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,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE ATLANTIC LEGAL FOUNDATION, AND NATIONAL AND STATE TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

LAWRENCE S. EBNER
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 729-6337
Counsel for Atlantic Legal Foundation

SEAN MAROTTA
Counsel of Record
BENJAMIN A. FIELD
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
sean.marotta@hoganlovells.com
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

Nos. 19-251 & 19-255

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
v.
XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE ATLANTIC LEGAL FOUNDATION, AND NATIONAL AND STATE TRADE ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The National Association of Manufacturers, the Atlantic Legal Foundation, the Forging Industry Association, the Kansas Chamber of Commerce, Oregon Business & Industry, the Pennsylvania

Manufacturers' Association, the Plastics Industry Association, the Treated Wood Council, and Wisconsin Manufacturers & Commerce submit this brief as *amici curiae* in support of Petitioners.[1]

The National Association of Manufacturers (NAM) is a trade association of American manufacturers made up of 14,000 member companies in every industrial sector. Since its founding in 1895, the NAM has advocated for American makers and the values that make American industry strong, including free enterprise, competitiveness, individual liberty, and equal opportunity. Working for the success of more than 22 million men and women who make things in America, the NAM is the voice of the manufacturing community. The NAM represents manufacturers big and small. Although its members include 79 percent of Fortune 100 manufacturers and 54 percent of Fortune 500 manufacturers, small- and medium-sized manufacturers make up 90 percent of the NAM's membership.

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the legal scholars, corporate legal officers,

---

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Petitioners filed notices of blanket consent with the Clerk. Respondent has consented to the filing of this brief.

private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as amicus curiae in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. Although the ALF chooses to disclose in its annual reports the names of the foundations, companies, law firms, and individuals that provide financial support, the Foundation recognizes the important value of the First Amendment right to anonymity. ALF supports the rights of other organizations to use anonymity to enable their members and donors to exercise their speech and association rights.

For more than 100 years, the Forging Industry Association (FIA) has been helping forging companies in North America to increase their global competitiveness. FIA's producer member companies manufacture approximately 75% of the custom forgings volume produced in North America. Its supplier members manufacture materials and provide services used by the forging industry. Together, FIA's 200 members comprise the only trade association dedicated to promoting and serving the forging industry in North America. FIA is dedicated to bringing awareness to lawmakers on key issues that impact the future of the industry. FIA's services are valuable to small member companies that cannot afford to take on the kinds of initiatives the FIA is capable of doing.

The Kansas Chamber of Commerce has been championing business in the State since 1924. The Chamber is member-driven and its strength comes from hundreds of Kansas employers of every size. The Chamber focuses on the key issues impacting Kansas

businesses, working to make Kansas a top State to do business. Its mission is to continually strive to improve the economic climate for the benefit of every business and citizen and to safeguard our system of free, competitive enterprise.

Oregon Business & Industry (OBI) is the State's largest and most comprehensive business association. With over 1,600 members who employ over 250,000 people in every corner of the State, OBI represents the diversity of Oregon's business community. OBI's members range from very small businesses to the State's largest employers. OBI advocates on behalf of a strong and healthy business climate for Oregon. OBI is also the Oregon Retail Council and the state affiliate of the National Association of Manufacturers.

Since its founding in 1909, the Pennsylvania Manufacturers' Association (PMA) has served as a leading voice for business and manufacturing in Pennsylvania. From its headquarters in the Frederick W. Anton, III, Center, across from the steps to the State Capitol Building in Harrisburg, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs. PMA forcefully advocates for forward-looking strategies that will both take advantage of Pennsylvania's tremendous energy resources and promote the Commonwealth's long-term economic stability for the benefit of Pennsylvania's businesses and citizenry.

Founded in 1937, the Plastics Industry Association (Plastics) is a purpose-driven organization that supports the entire plastics supply chain. It is the only association that supports the entire plastics supply chain. Plastics has a track record of fostering

collaboration between each segment of the industry and evolving right alongside the industry as a whole. Plastics gives its member companies a voice in shaping the industry's future while advancing the legislative and regulatory priorities across all levels of advocacy.

Organized in 2003, the Treated Wood Council (TWC) serves companies that harvest and saw wood, manufacture wood preservatives, produce pressure-treated wood products, or serve the treated wood industry. Its mission is to serve all segments of the treated wood industry in the field of government affairs.

