NO. 19-255

IN THE

Supreme Court of the United States

THOMAS MORE LAW CENTER,

Petitioner,

v.

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

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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INTRODUCTION

The United States unequivocally agrees with the Thomas More Law Center that (1) the Ninth Circuit's holding is seriously wrong, U.S.Br.7, 16; (2) the Ninth Circuit's opinion impairs free speech and association nationwide, U.S.Br.23; and (3) only this Court can repair the damage, U.S.Br.10–12, 24. Yet if anything, the United States understates the scope of the problem. While the United States' brief suggests that this Court could apply exacting scrutiny to this compelled-disclosure case even though it arises in the non-electoral context, U.S.Br.8–12, the petition and five Ninth Circuit en banc dissenters explain at length why California's conduct requires nothing less than strict scrutiny, Pet.16–25; App.108a (Ikuta, J. dissenting). In other words, even in their agreement that California's actions are unconstitutional, the differing views of the United States, on the one hand, and those of the Law Center and the en banc dissenters on the other, highlight the need for this Court to intervene and resolve the proper level of scrutiny.

Accordingly, the Court should grant review and clarify what level of scrutiny applies to non-electoral disclosures and how that standard applies to California's blanket-disclosure rule, both facially and as applied to the Law Center. Pet.i. What's more, as the Law Center, the United States, and dozens of amici implore, the Court should do so now, before *NAACP* v. *Alabama*, 357 U.S. 449 (1958), becomes a dead letter.

Certiorari is warranted.

I. The Ninth Circuit erred by jettisoning *NAACP* v. *Alabama's* narrow-tailoring requirement.

Under *NAACP*, non-electoral disclosure requirements must be narrowly tailored to further the state's interest, yet the California Attorney General's blanket-disclosure rule is not tailored in the least. Pet.22–23, 29–30. The United States agrees: "[T]he compelled disclosures here are subject to narrow tailoring but lack a reasonable fit to the asserted governmental interest." U.S.Br.7. Because the Attorney General's disclosure rule is not narrowly tailored it is unconstitutional. U.S.Br.7, 19–21.

The Ninth Circuit erred by "dispensing with [a tailoring] requirement altogether," U.S.Br.16, based on *Buckley* v. *Valeo*, 424 U.S. 1, 61 (1976) (per curiam), and other cases involving disclosures aimed to keep elections fair and honest, Pet.23. As the United States confirms, "[t]his Court's electoral disclosure cases do not support the court of appeals' refusal to require narrow tailoring." U.S.Br.16. The petition (Pet.21–23), United States brief (U.S.Br.16–19), and en banc dissent (App.113a–118a) (Ikuta, J., dissenting from denial of reh'g en banc) identify the same Ninth Circuit mistake. What's more, the United States confirms that other courts of appeals would have decided this case differently. U.S.Br.23–24.

The Ninth Circuit's legal error was also outcome determinative. "[T]he Attorney General does not seriously contend that it somehow satisfies narrow tailoring to require every charity in the country that wishes to fundraise in California to annually disclose its donors' names and addresses." ReplyBr.4.

Nor could he. "California's prophylactic desire to collect as many as 60,000 Schedule B forms per year . . . is out of all proportion to any interest in regulating charities and in conducting efficient investigations." U.S.Br.21. It is not narrowly tailored to require "blanket Schedule B disclosure from every registered charity [fundraising in California] when few are ever investigated, and less restrictive and more tailored means . . . to obtain the desired information are readily available." App.126a–27a (Ikuta, J., dissenting). Quite the opposite, the definition of "overbroad" is a nationwide dragnet of donors' names that the Attorney General admits has never been used to initiate an investigation and which the Attorney General admits could have been obtained through targeted subpoenas or audits in the five out of 540 investigations (over 10 years) where the Attorney General used the information at all. Pet.12.

