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 ATTORNEY GENERAL OF CALIFORNIA, *Respondent*.

THOMAS MORE LAW CENTER, *Petitioner*,

v.

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

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

BRIEF OF THE FLOYD ABRAMS INSTITUTE FOR FREEDOM OF EXPRESSION AT YALE LAW SCHOOL AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE[1]

The Floyd Abrams Institute for Freedom of Expression at Yale Law School promotes freedom of speech, freedom of the press, access to information, and government transparency. The Abrams Institute has an interest in defending robust constitutional protections for the freedoms of speech and press as critical safeguards of our democratic system. This case relates directly to that interest, and this brief, amicus curiae, is submitted to assure that potentially relevant First Amendment principles are fully set forth for the Court's consideration.

SUMMARY OF THE ARGUMENT

The petitioners and many of the *amici* supporting them cite and rely upon First Amendment interests in favor of preserving donor anonymity. There is no doubt that a level of First Amendment protection has been afforded to protect anonymity in a variety of circumstances. *See generally NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). But there is a strong, competing First Amendment interest that neither the petitioners nor any of the plethora of *amici* briefs submitted at the *certiorari* stage even identified: the public's need for disclosure of information that will enable it to "make informed decisions and give proper weight to different speakers

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither counsel for a party nor a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

and messages." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010).

The Floyd Abrams Institute for Freedom of Expression at Yale Law School submits this brief to draw the Court's attention to that important First Amendment interest in more rather than less public disclosure. We take no position on the ultimate resolution of this case. We agree with petitioner Americans for Prosperity Foundation that exacting scrutiny should be applied in determining whether the California law at issue is held to be constitutional. But unlike that entity and its *amici* allies, we submit that the public interest in disclosure of large donors is sufficiently important to satisfy exacting scrutiny in cases in which their charitable organizations speak out about, and thereby seek to influence, public policy.

The Question Presented by Americans for Prosperity Foundation illustrates the significance of the issue. It distinguishes between the exacting scrutiny it claims should be applied in cases that arise "outside the election context" and ones within that context. *See* Ams. for Prosperity Found. Br. i. Petitioner Thomas More Law Center's first Question Presented draws an identical distinction. *See* Thomas More Law Ctr. Br. i. But that distinction has not been made by this Court, and it is one that we urge the Court not to make. While the petitioners may yet prevail under exacting scrutiny in this case, the impact on the public's First Amendment interest in accessing information about who is trying to influence the resolution of public discussion or debate regarding significant matters of public policy would be gravely impaired if this Court were to limit the applicability of decisions sustaining public access to donor

information only to cases arising in the election context. In the non-election context as well, when public issues are discussed or debated, the public's First Amendment interest in disclosure is similarly strong and the application of exacting scrutiny should lead to the dissemination of more rather than less information about who is actually trying to persuade the public.

We begin with the caselaw that not only has repeatedly sustained donor disclosure requirements after engaging in exacting scrutiny but has done so based on the First Amendment interest of a better-informed public, an interest that is not dependent on the pendency of an election. We then turn to examples of charitable entities engaging in advocacy that illustrate the public's need to know the donors trying to influence public debate, yet where that information would remain hidden if the petitioners' view of the law were applied.

ARGUMENT

I. THE FIRST AMENDMENT IS VINDICATED BY THE IDENTIFICATION OF LARGE DONORS TO CHARITABLE ENTITIES THAT TAKE POSITIONS ON ISSUES OF PUBLIC IMPORTANCE

This Court has long recognized the public's strong First Amendment interest in understanding who is donating to electoral groups, and that interest applies with equal force to public disclosure of donors to groups that advocate on issues of public policy. Knowing the identity of large donors to such organizations is necessary for the public to adequately gauge the organizations' advocacy and thereby

participate, in an informed way, in public debate. This First Amendment interest in disclosure of major donors is sufficiently important to satisfy exacting scrutiny.

A. The public interest in donor disclosure identified in the election context is also important outside the election context

The public has an important First Amendment interest in knowing the information necessary to "make informed decisions and give proper weight to different speakers and messages." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010). As this Court's line of election cases has repeatedly explained, the public's interest in disclosure is rooted in the need to "'provid[e] the electorate with information' and 'insure that the voters are fully informed' about the person or group who is speaking." *Id.* at 368 (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 196 (2003), then *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)).

