Nos. 19-251 and 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 OF THE THOMAS MORE SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT. .1

ARGUMENT. 3

The Ninth Circuit's *Ad Hoc* Balancing Test for Protecting Donor Confidentiality Undermines the Categorical Protection For Evidentiary Privileges Recognized in *Jaffee* 3

CONCLUSION 8

TABLE OF CITED AUTHORITIES

Page

CASES

Americans for Prosperity Found. v. Becerra,
919 F.3d 1177 (9th Cir. 2019) .2, 6

Americans for Prosperity Foundation v. Becerra,
903 F.3d 1000 (9th Cir. 2018). 1, 2, 3, 7

Jaffee v. Redmond,
518 U.S. 1 (1996) . . . . *passim*

Mockaitis v. Harcleroad,
104 F.3d 1522 (9th Cir. 1997). .3

Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson,
357 U.S. 449 (1958) 2

Trammel v. United States,
445 U.S. 40 (1980) 3, 4, 5

Upjohn Co. v. United States,
449 U.S. 383 (1981) 5

STATUTES AND OTHER AUTHORITIES

U.S. Const. Amend I 1, 2, 7

Fed. R. Evid. 501 . . . . 2, 3, 4, 7

Sup. Ct. R. 37.6 1

INTEREST OF AMICUS CURIAE

Amicus is the Thomas More Society, a non-profit, national public-interest law firm dedicated to restoring respect in law for life, family, and religious liberty. The Thomas More Society provides legal services to clients free of charge and often represents individuals who cannot afford a legal defense with their own resources. The Thomas More Society relies entirely on donor support to provide its services. As such, it has a unique interest in this case to ensure that states cannot force 501(c)(3) non-profit organizations to disclose donor information without satisfying the rigors of strict scrutiny.[1]

SUMMARY OF ARGUMENT

In *Americans for Prosperity Foundation v. Becerra*, the Ninth Circuit wrongly held that California need not demonstrate a compelling interest in forcing 501(c)(3) non-profit organizations to disclose their top donors to the California Attorney General (a seat recently held by nationally renowned left-wing politicos Kamala Harris and Xavier Becerra). 903 F.3d 1000, 1009 (9th Cir. 2018). Instead, the Ninth Circuit held that California merely needs an interest that "reflect[s] the seriousness"—*i.e.*, outweighs, in the opinion of putatively unbiased judges—the admitted "actual burden on First Amendment rights."

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1. All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for amicus certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Id. (internal quotations omitted). But as the Petitioners' briefs explain, that holding blatantly violated the Supreme Court's blackletter rule that outside the electoral context, such forced disclosures (where, as here, there is evidence they will result in hostilities toward members or donors) require three things: (1) "a compelling government interest"; (2) "a substantial relation between the sought disclosure and that interest"; and (3) "narrow tailoring so the disclosures do not infringe on First Amendment rights more than necessary." *Americans for Prosperity Found. v. Becerra*, 919 F.3d 1177, 1181 (9th Cir. 2019) (Ikuta, J., dissenting from denial of reh'g *en banc*) (citing *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 460 (1958)) (the "*NAACP v. Alabama*" standard). California made none of those showings here. *See id.* at 1182.

This amicus brief makes an additional argument: If the Ninth Circuit is correct that strict scrutiny does not apply here (in lieu of a case-by-case balancing test), it will undermine key Supreme Court precedents founded on similarly critical interests in protecting confidentiality: *i.e.*, the recognition of categorical evidentiary privileges under Federal Rule of Evidence 501, as most recently affirmed in *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996)). In other words, by thumbing its nose at the critical private and public interests served by donor confidentiality here, the Ninth Circuit's position weakens the logical foundations for longstanding, categorical evidentiary privileges.

Reversing the Ninth Circuit thus will not only coincide with the proper "*NAACP v. Alabama* standard" mentioned above, but it will have the happy coincidence of

protecting the logical integrity of this Court's decisions in *Jaffee* and its predecessors, which ensure categorical protection for certain confidential communications at the service of the common good.

ARGUMENT

The Ninth Circuit's *Ad Hoc* Balancing Test for Protecting Donor Confidentiality Undermines the Categorical Protection For Evidentiary Privileges Recognized in *Jaffee*.

The Ninth Circuit once recognized, consistent with Supreme Court precedent, that longstanding evidentiary privileges for priest-penitents, attorney-clients, and physician-patients are "rooted in the imperative need for confidence and trust." *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997) (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)). A similar need supported the Supreme Court's decision in *Jaffee*, which held that Federal Rule of Evidence 501 likewise includes a categorical privilege for confidential communications between psychotherapists and their patients. *Jaffee*, 518 U.S. at 10-15. These privileges—which are categorical and not case-by-case—are based on the broader private and public interests served by protecting confidentiality in particular religious or professional relationships. *Id*. If, however, the Ninth Circuit's *ad hoc* balancing test in *Americans for Prosperity* for protecting *donor confidentiality* is correct, notwithstanding the critical broader interests served by anonymous donations, there is no inherent reason that extrinsic interests should justify the important categorical privileges the Supreme Court recognizes under FRE 501. Thus, reversing

the Ninth Circuit will help maintain the logic of the general evidentiary principle that some confidential communications are too important to the functioning of society to be placed at the fickle mercies of judicial whim.

