

Nos. 19-251, 19-255

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

**Brief of the Public Interest Legal Foundation
and Foundation for Michigan Freedom
as *Amici Curiae* in Support of Petitioners**

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INTERESTS OF *AMICI CURIAE*¹

The Public Interest Legal Foundation, Inc., (the “Foundation”) is a nonpartisan, public interest organization incorporated and based in Indianapolis, Indiana. The Foundation’s mission is to promote the integrity of elections nationwide through research, education, remedial programs, and litigation. The Foundation also seeks to ensure that voter qualification laws and election administration procedures are followed. Specifically, the Foundation seeks to ensure that the nation’s voter rolls are accurate and current, working with election administrators nationwide and educating the public about the same. The Foundation and individuals publicly associated with it are often targeted by the media and special interest groups with voracious attacks on their work. *See* Sam Levine and Spenser Mestel, ‘*Just like propaganda: the three men enabling Trump’s voter fraud lies*, The Guardian (Oct. 26, 2020). The Foundation has terminated fundraising in California due to California’s insistence on forcing the production of unredacted donor information. The Foundation has serious concerns about how the state will use and safeguard its donors information from abusive behavior.

¹ No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici curiae* and their counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Petitioners in both 19-251 and 19-255 issued blanket consents to the filing of *amicus curiae* briefs. Respondent was notified and consented to the filing of this brief.

The Foundation for Michigan Freedom is a non-profit, nonpartisan organization recognized by the Internal Revenue Service as tax-exempt pursuant to Section 501(c)(3) of the Internal Revenue Code. A core mission of the Foundation for Michigan Freedom is to undertake legal research projects in the public interest and to provide legal support in litigation designed to present positions on behalf of the public at-large on matters of public interest. In particular, the Foundation for Michigan Freedom is dedicated to the promotion and protection of the democratic process, including the right of all citizens to participate and enter the marketplace of ideas. As a nonprofit, nonpartisan organization, the Foundation for Michigan Freedom recognizes that the First Amendment protects citizens from government interference of our right to petition, criticize, and speak openly and freely on matters of public policy. The ability to do so anonymously and without fear of retribution is a key principle of that right and one that should be protected for all viewpoints, regardless of whether one agrees with the particular speaker.

Both *amici* have a substantial interest in the resolution of this matter as they are 501(c)(3) charitable organizations reliant on funding from generous donors. California's attempt to coerce the disclosure of charitable donors implicates serious constitutional concerns and chills the speech of *amici*.

SUMMARY OF ARGUMENT

Donor disclosure is a tool that is used to fuel personal attacks. The Petitioners provided compelling evidence of attacks made against their donors. *See, e.g.*, Americans for Prosperity Brief at 50-52; Thomas More Law Center Brief at 46-48. Unfortunately, their experiences are not isolated. *Amici* have suffered or fear suffering similar attacks. Indeed, attacks on donors who contribute to causes or candidates with which one disagrees are prolific.

The frequency of these attacks has risen as the ability to speak anonymously has eroded. Anonymity is woven into the American fabric. Many of the revolutionary documents that stirred the colonists towards independence were penned under pseudonyms. The reasons for anonymity were valid then and remain so now. State governments should not have the power to demand lists of supporters of groups active in the public square. Specifically, here, donors must be free to give anonymously if they so choose. It is no solace to promise that the disclosure is only to the government, especially when that promise appears empty. *See, e.g.*, Americans for Prosperity Brief at 39-42; Thomas More Law Center Brief at 14.

Amici herein compile examples of voracious probes for donor identities by their ideological foes and the harms stemming from disclosure of donor information, including examples where the disclosure was not authorized by law yet still occurred.

ARGUMENT

I. **Compelled Disclosure Is Antithetical to the Foundational Principles of the United States.**

“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective restraint on freedom of association.” *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958).

Indeed, anonymous speech was essential to the founding of the United States. Prominent founders communicated their positions to colonists through written works under pseudonyms such as Publius, Cato, and Federal Farmer. “Publius” is the name chosen by those who wrote the Federalist Papers, a series of essays aimed to garner support for the ratification of the United States Constitution. The first such paper authored by Publius, now known to be Alexander Hamilton, speaks to the author’s intent of presenting facts that are not clouded by bias regarding any one author himself.

In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth.

...

My motives must remain in the depository of my own breast. My arguments will be open to

all, and may be judged of by all. They shall at least be offered in a spirit which will not disgrace the cause of truth.