While the Court has often used elections cases to articulate the public's First Amendment interest in disclosure, it has never suggested that that interest is limited to speech about elections. In fact, it has said the opposite. *See id.* at 369 ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."); *McConnell*, 540 U.S. at 194 (rejecting "the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy"). Indeed, the Court in *Citizens United* upheld a disclosure requirement as applied to "commercial advertisements," which mentioned a candidate's

name only in the context of advertising an upcoming documentary. *Citizens United*, 558 U.S. at 368. The Court explained that disclosing the speaker behind such communications enabled the public to "make informed choices in the political marketplace." *Id.* at 367 (quoting *McConnell*, 540 U.S. at 197).

The Court has also recognized the public's First Amendment interest in knowing the source of speech—an interest that petitioners do not address—in cases that concern ballot initiatives rather than the election of candidates. For example, in *Buckley v. American Constitutional Law Foundation*, the Court recognized that a law requiring disclosure of all contributors to ballot initiatives "responds to [the] substantial state interest" of "disclosure as a control or check on domination of the initiative process by affluent special interest groups." 525 U.S. 182, 202-03 (1999); *see also Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 298-99 (1981) (striking down a California law imposing a $250 concerted contribution cap on ballot measures on the ground that existing law requiring disclosure of all contributors of more than $50 rendered the marginal value of the contribution cap in advancing pro-disclosure interests "insubstantial"); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791-92, 792 n.32 (1978) (recognizing that the proper response to corporate speech on referenda was for the public to "consider, in making their judgment, the source and credibility of the advocate," which might "require[]" identification of the source of the speech).

As demonstrated by these authorities, these "First Amendment interests of individual citizens seeking to

make informed choices," *McConnell*, 540 U.S. at 197 (quoting *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)), apply with no less strength when citizens engage in democratic debate about questions of public policy than they do during an election campaign. Whether an election is at hand or not, "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments," and therefore, "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *First Nat'l Bank of Bos.*, 435 U.S. at 791, 792 n.32. Without disclosure, people are unable to discern whether a group's donors stand to personally benefit from the position it advocates or have personal knowledge or expertise in the subject. People are stymied in their efforts to gauge or respond to the group's speech. Without disclosure, they are left to weigh opposing statements without a scale.

Indeed, this Court's own rules reflect the significance of disclosure in appraising speech on matters of public importance. Supreme Court Rule 37.6 requires *amici* to disclose the identities of "every person other than the amicus curiae, its members, or its counsel" who made a "monetary contribution" intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6. This rule presupposes that disclosure of the identity of those who fund a brief may bear upon the Court's assessment of it and that, in particular, when party counsel are disclosed as contributors, they "should expect the Court to accord their *amicus* briefs a lesser degree of credibility." Stephen M. Shapiro et al., *Supreme Court Practice* § 13.14 (11th ed. 2019).

The public's need for disclosure is a First Amendment interest. Disclosure of major donors to groups that seek to influence matters of public debate ensures the American people have the information they need "to inquire, to hear, to speak, and to use information to reach consensus," which is "a precondition to enlightened self-government." *Citizens United*, 558 U.S. at 339; *see also* Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 Geo. Mason L. Rev. 413, 416 (2012) ("[D]isclosure emphasizes informed popular sovereignty as the most effective check on factions consistent with the First Amendment's republican purpose."). That is why public disclosure is "a reasonable and minimally restrictive method of furthering First Amendment values." *Buckley*, 424 U.S. at 82. As Justice Brandeis famously recognized, "[p]ublicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants." *Id.* at 67 (1976) (quoting Louis Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933)).

Disclosure also helps the public, whether in an election season or not, to avoid confusion or misattribution of a message to the incorrect speaker, and thus effectively understand or respond to the message. It deters attempts by independent groups to influence the "political marketplace" and the electoral process "while hiding behind dubious and misleading names." *Citizens United*, 558 U.S. at 367 (quoting *McConnell*, 540 U.S. at 197); *see also McConnell*, 540 U.S. at 197 (noting the deceptive nature of running advertisements on behalf of "'The Coalition–Americans Working for Real Change' (funded by business organizations opposed to organized labor),

'Citizens for Better Medicare' (funded by the pharmaceutical industry), [and] 'Republicans for Clean Air' (funded by brothers Charles and Sam Wyly)"). Knowledge of the funding sources behind messages helps the public become more informed, discerning consumers of the messaging, which promotes self-government and a properly functioning "political marketplace."