Founded in 1911, Wisconsin Manufacturers & Commerce (WMC) is the largest and most influential business association in the State, working to make Wisconsin the best place in the nation to do business. WMC is the state chamber of commerce, state manufacturers' association, and state safety council. WMC represents over 3,800 member companies of every size, spanning all sectors of the economy. WMC has twice successfully litigated cases to the Wisconsin Supreme Court to defend the anonymity of its members and donors.

The breadth of *amici* demonstrates how important the First Amendment issues in this case are to an incredibly diverse range of businesses, industries, and associations. The type of disclosure requirements at issue here threaten to stifle individuals' and businesses' ability to speak with a collective voice on important matters, especially when their views are unpopular. Left with the choice of facing harassment or not speaking at all, many businesses will choose silence. *Amici* share common values of individual liberty and free enterprise. They believe that by joining

together—whether through public-advocacy groups or trade associations—individuals and businesses can often best exercise their First Amendment rights. *Amici* each provide an avenue for collective speech for their members or supporters. And the trade-association *amici* are emblematic of the types of organizations potentially threatened by disclosure requirements like those at issue in these cases. As such, they can offer the Court a unique perspective on the burden that disclosure laws such as those here place on trade associations and the members they speak for, as the NAM and the ALF did at the petition stage.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The First Amendment guarantees individuals and businesses alike a zone of anonymity to exercise their freedoms of speech and association. "[W]hether a group is popular or unpopular, the right of privacy implicit in the First Amendment creates an area into which the Government may not enter" without satisfying searching constitutional scrutiny. *Gibson* v. *Florida Legis. Investigation Comm.*, 372 U.S. 539, 570 (1963) (Douglas, J., concurring). Mandatory disclosure laws threaten to undercut this privacy by requiring nonprofit organizations like *amici* to turn over their donor or membership lists as a condition for their continued existence. If States may apply such disclosure requirements indiscriminately, that would open *amici*'s members and donors to pressure tactics such as boycotts, harassment, and even threatened or actual violence that are intended to prevent those individuals and organizations from engaging in free speech. Free speech is particularly at-risk when government officials themselves seek to punish or

eliminate it. These concerns are precisely why businesses choose to speak collectively through trade associations.

This Court has long held that state-compelled disclosures are subject to exacting scrutiny when the disclosures risk subjecting others to a reasonable probability of harm, economic reprisal, or "other manifestations of public hostility." *NAACP* v. *Alabama ex rel. Patterson* (*NAACP* v. *Alabama*), 357 U.S. 449, 462-463 (1958); *see Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961). Under the proper application of exacting scrutiny, a State defending a disclosure requirement must demonstrate that it has a compelling interest for the requirement, that there is a substantial relationship between the information sought and the substantial interest, and that the disclosure requirement is "narrowly drawn to prevent the supposed evil." *Gremillion*, 366 U.S. at 297 (internal quotation marks omitted).

Rather than applying exacting scrutiny in this case, however, the Ninth Circuit applied a laxer form of scrutiny akin to what courts have applied to the very different context of political-campaign contributions. *See Buckley* v. *Valeo*, 424 U.S. 1, 64-68 (1976). It concluded that California's interest in policing charitable fraud was sufficiently substantially related to its requirement that the State could compel every nonprofit organization in California to turn over the identities of its major donors on an indiscriminate basis. *See* No. 19-251 Pet. App. 16a-22a. The court ignored other, less restrictive means to achieve that same governmental interest. *Id.* at 22a-23a. This was error.

The experience of *amici* underscores the impact of the Ninth Circuit's error. Trade associations enjoy a

constitutionally protected right to speak on behalf of their members. *See Citizens United* v. *Fed. Election Comm'n*, 558 U.S. 310, 365 (2010); *Gremillion*, 366 U.S. at 296; *NAACP* v. *Alabama*, 357 U.S. at 458-459. Their members have a constitutionally protected right to associate with each other and with the association. An important corollary to these rights is the "[i]nviolability of privacy in group association," which is "indispensable to preservation of freedom of association." *NAACP* v. *Alabama*, 357 U.S. at 462. This right to associational privacy is especially important for those who may take unpopular positions. *See id.* Otherwise, individuals or businesses may choose silence, and their views will be removed from the "marketplace of ideas" that the First Amendment is meant to foster. *Matal* v. *Tam*, 137 S. Ct. 1744, 1762 (2017).