The Federalist No. 1.

Thomas Paine’s “Common Sense” was originally published anonymously. As Paine explained in his work, “Who the Author of this Production is, is wholly unnecessary to the Public, as the Object for Attention is the *Doctrine itself*, not the *Man*.” Thomas Paine, COMMON SENSE, Introduction (emphasis in original).

The founders understood the risks that came from speaking out against ruling powers. In response to calls for disclosure of the identities of the authors of Anti-federalist writings, one individual wrote that requiring an author to sign his name “is as much as to say, Give me a stick, and I will break your head.” Trish Loughran, THE REPUBLIC IN PRINT: PRINT CULTURE IN THE AGE OF U.S. NATION BUILDING at page 134 (2007). More recently, in finding that a prohibition on anonymous campaign literature violated the First Amendment, this Court noted that “Anonymity is a shield from the tyranny of the majority.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

In 1958, this Court was confronted with the issue of the State of Alabama seeking forced disclosure of the names and addresses of members of the NAACP. *NAACP*, 357 U.S. 449. The Court recognized that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *Id.* at 460. Abridgment of the freedom of association “even though unintended, may inevitably follow from varied forms of

governmental action.” *Id.* at 461. The Court found that Alabama’s forced disclosure of the NAACP’s member lists “is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs” because “it may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.” *Id.* at 462-63. Those fears and consequences are still present today.

II. Recent History Demonstrates that Donor Disclosure Is a Tool that Has Been Used to Engage in Personal Attacks.

Petitioners presented the district court with evidence demonstrating that “its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known.” Americans for Prosperity Petition App. at 49a. Recent history only amplifies the concerns presented to the district court below. Herein, *amici* present additional examples of the weaponization of donor information.

A. National Organization for Marriage’s Leaked Tax Document

The National Organization for Marriage (“NOM”) is a nonprofit organization that seeks to protect marriage across the country. In November of 2012, voters were set to vote on marriage-related issues in Maine, Maryland, Minnesota, and Washington. The political climate surrounding the issue of marriage was contentious. In March of 2012, NOM discovered that its confidential Schedule B from the tax year 2008 was

posted on its political opponent's website. NOM, *National Organization for Marriage Demands a Federal Investigation of the Human Rights Campaign and the Internal Revenue Service* (April 5, 2012), <http://www.nomblog.com/21437>.

That federal law protects against the disclosure of this information made no difference. NOM's Schedule B was disclosed and posted on the internet.

NOM filed suit in federal court, represented by *Amicus* Public Interest Legal Foundation. The Internal Revenue Service (IRS) admitted "that it improperly released the Schedule B." *National Org. for Marriage, Inc. v. United States, IRS*, 24 F. Supp. 3d 518, 532 (E.D. Va. 2014). The court determined that, contrary to federal law, the IRS disclosed the confidential tax document to an individual named Matthew Meisel. *Id.* at 520. Meisel then provided the document to the Human Rights Campaign, an organization opposed to the National Organization for Marriage. *Id.* at 521. Attorney General Eric Holder declined to grant Meisel immunity, which would have compelled him to answer deposition questions about his source in the IRS. The district court then denied NOM's request for punitive damages, finding that it had "made no showing from which a reasonable jury could find that the disclosure of its Schedule B was the result of willfulness or gross negligence." *Id.* at 527. The court determined that the disclosure, which was heavily publicized, constituted a single disclosure, subject to either \$1,000 in statutory damages or the actual damages stemming from the one disclosure. *Id.* at 532.

B. IRS Targeting Scandal

In May of 2013, it was discovered the IRS “developed and used inappropriate criteria to identify applications” from certain organizations associated with the “tea party” movement. *True the Vote, Inc. v. IRS*, 831 F.3d 551, 559 (D.C. Cir. 2016). The revelation confirmed what many groups thought to be true: applications from certain groups were subjected to heightened scrutiny based on the groups’ viewpoints.

The Treasury Inspector General for Tax Administration issued a report outlining “requests for information that [they] later (in whole or in part) determined to be unnecessary.” *Id.* at 560. Specifically, one question later determined to be unnecessary involved requesting the names of donors. *Id.*

The IRS Targeting Scandal was a violation of the public’s trust that resulted in numerous congressional hearings, resignations, court filings, and official reports. See Kelly Phillips Erb, *IRS Targeting Scandal: Citizens United, Lois Lerner And The \$20M Tax Saga That Won’t Go Away*, *Forbes* (June 24, 2016) <https://www.forbes.com/sites/kellyphillips-erb/2016/06/24/irs-targeting-scandal-citizens-united-lois-lerner-and-the-20m-tax-saga-that-wont-go-away/?sh=685b4af3bcd1>.