B. The exacting scrutiny described in the Court's election cases applies in the same way to non-election cases

Just as the public's First Amendment interest in disclosure is no different inside the election context than outside it, the exacting scrutiny delineated in election cases should be applied in the same way in non-election cases. Contrary to the implication of the Question Presented—and claims made outright by petitioner Thomas More Law Center and some of the *amici*—this Court and several Courts of Appeals have already held that exacting scrutiny applies outside the context of elections.

The *Citizens United* Court explicitly rejected attempts to limit the disclosure requirements at issue there to only "the functional equivalent of express advocacy." *Citizens United*, 558 U.S. at 368-69. It observed that the Court has repeatedly upheld disclosure requirements in circumstances outside express electoral advocacy, even where other forms of speech-related regulation would be impermissible. *Id.* at 369. The Court's holding in *Citizens United* recalls its earlier application of exacting scrutiny to laws impacting ballot initiatives. *See Am. Constitutional Law Found.*, 525 U.S. at 204 (holding that Colorado

law requiring disclosure of paid ballot initiative circulators "fail[s] exacting scrutiny").

These cases unequivocally refute petitioner Thomas More Law Center's argument that the use of exacting scrutiny is limited to "election-campaign regulations" because of the government's unique "interest in preventing electoral corruption." Thomas More Law Ctr. Br. 29. *American Constitutional Law Foundation* applied "exacting scrutiny" to a law requiring disclosure of certain information related to ballot initiatives immediately after holding that ballot initiatives do not present a risk of corruption. *See Am. Constitutional Law Found.*, 525 U.S. at 203 (holding that ballot initiatives do not involve the risk of "'*quid pro quo*' corruption present when money is paid to, or for, candidates"). The Court, in applying exacting scrutiny, observed the public's interest in knowing "the source and amount of money spent by proponents to get a measure on the ballot." *Id.* at 203-04.

The same decisions dispose of the suggestion by some *amici* that *no* non-electoral disclosure laws are constitutional.[2] The *amici*'s suggestion also founders

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[2] In the brief submitted by Free Speech Coalition, *et al.* in support of granting *certiorari*, *amici* argue that any interest balancing test, up to and including strict scrutiny, cannot apply to disclosure requirements for nonprofit organizations. Free Speech Coal. Br. 7 ("States should not impose such disclosure requirements on any nonprofit organizations. Nor should courts evaluate such requirements through the use of any 'interest balancing test,' or any 'standard of review'—whether it be 'exacting scrutiny' or 'strict scrutiny.'"). *Amici*, in the brief submitted by the Institute for Free Speech supporting *certiorari*, argue that there is only "one limited exception" to the Court's general practice of "repeatedly striking down donor disclosure regimes," which is "in the context of money given and spent on political campaign advocacy." Inst. for Free Speech Br. 1.

on the shoals of long-settled precedent upholding disclosure requirements outside the election context. *See United States v. Harriss*, 347 U.S. 612, 625 (1954) (upholding disclosure requirements related to lobbying expenditures).

Several circuit courts have followed this Court's lead and applied the exacting scrutiny standard outside the election context. The D.C. Circuit upheld a statute requiring registered lobbyists to disclose any donor organizations that met a monetary contribution statutory threshold, concluding that the disclosure requirement survived the same level of scrutiny applied "in *Davis* [*v. Fed. Elec. Comm'n*, 554 U.S. 724 (2008)], *McConnell*, and *Buckley* [*v. Valeo*]." *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 20 (D.C. Cir. 2009). The Tenth Circuit applied exacting scrutiny in upholding the constitutionality of Colorado's Fair Campaign Practice Act, which imposed disclosure requirements on, among other things, some forms of "genuine issue advocacy" unconnected to a political campaign or advocacy for a particular candidate. *Independence Inst. v. Williams*, 812 F.3d 787, 792 (10th Cir. 2016). Similarly, the Seventh Circuit concluded that *Citizens United* "made clear that the wooden distinction between express advocacy and issue discussion does not apply in the disclosure context" and upheld, under exacting scrutiny, a disclosure requirement applied to independent issue advocacy groups. *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 484 (7th Cir. 2012). The First Circuit has reached a similar conclusion. *See Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011) (applying exacting scrutiny to uphold Maine's disclosure requirements that reached issue discussion as opposed to express advocacy).

