributors, in an effort to prove that those organizations proposing free-market policies were being secretly funded by business interests, whereas the left was unbiased and impartial. Emma Burnell, *Who Funds You? Think Tanks Are All Being Tarnished by Secretive Right-Wingers*, Politics.co.uk, Feb. 5, 2019.[10] The information did indeed seem to prove this—but only because left-wing foundations are disproportionately funded by the government, giving them a specious claim to objectivity. *See* Tim Worstall, *It Doesn't Matter Who Funds Think Tanks, But If It Did, Left-wing Ones Would Do Particularly Badly*, The Telegraph, June 21, 2012.[11]

Obviously there is a role in political debates for information about who funds a speaker. It can indeed be the case that advocates on one side of an issue are presenting false, misleading, or biased ideas to the public in the service of secretive private interests. Thus the participants in public debate can and should discuss both the merits of candidates and issues and also the motives of their respective supporters. If one side

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[10] https://www.politics.co.uk/comment-analysis/2019/02/05/who-funds-you-think-tanks-are-all-being-tarnished-by-secretive-right-wingers/.

[11] http://web.archive.org/web/20130820225246/http://blogs.telegraph.co.uk/finance/timworstall/100018107/it-doesnt-matter-who-funds-think-tanks-but-if-it-did-left-wing-ones-would-do-particularly-badly/.

refuses to identify its funding sources, the other side can point that fact out to the public, explain why it should be a concern, and let the public decide based on that fact as well as the merits. All of this is already adequately protected by the First Amendment.

As long as laws are in place to ensure the safety of voters, the fair counting of votes, etc., the "uninhibited, robust, and wide-open" "debate on the public issues" will include this information. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But for government to mandate the disclosure of a specific type of information inherently privileges or emphasizes that information and distorts the deliberative process—and often in the interest of one side of the debate.

### 2. Disclosure mandates rely on the false assumption that government is an impartial umpire.

The unspoken premise of disclosure mandates is that government stands outside the political process, in a position of neutrality, and can impartially determine what information voters will find useful, so as to foster an evenhanded democratic deliberation. But that premise is false. Government stands *inside* the democratic arena, and whether to mandate the disclosure of X as opposed to Y is a question legislators will answer based on their own biases and agendas—including subconscious ones—which will inevitably affect that debate. *See* Bradley A. Smith, *The Myth of Campaign Finance Reform*, National Affairs, Winter

2010[12] ("If the problem is that venal legislators are betraying the public trust in exchange for campaign contributions, why would we expect them not to be equally motivated by base impulses when passing campaign-finance legislation?").

*Cook v. Gralike*, 531 U.S. 510 (2001), is a perfect example. That case involved a Missouri law that forced candidates to specify on the ballot, in all caps, that they had "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." *Id.* at 524. This information was true, but by "'directing the citizen's attention to [that] single consideration,'" the requirement inherently "impl[ied] that the issue 'is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot,'" and thus inherently biased the political debate. *Id.* at 525 (quoting *Anderson v. Martin*, 375 U.S. 399, 402 (1964)).

The same phenomenon can be found in the very first federal campaign finance regulation, the Tillman Act of 1907 (34 Stat. 664). Its sponsor, South Carolina Senator Benjamin "Pitchfork" Tillman—a white supremacist and advocate of lynching—argued that his political opponents "were themselves 'owned' by 'the corporations,'" and that black laborers were "'as plastic as putty in the hands of shrewd and ambitious leaders.'" Stephen Kantrowitz, *Ben Tillman and the Reconstruction of White Supremacy* 188 (2000).

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[12] https://www.nationalaffairs.com/publications/detail/the-myth-of-campaign-finance-reform.

Because corporations, particularly railroads, actively opposed racial segregation, Tillman drafted the Act to bar them from contributing to political candidates, which he saw as distorting the proper functioning of democracy. *See* Smith, *supra.* His view of legitimate deliberation was inevitably influenced by his preconception of the "right" results.

The assumption that government can impartially decide what information will educate the public is problematic even outside the realm of politics—for instance, in the realm of verifiable information about goods and services. Consider the rule of *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), which allows government to compel businesses to disclose "purely factual and uncontroversial information" about a product or service. Courts of appeals have found that these categories are not always clear, and that the very fact that government forces disclosure can give some information undue weight, leading to a false impression.

Thus in *American Beverage Association v. City & County of San Francisco*, 871 F.3d 884 (9th Cir. 2017), the city required beverage companies to say on their highway billboards that "[d]rinking beverages with added sugar(s) contributes to obesity, diabetes, and tooth decay." *Id.* at 888. By itself, that statement was factual—yet although "'literally true,'" it was "'nonetheless misleading,'" *id.* at 893 (citation omitted), because it was "required exclusively on advertisements for sugar-sweetened beverages, and not on advertisements for other products with equal or greater

amounts of added sugars and calories." *Id.* at 895. Thus the information lacked context, and because it was presented in the form of a compulsory disclosure, the mandate "convey[ed] the message that sugar-sweetened beverages are less healthy than other sources of added sugars and calories and are more likely to contribute to obesity, diabetes, and tooth decay than other foods"—which was not true. *Id.* In other words, the manner of compulsory disclosure overemphasized true information in a way likely to give a false impression of danger—and to result in worse public health outcomes.