In *Jaffee*, the Supreme Court held that, pursuant to the terms of FRE 501, "reason and experience" show that an evidentiary privilege for confidential communications between psychotherapists and their patients "promotes sufficiently important interests to outweigh the need for probative evidence." *Jaffee*, 518 U.S. at 9-10 (quoting *Trammel*, 445 U.S. at 51). The Supreme Court recognized this privilege serves both private and public interests. *Id.* at 10-12. And, significantly, it also held this privilege is categorical and not subject to *ad hoc* judicial evaluation. *Id.* at 17-18.

Specifically, *Jaffee* held that a psychotherapist-patient privilege serves private interests because disclosure of psychotherapist-patient communications could cause embarrassment and disgrace for the patient. *Id.* at 10. As the Court noted, "the mere possibility of disclosure may impede the development of the confidential relationship necessary for successful treatment." *Id.* The Court observed there is "wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment." *Id.* (internal quotations omitted).

The Court also held that the psychotherapist-patient privilege serves important public interests because it facilitates proper treatment for improving "[t]he mental health of our citizenry," which, "no less than its physical health, is a public good of transcendent importance." *Id.* at 11. In that respect, the privilege is similar to the

attorney-client privilege, whose purpose "is to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'" *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). It is also like the spousal privilege, which "is justified because it 'furthers the important public interest in marital harmony.'" *Id.* at 11 (quoting *Trammel*, 445 U.S. at 53). Furthermore, it is not outweighed by any evidentiary benefit that would result from denial of the privilege, since that would chill full and frank discussions between psychotherapists and their patients and thus any disclosure of evidence that the state is seeking in the first place. *Id.*

Critically, the Supreme Court also held the psychotherapist-patient privilege is categorical and not "contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure." *Id.* at 17. Like the attorney-client privilege, "the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected,'" and "[a]n uncertain privilege . . . is little better than no privilege at all." *Id.* at 18 (quoting *Upjohn*, 449 U.S. at 393).

All of the interests at stake in *Jaffee* are also present here with respect to the importance of protecting the confidentiality of donors who contribute to 501(c)(3) charitable organizations. First, disclosure of donors' identity would likely cause them significant public disgrace given the evidence of threats, violence, and economic reprisals already shown to employees and supporters

of AFP over the years. *See Americans for Prosperity Found.*, 919 F.3d at 1183-84 (Ikuta, J., dissenting); *see also id.* at 1184 (Ikuta, J., dissenting) (noting "the district court found ample evidence that Foundation supporters would likely be subject to threats or hostility should their affiliations be disclosed").

Second, and accordingly, protecting donor confidentiality serves private interests because "the mere possibility of disclosure" would almost certainly, and quite reasonably, impede the willingness of donors to contribute to 501(c)(3) organizations that hold or promote views deemed highly controversial in modern society (*e.g.*, that human life begins at fertilization, that marriage is between one man and one woman, that sex is determined by biology and not subjective identity, etc.). *See Jaffee*, 518 U.S. at 10. For that reason, confidentiality is assuredly a *sine qua non* for many donors who contribute to 501(c)(3) organizations whose controversial views they support. *See id.*

Third, and relatedly, donor confidentiality serves critical public interests by ensuring that 501(c)(3) organizations have the financial support to help resolve social ills in our society. Many of these organizations rely entirely on donor support and would face financial ruin should their donors face the prospect of their own economic peril if their identities are disclosed. As such, protecting donors' confidentiality helps ensure their uninhibited support of 501(c)(3) organizations that provide critical services not otherwise available to the public, such as the free legal representation to victims of civil rights violations provided by the Thomas More Law Center (a party in this case) and the Thomas More Society (a

different organization). This public interest is surely just as critical as the citizenry's mental health, the administration of justice, and marital harmony protected under FRE 501. *See Jaffee*, 518 U.S. at 11. And it is not outweighed by any benefit from eliminating donor confidentiality, since the resulting chill in significant donations to non-profit organizations would likely vitiate the asserted evidence of fraud that purportedly underlies the state's interest in exposing donor identity in the first place.

Finally, the Ninth Circuit's solution unacceptably leaves donor confidentiality up to individual judicial whim. The Ninth Circuit's test simply requires judges to determine whether the state's interest in exposing charitable donors "reflect[s] the seriousness of the actual burden on First Amendment rights." *Americans for Prosperity Found.*, 903 F.3d at 1009. But as in the context of evidentiary privileges, "participants in the confidential [relationship] must be able to predict with some degree of certainty whether particular discussions will be protected." *Jaffee*, 518 U.S. at 18. Indeed, a milquetoast balancing test is effectively no better than no protection at all. *Id*. Only categorical protection guarantees the private and public interests served by donor confidentiality. And strict scrutiny—rather than an *ad hoc* balancing test—offers just such protection.

Accordingly, given the similarity of interests at issue in protecting non-profit donor confidentiality and evidentiary privileges under FRE 501, the Ninth Circuit's balancing test in this case undermines the logical foundations for protecting longstanding evidentiary privileges rooted in the interests served by confidential communications. Thus, reversing the Ninth Circuit will have the happy benefit of preserving the logic of *Jaffee* and its predecessors.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit and invalidate the California law requiring 501(c)(3) charitable non-profits to disclose their top donors.

Respectfully submitted,

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