C. Friends of Abe

“Friends of Abe,” a nod to the country’s sixteenth President, was comprised of conservative writers, actors and producers in Hollywood. Just like “Friends of Bill” was designed to create a space for those struggling with alcoholism to remain anonymous, Friends of Abe was designed to serve as a space where individuals “could be who they were and think what they

thought without being criticized.” Ted Johnson, *Friends of Abe: Hollywood’s Comfort Zone for Industry Conservatives Winds Down*, *Variety* (April 27, 2016), <https://variety.com/2016/biz/news/friends-of-abe-hollywood-winds-down-1201760428/>.

Friends of Abe sought 501(c)(3) nonprofit status but encountered what appeared to be heightened scrutiny. Specifically, the IRS sent “a demand — which was not met — for enhanced access to the group’s security-protected website, which would have revealed member names.” Michael Cieply and Nicholas Confessore, *Leaning Right in Hollywood, Under a Lens*, *The New York Times* (Jan. 22, 2014), https://www.nytimes.com/2014/01/23/us/politics/leaning-right-in-hollywood-under-a-lens.html?_r=1&referrer=. “Tax experts said that an organization’s membership list is information that would not typically be required. The I.R.S. already had access to the site’s basic levels, a request it considers routine for applications for 501(c)(3) nonprofit status.” *Id.* Friends of Abe later discontinued activities.

D. League of United Latin American Citizens v. Public Interest Legal Foundation

Amicus Public Interest Legal Foundation itself has experienced the hardships adjacent to attacks from ideological foes. The Foundation was sued by the League of United Latin American Citizens as a result of its efforts to educate the public on public information obtained from the Commonwealth of Virginia.

The Foundation sought, collected, and publicized public records from Virginia election officials regarding noncitizen registration and voting in Virginia. *See*

Testimony of J. Christian Adams, U.S. House Subcommittee on the Constitution, Civil Rights and Civil Liberties (Sept. 10, 2019) at 6. These public voter registration records included lists of “declared non-citizen” cancellations and the Foundation republished the public government records in their original form and spoke about them. It was later discovered that Virginia was improperly canceling *citizens* as “non-citizens.” The Foundation notified Virginia that it was in violation of federal law for removing citizens from its rolls. Rather than work with Virginia elections officials to fix the problem, the League of United Latin American Citizens and several individuals sued the Foundation for defamation and violations of the Voting Rights Act. *League of Latin American Citizens v. Public Interest Legal Foundation*, No. 1:18-cv-00423 (E.D. Va., filed April 12, 2018). “That case has since settled and [the Foundation] apologized for overly relying on the government list maintenance records and repeated statements by election officials that the cancelled registrants were declared non-citizens.” Testimony of J. Christian Adams at 6. Notably, during discovery, the plaintiffs aggressively sought access to the Foundation’s fundraising and donor information, matters the court eventually indicated were “a waste of time.” Transcript of Motion Hearing at 21, *League of Latin American Citizens v. Public Interest Legal Foundation* (May 24, 2019) (“[B]reaking down where their money came from appears to this Court at least at this juncture a waste of everyone’s time.”) Nevertheless, it demonstrates how litigation between ideological opponents is yet another forum for intrusion into private donor information.

E. Chick-fil-A

Chick-fil-A's charitable giving has been under fire since "CEO Dan Cathy said the company supported 'the biblical definition of the family unit.'" Kate Taylor, *For Chick-fil-A, impact trumps 'any political or cultural war' when it comes to controversial donations*, Business Insider (May 15, 2019), <https://www.businessinsider.com/chick-fil-a-explains-donations-groups-considered-anti-gay-2019-5>.

In the years that followed, the company has faced continued backlash, including efforts to stop the opening of new restaurants. See Matt Kempner, *Chick-fil-A, criticized for its charitable giving, narrows donations*, The Atlanta Journal-Constitution (Nov. 23, 2019), <https://www.ajc.com/news/local/chick-fil-criticized-for-its-charitable-giving-narrows-donations/B3JdR5yTuXoAL73WoSiotM/>.