Of course, exacting scrutiny does not always require disclosure, for private persons may be able to point to legitimate harms arising from disclosure in a particular case. Outside the election context, just as within it, a showing of "a reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties" may chill association to a degree sufficient to justify exceptions to disclosure. *Buckley*, 424 U.S. at 74; *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (invalidating order to disclose NAACP's membership lists to Alabama based on "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"). But these effects on association must be "serious" and may not be "speculative." *Buckley*, 424 U.S. at 70. Public disclosure must be the baseline expectation. *See id.* at 72 (concluding that the "the substantial public interest in disclosure . . . outweighs the harm generally alleged"). As Justice Scalia wrote, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed." *John Doe No. 1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) (a society that "campaigns anonymously . . . does not resemble the Home of the Brave").

C. Examples of nonprofits' activities demonstrate the public's compelling need for disclosure

The public's First Amendment interest in disclosure is illustrated by recent examples of advocacy funded by anonymous donations. With the donors' identities hidden, the public is left in the dark as to whether the donors are merely advocating a position that benefits them financially or politically, or whether they have any specialized knowledge or expertise that should affect the weight given to their views. This lack of disclosure inhibits the public's ability to "make informed choices in the political marketplace," *McConnell*, 540 U.S. at 197, and to participate in debate on issues of national importance. In this section, we provide four illustrative examples of non-electoral speech in which disclosure of the individuals or entities behind the speech is essential for the public to evaluate their claims or participate in the debate.

First, in the days before the 2020 general election, social media users in several states encountered a $400,000 advertising campaign warning them against the supposed danger of an executive order by then-President Donald Trump aimed at lowering prescription drug costs. Brian Schwartz, *Dark Money Health-Care Group Runs Ad Blitz Against Trump Heading into Election Day*, CNBC (Nov. 3, 2020), https://www.cnbc.com/2020/11/03/dark-money-group-runs-ad-blitz-against-trump-week-before-election.html. The voiceover for one of the video advertisements stated, "America needs a cure for Covid-19 now and innovative biopharmaceutical companies are rising to the challenge. So why is

President Trump risking American lives with dangerous executive orders?" *Id.* The proper weight given to these claims—and the proper response by other speakers—necessarily depended on who was speaking through the ads. The public's understanding of the message would be markedly different if it turned out the ads were paid for by a group of emergency room doctors, or an association of insurance companies, or a single Democratic activist. But the group responsible for the campaign, A Healthy Future, did not disclose its donors. Matt Corley, *CREW Complaints Target Network Responsible for at Least $36 Million in Dark Money*, Citizens for Resp. and Ethics in Wash. (Nov. 20, 2020), https://www.citizensforethics.org/reports-investigations/crew-investigations/crew-complaints-target-36-million-dark-money/ (reporting A Healthy Future is wholly owned by A Public Voice, a 501(c)(4) nonprofit). As is often the case, the group's name gave no indication of the people behind it. *See Citizens Against Rent Control*, 454 U.S. at 298 ("[W]hen individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source."). The people ultimately speaking through the ad campaign remained unknown to the public, limiting the ability of the public to gauge the campaign's claims and of anyone else to counter with speech that could bolster or undermine the speaker(s') credibility.