II. The Ninth Circuit's ruling trivializes free association and free speech, undermining both nationwide.

Freedom of association is a basic right that preserves dissenting voices in our pluralistic society. *NAACP* v. *Alabama*, 357 U.S. at 460. But the panel relegated that First Amendment guarantee to second-tier constitutional status. Misreading this Court's precedents, the Ninth Circuit applied a sliding-scale test in which "the interest and tailoring required . . . varies from case to case, depending on the actual burden on First Amendment rights at stake." App.134a (panel response to the dissent from denial of reh'g en banc). Where a court deems the burden imposed by a disclosure requirement "great, the

interest and the fit must be as well." *Ibid.* But when a court sees a disclosure mandate's burden as "slight, a weaker interest and a looser fit will suffice." *Id.* at 135a.

Nothing in the First Amendment's text—which protects free speech and assembly—allows such free-form analysis. U.S. Const. amend. I. Nor has this Court allowed free association to turn on courts' subjective notions of whether the burden posed by disclosure mandates is heavy or slight. For over 60 years, this Court has recognized that "'privacy in group association [is] in many circumstances . . . *indispensable* to preservation of freedom of association, particularly where a group espouses dissident beliefs.'" U.S.Br.8 (quoting *NAACP* v. *Alabama*, 357 U.S. at 462) (emphasis added).

As the Law Center explained, Pet.3–4, 35–36, and the United States confirmed, the questions presented here are "of substantial national importance," U.S.Br.23. "California is the most populous State in the union, and many charitable organizations fundraise there . . . giving its disclosure requirement outsized effect." *Ibid.*; accord Reply Br.6. New York employs a similar rule. U.S.Br.23. Both California's and New York's "disclosure requirement [have] a nationwide impact because" any charity that wants to fundraise in either location "must disclose all the substantial contributors listed on Schedule B, not just those with a connection to" the Golden or Empire States. U.S.Br.23. One internet leak is all it would take to permanently expose donors in all 50 states.

Under the Ninth Circuit's approach, those affiliated with small but high-profile charities like the Law Center "have little or no protection from compelled disclosure." App.110a (Ikuta, J., dissenting). And this vulnerability will devastate "important associational interests related to political and religious expression" across the nation. U.S.Br.23.

In fact, it already has. Charities and their donors are mindful of the "real threats of harm" posed by California's blanket-disclosure mandate. App.128a (Ikuta, J., dissenting); accord Br. of Prop. 8 Legal Def. Fund 10–18. That is why multiple charities have stopped fundraising in California, depriving themselves of resources and roughly 40 million people of protected speech. ReplyBr.6. Unless this Court grants the petition, our nation's "marketplace of ideas" will deteriorate further—a result the Founders designed the First Amendment to prevent. *Pac. Gas & Elec. Co.* v. *Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 8 (1986).

III. By advocating a different level of scrutiny than the petition, the United States highlights the need for this Court's review.

The modestly different legal standards advanced in the petition and the United States' brief underscore the need for this Court's review. Surveying the *NAACP* v. *Alabama* and *Buckley* lines of cases, the petition makes a strong case that strict scrutiny applies to compelled disclosures outside the electoral context, as it does to serious burdens on free association generally. Pet.16–25. The Attorney General would therefore be required to show the blanket-disclosure rule is narrowly tailored to serve a compelling state interest. Pet.20–21.

Five Ninth Circuit en banc dissenters interpreted this Court's free-association precedent similarly. App.108a (Ikuta, J., dissenting) ("Where government action subjects persons to harassment . . . or other manifestations of public hostility, the government must demonstrate a compelling interest, there must be a substantial relationship between the information sought and the compelling state interest, and the state regulation must be narrowly drawn to prevent the supposed evil.") (cleaned up).