F. U.S. Virgin Islands Subpoena

The Competitive Enterprise Institute (CEI) is a non-profit organization that focuses on the principles of limited government and individual liberty. CEI is involved in the climate policy debate, another hotly contested issue in the United States. "On April 7, 2016, CEI received a subpoena from U.S. Virgin Islands Attorney General Claude Walker demanding a full decade's worth of [its] communications, emails, statements, and other documents regarding energy and climate policy. Those documents included private donor information." CEI, *First Amendment Fight: CEI's Climate Change Subpoena* (April 5, 2017), <https://cei.org/climatesubpoena>. CEI engaged in a months-long fight regarding the subpoena, which was eventually withdrawn.

III. Donor Disclosure Is Also Used to Engage in Personal Attacks in the Election Context.

As Petitioners note, disclosures of charitable donations are distinguishable from election-related disclosures. *See* Americans for Prosperity Foundation Brief at 18; Thomas More Law Center Brief at 29. Yet the following examples from the election context demonstrate the harms that may flow from the targeting of donors.

A. California's Proposition 8

A contentious state ballot proposition in California epitomizes precisely why donors to organizations addressing hot button issues may wish to stay anonymous. Proposition 8 concerned an amendment to California's constitution providing that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const. Art. I § 7.5. Proposition 8 quickly became a household name across the nation as the country was sharply divided on the issue of the redefinition of marriage. Pursuant to state law, a person who gave \$100 or more to a committee supporting or opposing Proposition 8 would be subject to public disclosure. Cal. Govt. Code Ann. § 84211(f). This disclosure included the donor's full name, street address, and occupation. *Id.* As Justice Thomas recounted, disclosures of even minor donors had major consequences.

Some opponents of Proposition 8 compiled this information and created Web sites with maps showing the locations of homes or businesses of Proposition 8 supporters. Many supporters (or their customers) suffered property

damage, or threats of physical violence or death, as a result. They cited these incidents in a complaint they filed after the 2008 election, seeking to invalidate California's mandatory disclosure laws. Supporters recounted being told: "Consider yourself lucky. If I had a gun I would have gunned you down along with each and every other supporter," or, "we have plans for you and your friends." Complaint in *ProtectMarriage.com--Yes on 8 v. Bowen*, Case No. 2:09-cv-00058-MCE-DAD (ED Cal.), P. 31.

Citizens United v. FEC, 558 U.S. 310, 481 (2010) (Thomas, J., dissenting in part).

Accounts of attacks on donors supporting Proposition 8 have been well-documented. *See also*, Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009), available at <https://www.heritage.org/marriage-and-family/report/the-price-prop-8> and *Doe v. Reed*, 561 U.S. 186, 205 (2010) (Alito, J., concurring) ("The widespread harassment and intimidation suffered by supporters of California's Proposition 8 provides strong support for an as-applied exemption in the present case.").

Following Proposition 8, the targeting of donors has increased exponentially. "The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to *pre-empt* citizens' exercise of their First Amendment rights." *Citizens United*, 558 U.S. at 482 (Thomas, J., dissenting in part) (emphasis in original). As Justice Thomas acknowledged, "the advent

of the Internet’ enables ‘prompt disclosure of expenditures,’ which ‘provide[s]’ political opponents ‘with the information needed’ to intimidate and retaliate against their foes.” *Id.* at 484 (citing to part IV of the Court’s decision). The proliferation of the Internet over the past decade, including the ubiquity of portable Internet-enabled devices, further underscores this real concern. See Pew Research Center, *Mobile Fact Sheet* (June 12, 2019), <https://www.pewinternet.org/fact-sheet/mobile/> (“The vast majority of Americans – 96% – now own a cellphone of some kind. The share of Americans that own smartphones is now 81%, up from just 35% in Pew Research Center’s first survey of smartphone ownership conducted in 2011.”)

B. Will & Grace

In August of 2019, actors Debra Messing and Eric McCormack of the television program “Will & Grace” each posted on Twitter a news story regarding a President Trump fundraiser to be held in Beverly Hills. Messing stated, “Please print a list of all attendees please. The public has a right to know.” Debra Messing (DebraMessing), <https://twitter.com/DebraMessing/status/1167658588384501760>.