By joining together through public-advocacy groups, member businesses—like those belonging to *amici*'s associations—are best able to exercise their First Amendment rights to speak and to associate. Compelled disclosure of membership invites disproportionate retaliation to speech, giving would-be censors the ability to silence the exercise of First Amendment speech rights and to control the terms of public discourse. By embracing a legal rule that makes compelled disclosure easy for States to justify, the Ninth Circuit invites just that sort of silencing.

ARGUMENT

Anonymous and pseudonymous speech are not new. They are part of the fabric of the American tradition: Alexander Hamilton, James Madison, and John Jay wrote the *Federalist Papers* under the pseudonym "Publius" to advocate for the Constitution's ratification; John Marshall wrote as "a Friend of the Union"

and "a Friend of the Constitution" to elaborate on his opinion in *McCulloch* v. *Maryland*; and both Thomas Jefferson and Abraham Lincoln published political writings anonymously throughout their careers. *See* Bradley A. Smith, *In Defense of Political Anonymity*, City J. (2010), https://www.tinyurl.com/yyafwotm. Anonymous writings, therefore, "have been historic weapons in the defense of liberty" and "have played an important role in the progress of mankind." *Talley* v. *California*, 362 U.S. 60, 62, 64 (1960) (internal quotation marks omitted).

Anonymous speech is perhaps even more important today than it was for the founding generation. In an intensely polarized political climate where social-media inspired backlash can have catastrophic effects, anonymity as members of trade associations or public-interest groups allows manufacturers and other businesses to speak confidently with a collective voice. *See NAACP* v. *Alabama*, 357 U.S. at 460-461.

I. BY APPLYING A LAX FORM OF FIRST AMENDMENT SCRUTINY, THE NINTH CIRCUIT'S DECISION INVITES STATES TO CHILL DISFAVORED SPEECH.

The First Amendment protects the right to band together to advocate in two distinct and critical ways. First, the First Amendment protects companies' and individuals' right "to engage in association for the advancement of beliefs and ideas." *NAACP* v. *Button*, 371 U.S. 415, 430 (1963) (internal quotation marks omitted). Second, the First Amendment separately protects an association's right to speak and petition on its members' behalf. *See McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); *Gremillion*, 366 U.S. at 296; *NAACP* v. *Alabama*, 357 U.S. at 458-459.

These rights apply whether or not the association is itself incorporated and whether its members are companies or individuals. *See Citizens United*, 558 U.S. at 365; *NAACP* v. *Alabama*, 357 U.S. at 458-459.

Without the option for anonymity, the speech protected by these First Amendment rights will be chilled. This Court has long recognized that privacy in one's associations is "indispensable to preservation of freedom of association." *NAACP* v. *Alabama*, 357 U.S. at 462; *see Gibson*, 372 U.S. at 544. Disclosure laws "may induce members to withdraw from the [a]ssociation 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." *NAACP* v. *Alabama*, 357 U.S. at 462-463.

To protect these fundamental rights, this Court requires exacting scrutiny of state-compelled disclosures when the disclosure will subject an association or its members to a reasonable probability of harm, economic reprisal, or "other manifestations of public hostility." *Id.*; *see Gremillion*, 366 U.S. at 297. Petitioners' experiences, as well as the private and public backlash *amici*'s members and countless other businesses and entities have faced for taking unpopular positions on controversial issues, plainly demonstrate why California's mandatory donor-disclosure law must be subject to exacting scrutiny. *See infra* Part II.A.

Under exacting scrutiny, the government bears a heavy burden. First, the government must demonstrate a compelling interest furthered by compulsory disclosure; second, there must be a substantial relationship between the information sought and that

government interest; and third, the information sought must be narrowly tailored. *See NAACP* v. *Alabama*, 357 U.S. at 462-463, 466; *Gibson*, 372 U.S. at 546, 548-549; *Gremillion*, 366 U.S. at 296. It is not enough that there be *some* legitimate governmental interest. For "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

California's indiscriminate disclosure law is not narrowly tailored. Its purported interest is policing charitable fraud. *See* No. 19-251 Pet. App. 6a-7a. But mandating perpetual and ongoing disclosure is not narrowly tailored to achieve that goal. Such disclosure invites the kind of disproportionate retaliation for political speech that risks chilling the associational and speech rights of the members in the organizations subject to California's rule. That risk is especially grave given legitimate concerns about disclosed information being leaked or used by politically motivated officials. Yet California has available a panoply of alternative tools that are less likely to chill speech. For example, traditional investigatory methods—such as grand jury subpoenas—are less-disruptive, more-targeted means that belie California's supposed need for blanket disclosure.