The United States suggests a lower standard of review: exacting scrutiny.[1] U.S.Br.9–10. The United States acknowledges that label originated in *Buckley* and that "[t]he Court has continued to use [it] to describe the standard applicable to compelled-disclosure requirements in the *electoral context*." U.S.Br.9 (emphasis added). Yet the United States recommends importing the "same [exacting-scrutiny] standard . . . *in[to] other contexts* in which compelled disclosure is reasonably likely to result in harassment, reprisal, and similar harms." U.S.Br.10 (emphasis added). Under the United States' theory, the Attorney General would have to prove the disclosure rule serves "a subordinating interest of the State that is compelling" and "there is a substantial relation between the information sought and [that] overriding and compelling state interest." U.S.Br.9 (cleaned up). Because the United States interprets

[1] Americans for Prosperity Foundation also urges the Court to apply exacting scrutiny to California's disclosure mandate. But, unlike the United States, it recognizes that the "Court sometimes treats 'exacting scrutiny' interchangeably with 'strict scrutiny.'" Pet. for Writ. of Cert., *Ams. for Prosperity Found.* v. *Becerra* (19-251) at 18–19 & n.5.

Buckley's substantial-relation requirement as the equivalent of narrow-tailoring, U.S.Br.10–11, the difference between its proposed standard and the Law Center's is important but small. U.S.Br.11.

More critical, the Ninth Circuit's understanding of exacting scrutiny bears no resemblance to the United States' description of it. The court of appeals panel incanted "exacting scrutiny" but required the Attorney General to demonstrate neither a compelling state interest nor narrow tailoring. App.16a. It held that the disclosure rule "survives exacting scrutiny as applied to [the Law Center] because it is substantially related to an important state interest," App.8a, and the panel rejected narrow-tailoring analysis outright. App.17a–18a.

In sum, the Law Center, the United States, the Ninth Circuit panel, and en banc dissent all reviewed this Court's free-association precedent. And they reached different conclusions about (1) whether strict or exacting scrutiny applies, and (2) what exacting scrutiny means. Only this Court can resolve the confusion and conflict, select the correct legal standard, and explicate what that standard means. The Court should grant the petition to do so and dispel longstanding confusion in lower courts, Pet.32–35, which is largely due to *Buckley's* perplexing analysis, U.S.Br.9–11, and this Court's invocation and varying descriptions of exacting scrutiny, Br. of Goldwater Inst. 7–10; Br. of Inst. for Justice 20–23.

IV. The questions presented give this Court flexibility to clarify its free-association precedent in a variety of ways.

The petition poses two questions: (1) whether exacting or strict scrutiny applies to disclosure requirements that burden expressive association rights outside the electoral context, and (2) whether the Attorney General's disclosure requirement violates charities' and their donors' freedom of association and speech facially or as applied to the Law Center. Pet.i.

Unraveling whether strict scrutiny or something less applies to the disclosure rule "is of substantial national importance." U.S.Br.23. And once that legal question is answered the Law Center's petition gives this Court considerable flexibility in settling the dispute between charities and California. The Court could hold that the blanket, annual disclosure mandate for charities that fundraise in the state is "prophylactic, imprecise, unduly burdensome, and facially violates the First Amendment." Pet.16; accord Pet.27–29. Or it could more narrowly rule that the disclosure regulation is unconstitutional as applied to the Law Center because it is reasonably likely to result in harassment, reprisals, and other significant harms. Pet. 29–32; accord U.S.Br.10.

No matter the standard (strict or exacting scrutiny) or mode of analysis (facial or as-applied), the petition describes how the Ninth Circuit erred and why the Law Center should prevail. This comprehensive defense of the First Amendment will prove valuable to the Court as it resolves the confusion in this area of the law. U.S.Br.23–24.

V. No one disputes this case is a clean vehicle for resolving the questions presented.

Neither the United States nor the Attorney General alleges any deficiencies in the Law Center's case. Indeed, the petition is an ideal vehicle for this Court to resolve the important questions presented on both the law and the facts.

As to the law, the Law Center draws a clear line between disclosures in the electoral context—which are subject to exacting scrutiny—and disclosures in the non-electoral context—which are subject to strict scrutiny. Pet.21–25. The United States blends the two. U.S.Br.8–12. But maintaining this distinction is key to reconciling this Court's precedents and the First Amendment interests at play, as amici confirm. Br. of Goldwater Inst. 7–10; Br. of Inst. for Free Speech 2–11; Br. of Inst. for Justice 2–9. Courts should not scrutinize *any* disclosure rule imposed by *any* agency in the state's vast bureaucratic network the same as statutes designed to ensure free and fair elections. Pet.23–26; ReplyBr.3–4.