Messing went on to say, “I am proud to be a donor when I contribute to a campaign,’... ‘I am happy to be listed when I attend a fundraiser. I am assuming anyone who donates to Trump’s fundraiser would feel the same. Why wouldn’t they?” Caitlin O’Kane, *Debra Messing demands attendee list for Beverly Hills Trump fundraiser, president hits back*, CBS News (Sept. 2, 2019), <https://www.cbsnews.com/news/>

trump-fundraiser-beverly-hills-debra-messing-demands-attendee-list-for-fundraiser-event-president-hits-back-today/.

C. Representative Joaquin Castro

Texas Representative Joaquin Castro represents the city of San Antonio. Shortly after a tragic event in El Paso, Texas, more than 500 miles away from San Antonio, Representative Castro posted on social media a list of donors to President Trump who live in San Antonio. “These contributions are fueling a campaign of hate that labels Hispanic immigrants as “invaders,” Castro wrote, posting a graphic that included the names and employers of 44 Trump donors, including several retirees.” Fredreka Schouten, *Rep. Joaquin Castro tweets names, employers of Trump donors in San Antonio*, CNN (Aug. 7, 2019), <https://www.cnn.com/2019/08/06/politics/joaquin-castro-trump-donor-names/index.html>.

The chilling effect of Castro’s social media post was felt outside San Antonio. “A Trump donor in Beverly Hills, who plans to attend the upcoming fundraiser, said he was appalled by Castro’s tweet. The donor asked that neither he nor his wife be identified out of fear that someone would search for them online and find their home.” Michelle Ye Hee Lee, *Trump’s critics are targeting his donors, sparking fears of a backlash against disclosure*, Washington Post (Sept. 10, 2019), https://www.washingtonpost.com/politics/president-trumps-critics-are-weaponizing-information-about-his-donors-raising-concerns-about-federal-donor-disclosure-requirements/2019/09/10/b0b60ff8-cfe4-11e9-87fa-8501a456c003_story.html.

D. Michigan Chamber of Commerce

In 2018, Michigan voters considered “Ballot Proposal 2,” which sought to amend the state constitution “to establish a commission of citizens with exclusive authority to adopt district boundaries for the Michigan Senate, Michigan House of Representatives and U.S. Congress, every 10 years.” See Brief Summary of the Ballot Proposal at 2, [https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_2018-2_VNP_](https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_2018-2_VNP_Redistricting.pdf)

[Redistricting.pdf](https://www.house.mi.gov/hfa/PDF/Alpha/Ballot_Proposal_2018-2_VNP_Redistricting.pdf). Among those who opposed Proposal 2 were the Michigan Chamber of Commerce.

An organization called Represent.Us ran advertisements targeting Members of the Chamber’s Executive Board specifically. Notably, “[t]hose pictured in the ads are not identified as chamber board members, but rather as a ‘dark money group’ formed to deny Michigan citizens their right to vote on ‘anti-gerrymandering.’ Along with their names and photographs, the companies they run are also listed.” Nolan Finley, *Finley: Left turns to terroristic tactics to silence critics*, The Detroit News (July 11, 2018), <https://www.detroitnews.com/story/opinion/columnists/nolan-finley/2018/07/12/political-terrorism-left-represent-us/774802002/>. Social media comments on the advertisements were concerning. “Posters repeatedly suggested [Chamber Chair] Davidoff should face the guillotine, or be shot. One opined that violence ‘can be used for good.’ Several others urged the site’s followers to confront Davidoff — and his kids — in public. Another asked when the killing could start.” *Id.*

E. SoulCycle

When one investor to SoulCycle, an indoor cycling company, hosted a fundraiser for President Trump, a boycott of the company quickly followed. The boycott has been successful. “SoulCycle attendance declined about 1 percent compared with the same week a year earlier. That’s been followed with consistent declines of 6 percent to 7.5 percent in subsequent weeks.” Rani Molla, *One Trump fundraiser was all it took to slash SoulCycle’s attendance*, Vox (Sept. 5, 2019), <https://www.vox.com/2019/9/5/20851538/soulcycle-boycott-attendance-down-data-earnest>.

CONCLUSION

Modern politics has become vitriolic and even dangerous. Disclosure of donors to causes that engage the public in controversial policy disputes puts those donors at risk, and will likely have a severe chilling effect on the exercise of First Amendment speech and association rights. The Court should reject California's attempt to facilitate the kind of threats and acts of retaliation described in this brief, by compelling the disclosure of donor lists produced to the IRS under a statutory promise of confidentiality when the state has no justification to collect federal tax form information.

Respectfully submitted,

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