The Framers ratified the First Amendment because they feared "silence coerced by law" and "the occasional tyrannies of governing majorities" that might be tempted to "discourage thought" through "fear of punishment." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269–271 (1964) (quoting *Whitney* v.

California, 274 U.S. 357, 375–376 (1927) (Brandeis, J., concurring)). The Ninth Circuit invited just those unhappy results by unduly cabining the First Amendment's zone of protection for anonymous speech and association, even though the Petitioners put forward specific evidence that they had in fact faced harassment and retaliation. *See* No. 19-251 Pet. App. 49a-50a; No. 19-255 Pet. App. 94a. Under a mandatory disclosure regime, businesses and individuals will have to choose between advocating for their interests—and risking public exposure and disproportionate backlash—or staying silent and disengaged from public debate. The decision below thus risks robbing society of a free flowing "marketplace of ideas" and replacing it with a culture of stifled speech amidst fear of reprisal. *Virginia* v. *Hicks*, 539 U.S. 113, 119 (2003). The First Amendment demands more exacting scrutiny than the Ninth Circuit provided.

II. ANONYMITY IS ESSENTIAL FOR PEOPLE AND COMPANIES TO FREELY AND EFFECTIVELY SPEAK AND ASSOCIATE.

The consequences of removing the protections of anonymity are not merely theoretical. Retaliation can come in many different forms: economic loss, property damage, or even threatened or actual violence. *See, e.g.*, *ProtectMarriage.com* v. *Bowen*, 830 F. Supp. 2d 914, 917-922 (E.D. Cal. 2011) (summarizing plaintiff's evidence of threats and harassment received in response to plaintiff's support for a controversial ballot initiative); *see, also, e.g.*, James Dao, *How the Anonymous Op-Ed Came to Be*, N.Y. Times (Sept. 8, 2018), https://tinyurl.com/u05tjbh8 (noting that the *New York Times* sometimes chooses to publish content with an anonymous author where the author is at risk, like

with asylum seekers or refugees, or where the author is concerned about retaliation).

Most people and businesses today *can* speak freely and anonymously because most States do not have mandatory disclosure laws for organizations that engage in collective speech; California's scheme is, at this point, an anomaly. The most stark examples of retaliation are therefore cases where individual speakers choose to take *public* positions. But the backlash experienced by public speakers illustrates why anonymous, collective speech is so important.

A. Recent History Is Replete With Examples Of Businesses And Advocacy Organizations Facing Retaliation For Their Speech.

1. In today's highly polarized political climate, "compelled disclosure" of advocacy risks "subject[ing]" businesses "to threats, harassment, or reprisals from * * * private parties." *John Doe No. 1* v. *Reed*, 561 U.S. 186, 200 (2010) (quoting *Buckley*, 424 U.S. at 74). One does not have to look hard to find examples of private harassment and retaliation in response to advocacy and expression.

In the present cases, one of the petitioner organizations advocated free enterprise and a free society, and the other advocated traditional Judeo-Christian religious values. *See* No. 19-251 Pet. App. 10a. They presented evidence at trial that in retaliation for that advocacy, their donors received threatening messages and packages, and even death threats. *See id.* at 49a-50a ("[T]he Court heard ample evidence establishing that AFP, its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the

organization becomes publicly known."); *see also* No. 19-255 Pet. App. 94a (district court noting that record is "replete with allegations and supporting evidence showing that persons associated with the" Thomas More Law Center "have experienced threats, harassment, or other potentially chilling conduct"). Supporters of one Petitioner were surrounded by knife and box-cutter wielding protestors at a rally. The protestors later collapsed a tent on the supporters. *See* No. 19-251 Pet. App. 49a-50a. Protestors also targeted supporters individually by calling for boycotts of their businesses, forcing some to reconsider contributing to or supporting the organization. *See id.*

This type of harassment is not unusual. *See, e.g.*, *State* v. *Grocery Mfrs. Ass'n*, 425 P.3d 927, 932, 941-942 (Wash. Ct. App. 2018), *aff'd in part and rev'd in part*, 461 P.3d 334 (Wash. 2020) (members of a trade association that opposed a ballot initiative were harassed, boycotted, pressured to withdraw from membership, and even threated with death, when their opposition was disclosed).