This problem is accentuated in matters involving contested normative or political issues, where it is harder to specify what information the public will consider relevant and why, and where incumbent legislators have an incentive to manipulate disclosure requirements in order to affect political outcomes. *See* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. Pa. L. Rev. 1, 130 (1991) ("Seeking to harm one's political opponents by disseminating information is a time-honored tradition, made even more respectable if the information purveyed is accurate.").

Moreover, the question of what constitutes relevant information with respect to the identities and motives of political speakers is itself affected by the ideologies of those who seek to answer that question. *Cook* and the Tillman Act are examples of lawmakers intentionally biasing the public debate through purportedly neutral requirements, but the same result

occurs even when lawmakers do not have that intention. For example, before adoption of the Taft-Hartley Act (61 Stat. 136), it was lawful for unions to contribute money to political campaigns, but not for corporations to do so.[13] This was not because Congress set out to benefit one side of public debate over the other, but because it did not initially perceive labor unions as political actors on a par with corporations. Congress prohibited *corporate* donations in the Tillman Act of 1907 and the Corrupt Practices Act of 1910 (36 Stat. 822)—on the theory that corporations are self-interested entities that support or oppose candidates for that reason—but for decades, it failed to recognize that the same is true of labor unions.[14] Thus for nearly two decades, unions enjoyed a political advantage denied to corporations, not because lawmakers were openly biased, but because their basic assumptions about the nature of political actors blinded them to their own biases regarding which side was engaged in improper acts.

To reiterate, it is true that a speaker's identity is a relevant datum in political debate. But the First Amendment already ensures that parties to such debates can discuss that fact—and, if a party conceals its funding sources, that fact can also be addressed in the

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[13] The Smith-Connally Act (57 Stat. 167) temporarily prohibited union political donations four years previously.

[14] When the proposal was made to bar unions from directly contributing to political candidates, opponents argued that "[t]his is not legislation for the common good—this is punishment because labor unions have grown so powerful." 93 Cong. Rec. 3536 (Apr. 16, 1947) (statement of Mr. Fogarty).

debate. Research shows that voters already reward voluntary disclosure and punish non-disclosure, even without the law requiring it. Jiang, *supra* at 518. But for government to intervene, and compel the release of some information as opposed to other information, and thereby to emphasize some information over other information, is more likely to distort the political debate and to intrude on important privacy interests, than to achieve an abstract goal of fairness.

## II. The Court of Appeals' analysis of the chilling effect was legally erroneous.

The Court of Appeals also erred in its discussion of the threat of retaliation and intimidation against Petitioners' supporters. After acknowledging that the Petitioners' "evidence shows that *some* individuals who have or would support the plaintiffs *may* be deterred from contributing" as a result of the disclosure mandate, the court nonetheless decided that Petitioners had failed to establish a significant chilling effect. App. at 30a. This self-contradictory conclusion reveals a profound confusion about how chilling effects work, specifically in the disclosure context.

The chilling effect test is an *objective* test, not a subjective one; the question is whether "a person of ordinary firmness" would have been deterred from speaking under the circumstances. *Nieves*, 139 S. Ct. at 1721 (citation omitted). This means a person can bring a chill case even if she did not actually desist from speaking. *See*, *e.g.*, *Eaton v. Meneley*, 379 F.3d 949,

956 (10th Cir. 2004) ("the standard permits a plaintiff who perseveres despite serious injury from official misconduct to assert a constitutional claim.").

This is important because although many amici have already provided examples of how disclosure mandates can and do lead to actual harassment of people who support organizations engaged in speech on controversial issues,[15] chill is about people who choose *not* to step forward—and is therefore unmeasurable by definition. *See Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006) (analyzing chill is "delicate" because it is "inchoate: because speech is chilled, it has not yet occurred and might never occur, yet the government may have taken no formal enforcement action."). As the D.C. Circuit put it, "the absence of any direct actions against individuals . . . can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern." *Cmty.-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1118 (D.C. Cir. 1978).

For every example of violence or recrimination that makes the news or reaches a courtroom, there are many others that do not—either because they are not

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[15] *See*, *e.g.*, Brief Amicus Curiae of Liberty Justice Center in Support of Petition for Certiorari at 12–18; Brief of Amicus Curiae Proposition 8 Legal Defense Fund in Support of Petition for Certiorari at 8–18; Brief Amicus Curiae of Buckeye Institute in Support of Petition for Certiorari at 12–14; Brief Amicus Curiae of American Center for Law and Justice in Support of Petition for Certiorari at 14–22. *See also* Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 Harv. J. on Legis. 75, 98–99 (2010) (citing more examples).