The Law Center has also consistently argued that the Attorney General cannot constitutionally require every charity that fundraises in California to annually disclose its major donors. Pet.11, 14, 27–29. Although the United States does not address this facial claim, U.S.Br.9, its observation that the Attorney General's Office "can assert only a broad [and unpersuasive] regulatory interest in compelling the disclosures here," because it is not a tax agency, helps prove the Law Center's point. U.S.Br.18; accord ReplyBr.7. "California's prophylactic desire to collect as many as 60,000 Schedule B forms per year[] . . . is

out of all proportion to any interest in regulating charities and in conducting efficient investigations." U.S.Br.21. And the unconstitutionality is even more apparent when one recognizes that the burden is on the Attorney General—not charities—to justify the state's pervasive intrusion into nonprofits' and their donors' free-association rights. Pet.20; ReplyBr.8.

Regarding the as-applied challenge, the Law Center prevails under either strict or exacting scrutiny. Pet.29–32. The Law Center proved a "'reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" U.S.Br.19 (quoting *Buckley*, 424 U.S. at 74). In fact, the district court conducted a full bench trial *after* the Attorney General adopted last-minute and feeble measures to keep donor information private, in response to the fact findings the district court made during Americans for Prosperity Foundation's trial. ReplyBr.9. And the district court ruled for the Law Center anyway. App.62a–63a.

The district court found these litigation-inspired measures futile and the Law Center's factual record strong. App.58a–63a. As the United States recognized, none of the district court's findings are clearly erroneous. U.S.Br.19. Yet the Ninth Circuit engaged in appellate factfinding and effectively overruled them. Pet.14, 20 31; ReplyBr.1, 11; App. 109a, 122a (Ikuta, J., dissenting).

Though the Law Center is small, its work defending religious freedom, family values, and the sanctity of human life is uniquely controversial. The Law Center's employees, donors, and clients have faced intimidation, death threats, hate mail, boycotts, and even an assignation attempt. Pet.30–31. The threats posed by donor disclosure are real, App.59a–61a, as the Law Center's unrebutted expert confirmed.

At trial, Dr. Paul Schervish—the author of the only peer-reviewed study on anonymous-donor behavior—described "highly controversial issues" like religion and abortion as particularly "high emotion and high intensity . . . across the board." Ninth Circuit Excerpts of Record ("E.R.") at 317. He testified that (1) the Attorney General's disclosure mandate "would chill contributions," E.R. at 318; (2) California's failure "[t]o keep Schedule B's private increases the chilling factor," E.R. at 319; and (3) "the religious nature of [the Law Center's work] heightens the need for First Amendment protection," E.R. at 319.

The Law Center thus prevails under any standard, particularly as "the State barely [uses] the Schedule B forms that it has collected over the years, and can obtain the same information through subpoenas and audits in the rare instances when the need arises." U.S.Br.20. But the Ninth Circuit upheld the blanket-disclosure mandate and stripped the Law Center "of First Amendment protection." App.129a (Ikuta, J., dissenting). This Court should grant the petition, restore free association to its proper place atop the First Amendment, and reject California's latest attempt "to stifle free speech." *Nat'l Inst. of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring).

* * *

Uncertainty regarding the proper test to apply to government-compelled disclosure allows lower courts to pick and choose among standards and engage in results-based judging. This means that courts remedy some First Amendment harms and not others based on mere happenstance, such as the circuit where a claim happens to arise, or how a particular judge happens to view the case. Even courts that try to apply the same standard are confused about what "exacting scrutiny" means, particularly compared to strict scrutiny. All this requires this Court's immediate intervention to (1) clarify the proper test, (2) explain what that test means, (3) and apply the test to the Law Center's facial and as-applied claims. Certiorari is warranted.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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