Amici's members have similarly been the targets of accusatory letter-writing campaigns by activist investors and other individuals, in response to the positions taken by *amici* and other industry organizations to which they belong. The letters make clear that the goal of these campaigns is to silence members and to intimidate the organization from advocating for the disfavored positions.

Supporters of social-justice movements, including Black Lives Matter, have also been the subject of public ire. An Oregon attorney was placed on a government watchlist of potential threats to police after he was identified as supporting Black Lives Matter. *See*

Andrew Dorn, *Johnson Says Oregon DOJ Didn't Show 'Loyalty' In Civil Rights Case*, Or. Pub. Broad. (Oct. 17, 2017), https://tinyurl.com/ca4bjb4v. Last year, a Hamptons craft brewery was boycotted after it declared support for Black Lives Matter in the aftermath of George Floyd's death. *See* Isabel Vincent, *Hamptons Brewery Targeted with Boycott Over Black Lives Matter Support*, N.Y. Post (Aug. 29, 2020), https://tinyurl.com/1gfb1q39. An online group supporting the boycott grew to over 30,000 members and the brewery's Yelp page was overwhelmed by negative reviews relating to the boycott. *See id.*

2. Retaliation does not stop with private individuals. "[T]hreats, harassment, or reprisals from * * * Government officials" occur with regularity when a business, individual, or entity is seen as being on the wrong side of an issue. *Reed*, 561 U.S. at 200 (internal quotation marks omitted). Individuals in government have shown a willingness to use their positions of power to criticize private organizations and donors, often with the intent of forcing them into silence.

For example, some members of Congress have assailed *amici* and their members or donors for speaking publicly in support of positions the members of Congress oppose. They have sent letters to businesses they know to be members of certain associations, pressuring them to speak out against the association or its position, or else face congressional opprobrium by continued association with the group. Government agencies running pension funds have followed a similar tack, sending letters to known association members demanding they cease support of the organization because of its positions. Congress has even considered legislation requiring nonprofits to disclose their

donors precisely *because* disclosure could deter nonprofits from speaking on certain issues. *See* DISCLOSE Act of 2017, S. 1585, 115th Congress (2017); DISCLOSE Act of 2014, S. 2516, 113th Congress (2014); DISCLOSE Act of 2012, S. 3369, 112th Congress (2012).

The First Amendment's implicit right to privacy ensures that government officials focus their attention on organizations broadly, and *not* on individual *members* of organizations. Without the ability to speak anonymously and in concert, businesses and individuals will reasonably fear becoming the next target of politicians' ire. *See, e.g.*, *Citizens United*, 558 U.S. at 483 (Thomas, J., concurring in part and dissenting in part); *Majors* v. *Abell*, 361 F.3d 349, 356 (7th Cir. 2004) (Easterbrook, J., *dubitante*) ("Disclosure also makes it easier to see who has not done his bit for the incumbents * * * .").

3. The Internet has magnified the potential consequences of expansive disclosure rules. Some activist groups have adopted a strategy of "expos[ing] secret donors" in hopes of using "immense public pressure, including perhaps boycotts, to shame them and hurt business," with the goal of chilling their speech and contributions to advocacy organizations. George Zornick, *Progressives Mount Major Campaign to Intimidate Corporate Election Donors*, The Nation (Mar. 12, 2012), https://tinyurl.com/3hslj87t. One example is Accountable America, a nonprofit whose goal is "to confront donors to conservative groups, hoping to create a chilling effect that will dry up contributions." Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. Times (Aug. 7, 2008), https://tinyurl.com/54akwwv2. A similar group on the other

side of the aisle—Americans for Limited Government—secured the names and addresses of donors to liberal causes and mailed letters to those donors threatening to publicize their involvement. *See* Ben Smith, *Group Targets Liberal Donors*, Politico (Sept. 30, 2008), https://tinyurl.com/1riov59d ("We are monitoring all reports of a wide variety of leftist organizations. As your name appears in subsequent reports, it is our intent to publicize your involvement in your local community.").