Second, another group, North Fund, has inserted itself into numerous local policy debates without revealing who was behind its advocacy or what their interests may have been, leaving the public unable to "give proper weight" to its speakers or messages. In

Montana, North Fund spent at least $4.6 million advocating for marijuana legalization—about 70 percent of the total expenditures in support of the effort. Addie Slanger, *Progressive-Leaning D.C. Nonprofit Spends Nearly $5 Million for Marijuana Legalization*, Bozeman Daily Chronicle (Oct. 26, 2020), https://www.bozemandailychronicle.com/news/politics/progressive-leaning-d-c-nonprofit-spends-nearly-5-million-for-marijuana-legalization/article_90fded5b-1e86-5ea8-a98e-3e6949430993.html. In Missouri, it gave $1.5 million to a committee pushing for a state constitutional amendment expanding Medicaid, eclipsing the anti-expansion committee's total fundraising of $88,000. Matthew Kelly, *Dark Money Accounts for Roughly a Quarter of Pro-Medicaid Expansion Committee's Funds*, Kan. City Star (July 13, 2020), https://www.kansascity.com/news/politics-government/article244192572.html. And in Washington, D.C., the group promised to spend more than a million dollars on ads pushing for D.C. statehood and aired in states with early presidential primaries. Rachel Kurzius, *This New Campaign Plans to Spend 'Seven Figures' Pushing for D.C. Statehood. But It Won't Disclose Its Funders*, DCist (May 23, 2019), https://dcist.com/story/19/05/23/this-new-campaign-plans-to-spend-seven-figures-pushing-for-d-c-statehood-but-it-wont-disclose-its-funders/. In none of those instances did the public know who was behind the speech or what their interests may be. Nor could they reasonably infer the source(s') identities or general motivations from the potpourri of causes North Fund supports.

Third, on January 6, 2021, supporters of President Trump gathered at the Ellipse outside the White House for a rally called "March to Save America" that

was organized by the 501(c)(4) group Women for America First. Brian Schwartz, *Pro-Trump Dark Money Groups Organized the Rally that Led to Deadly Capitol Hill Riot*, CNBC (Jan. 9, 2021), https://www.cnbc.com/2021/01/09/pro-trump-dark-money-groups-organized-the-rally-that-led-to-deadly-capitol-hill-riot.html. While reporters later identified some of the primary funders of the rally, *see* Shalini Ramachandran et al., *Jan. 6 Rally Funded by Top Trump Donor, Helped by Alex Jones, Organizers Say*, Wall St. J. (Feb. 1, 2021), https://www.wsj.com/articles/jan-6-rally-funded-by-top-trump-donor-helped-by-alex-jones-organizers-say-11612012063, other funders and the individuals behind Women for America First remain unknown to the public.

Fourth, the philanthropy of Cordelia Scaife May is yet another example of how donor disclosure is in the public interest. May almost single-handedly funded the development of modern conservative immigration policies, all while keeping her involvement private. Nicholas Kulish & Mike McIntire, *Why an Heiress Spent Her Fortune Trying to Keep Immigrants Out*, N.Y. Times (Aug. 14, 2019), https://www.nytimes.com/2019/08/14/us/anti-immigration-cordelia-scaife-may.html. Several of May's papers were recently made public posthumously, revealing for the first time that "she bankrolled the founding and operation of the nation's three largest restrictionist groups—the Federation for American Immigration Reform, NumbersUSA and the Center for Immigration Studies—as well as dozens of smaller ones." *Id.* In 1996, May founded the Colcom Foundation, which continues to fund a range of 501(c)(3) and (4) groups advancing conservative immigration policies, almost two decades after her death. *Id.* The public, reviewing

the messages of those various groups, might have evaluated them differently had it known that the groups were all funded by the same individual, rather than a groundswell of many Americans supporting the same position.

In every one of these examples, the public was left without key information necessary for it to "evaluate the arguments to which [it was] being subjected," *First Nat'l Bank of Bos.*, 435 U.S. at 792 n.32, and thus to fully participate in the "political marketplace" of ideas.

CONCLUSION

The Abrams Institute takes no position on whether the Court should affirm or reverse the Court of Appeals for the Ninth Circuit. However, we urge the Court to reaffirm the public's strong First Amendment interest in knowing the source of speech on non-electoral matters of public concern, and to hold that exacting scrutiny applies to disclosure laws outside the electoral context.

Respectfully submitted,[3]

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[3] This brief was prepared by the Floyd Abrams Institute for Freedom of Expression at Yale Law School. The brief does not purport to express the school's institutional views, if any.