considered newsworthy or because victims do not report them. In fact, *sub rosa* retaliation can also be engaged in *by* the authorities, who, for example, can deny or delay permits, start investigations, block public contracts, or engage in other forms of retribution—much of which never makes it into court. *See*, *e.g.*, Hal Dardick, *Alderman to Chick-fil-A: No Deal*, Chicago Tribune, July 25, 2012[16] (Chicago alderman sought to block permit for restaurant because its CEO donated funds to oppose same-sex marriage campaigns); Brooke Phillips, *San Antonio Bans Chick-fil-A from Airport*, News4SA.com, Mar. 21, 2019 (city denied restaurant location in airport in retaliation for its CEO's political activities).[17]

It is crucial not to assume that retaliation or retribution always takes the form of violence or outright threats. There are many other ways in which mandatory disclosure can harm people. As one scholar observes,

> [t]hose who rely on trust and identification with others to do their work—such as ministers, psychotherapists, or schoolteachers—may find their roles undermined if congregants, patients, or parents know and judge their personal political activity. . . . [A] gay or

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[16] https://www.chicagotribune.com/business/ct-met-chicago-chick-fil-a-20120725-story.html.

[17] https://news4sanantonio.com/news/local/city-councilman-motions-to-ban-chick-fil-a-from-san-antonio-international-airport?fbclid=IwAR0RJNXO824l8obFtAdTb9CDbfAK-2QggzuARPxyDCnidkQPy-E0tQKLCXc.

> lesbian person who wishes to contribute to the Log Cabin Republicans risks being outed by FEC reports. . . . Political contributions label us, and disclosure displays that label to others without our consent. Forced revelations are intrusions into a sphere of personal liberty.

William McGeveran, *Mrs. Mcintyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. Pa. J. Const. L. 1, 17, 19 (2003).

But chill occurs when people, fearful of these risks, choose to remain silent instead of identifying themselves. They are never retaliated against, harassed, or intimidated, because they decline to exercise their First Amendment rights in the first place. That is why this Court has never required specific proof of harms in order to establish a chilling effect. While it requires something more than a mere subjective fear, *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972), the law does not require plaintiffs in a chill case to prove either that they have desisted from speaking, *Eaton*, 379 F.3d at 956, or that they have suffered actual retaliation. *Walker*, 450 F.3d at 1089. Chill is invisible—so a court cannot dismiss a chill allegation by saying it doesn't see a chill.

What's more, the absence of retaliation *today* cannot guarantee that a speaker will not be retaliated against in the *future*. Once a person's personal identifying information is released to the public, that person may be retaliated against years afterward. In 2014, Brendan Eich, CEO of the software company Mozilla, was forced to resign when it was revealed that he had donated money to support a California ballot initiative

banning same-sex marriages *six years* previously. Casey Newton, *Outfoxed: How Protests Forced Mozilla's CEO to Resign in 11 Days*, The Verge, Apr. 3, 2014.[18] During the "Red Scare" of the 1950s, some people were retaliated against for having aided the Soviet Union during the 1940s—when it was a wartime ally of the United States. David E. Bernstein, *The Red Menace, Revisited*, 100 Nw. U. L. Rev. 1295, 1299 (2006). In short, political ideas that are now viewed as unremarkably mundane can later be regarded as deplorably reactionary—and incur retaliation then.

The court below disregarded all these considerations. Instead, after admitting that the evidence *did* show a likelihood of chill, it minimized this by calling the chill "modest," App. at 30a, and never applied the objective test for chill. Of course, there is no First Amendment exception for "modest" chilling effects.

It also concluded that there was no chill because the Plaintiffs "could not point to any contributor who had reduced or eliminated his or her support . . . due to the fear of disclosure," *id.* at 29a—even though chill is invisible. Indeed, the absence of such examples is just as likely to be "proof of the success of the chill" as proof of its absence. *FCC*, 593 F.2d at 1118.

The Ninth Circuit is not alone in committing this error. Amicus Rio Grande Foundation is currently involved in litigation challenging the constitutionality of a Santa Fe, New Mexico, ordinance that forces any

[18] https://www.theverge.com/2014/4/3/5579516/outfoxed-how-protests-forced-mozillas-ceo-to-resign-in-11-days.

organization that spends more than $250 supporting or opposing a ballot initiative to disclose to the public the identities of any donor who gives even a penny for that purpose. *Rio Grande Found.*, 437 F. Supp. 3d at 1058. At trial, the Foundation proved that members of other, similar organizations have experienced harassment, intimidation, and violence, when their personal identifying information was publicized, *see id.* at 1060–61, 1070. Yet the District Court—relying in part on the Ninth Circuit's decision in this case, *id.* at 1072—ruled against the Foundation because it had not *itself* experienced violence or threats (yet). *Id.* at 1073.

In other words, the District Court in that case, and the Court of Appeals in this case, essentially required speakers to prove specific acts of retaliation—and enough to rise above a "modest" amount, whatever that might mean—in order to prove a chilling effect. But that is not and has never been the test. The test is whether a person of ordinary firmness would *hesitate* to exercise her First Amendment rights under the circumstances. That alone requires reversal.

## CONCLUSION

The decision should be *reversed*.

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Respectfully submitted,

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