Due to the ubiquitous nature of social media, it is easier than ever before to retaliate against businesses and individuals for their speech and advocacy contributions. Any member of the public can crowdsource data online, including names and addresses of a group's members made available by government disclosure, to then compile a database of targets. "[W]atchdog groups have created websites that use government-gathered data to organize [donor] information easily for online users, sometimes in provocative ways"—for instance, by identifying addresses of individual donors on a Google map. Raymond J. La Raja, *Political Participation and Civil Courage: The Negative Effect of Transparency on Making Small Campaign Contributions*, 36 Political Behavior 753, 760 (2014); *see Van Hollen, Jr.* v. *Fed. Election Comm'n*, 811 F.3d 486, 500 (D.C. Cir. 2016) ("[T]he advent of the Internet enables prompt disclosure of expenditures, which provides political opponents with the information needed to intimidate and retaliate against their foes." (internal quotation marks omitted)). These campaigns are clearly not designed to respond to disfavored speech with reasoned counterargument, but rather to intimidate donors into shutting down the disfavored speech altogether.

Such campaigns have occurred in California specifically. After a controversial ballot initiative passed, opponents created a website combining state-provided data with Google Maps to geo-locate the initiative's supporters. *See* Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 Ind. L. Rev. 255, 276 (2010); *Hollingsworth* v. *Perry*, 558 U.S. 183, 185-186 (2010) (per curiam). Retaliation against these supporters "may have largely been fueled by the creation of [such] websites." Mayer, *supra*, at 276.

Social media fuels a "censoriousness" marked by "an intolerance of opposing views, a vogue for public shaming and ostracism, and the tendency to dissolve complex policy issues in a blinding moral certainty." *A Letter on Justice and Open Debate*, Harper's Magazine (July 7, 2020), https://tinyurl.com/259lv7l8. Although this "censoriousness" is not new to the Internet era, the medium makes it much easier for vigilante censors to identify and muster a retaliatory crowd against speakers they wish to silence. The modern environment only underscores the wisdom of this Court's First Amendment jurisprudence in recognizing the importance of collective and anonymous speech and association.

B. Anonymity Enables More Effective Free Speech Through Collective Speech.

Amici's members operate in a precarious environment. Consider an owner of a small manufacturer in a rural area who relies on immigrant employees, but whose community favors immigration restrictions. Or a business owner in an urban enclave who fears that a statewide referendum to increase the minimum wage will put him out of business, but who knows the initiative is widely supported by his neighbors. In

both cases, were the businesses to publicly state their views or reveal that they were joining an association to advocate for those interests, they would run the risk of retaliation, be it a retaliatory boycott or an online harassment campaign.

Trade associations and advocacy organizations like *amici* provide a way out of this dilemma. These organizations allow members to pool their resources to speak with a collective voice more effectively than any one company speaking alone. *See ACLU of Nev.* v. *Heller*, 378 F.3d 979, 989 (9th Cir. 2004) ("[I]ndividuals working in cooperation with groups may be concerned about readers prejudging the substance of a message by associating their names with the message."). "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association * * * ." *NAACP* v. *Alabama*, 357 U.S. at 460.

Trade associations, in particular, benefit from membership confidentiality. It protects their members' and contributors' privacy, and the associations can therefore focus their advocacy on the substance of issues rather than on the speakers' identity. *See* Bradley A. Smith, *supra* ("[D]isclosure fosters * * * the * * * idea[ ] that the identity of the speaker matters more than the force of his argument."). After all, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)—not the popularity of the speaker. Member businesses can thus use their membership in a larger organization to avoid being singled out for their views, while still advancing them in the marketplace of ideas.

Faced with the choice to speak and face harassment or to not speak at all, many businesses and individuals will choose silence. This reality will have a chilling effect on trade associations' ability to advocate for themselves and for their members, especially when their views are unpopular in a member's community. *See Buckley*, 424 U.S. at 71 ("In some instances fears of reprisal may deter contributions to the point where the movement cannot survive."). If the Ninth Circuit's rule stands, it will invite States to exercise just this sort of chilling power on trade associations and advocacy groups.

CONCLUSION

For the foregoing reasons and those in Petitioners' briefs, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

LAWRENCE S. EBNER
ATLANTIC LEGAL FOUNDATION
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 729-6337

Counsel for Atlantic Legal Foundation

SEAN MAROTTA
Counsel of Record
BENJAMIN A. FIELD
PATRICK C. VALENCIA
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
sean.marotta@hoganlovells.com

Counsel for Amici Curiae

March 2021