
In the Supreme Court of the United States

RIO GRANDE FOUNDATION,

Petitioner,

v.

MAGGIE TOULOUSE OLIVER, in Her Official Capacity as
Secretary of State of New Mexico,

Respondent.

**On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM;
AMERICAN VALUES; CENTER FOR A FREE ECONOMY; CENTER FOR
URBAN RENEWAL AND EDUCATION (CURE); FAMILY INSTITUTE OF
CONNECTICUT ACTION; JAMES DOBSON FAMILY INSTITUTE;
JCCWATCH.ORG; MARYLAND FAMILY INSTITUTE; MEN AND WOMEN
FOR A REPRESENTATIVE DEMOCRACY IN AMERICA, INC.; NORTH
CAROLINA VALUES COALITION; STUDENTS FOR LIFE OF AMERICA;
SUTHERLAND INSTITUTE; TEA PARTY EXPRESS; THE FAMILY
FOUNDATION OF VIRGINIA; UNIFY.US; WOMEN FOR DEMOCRACY IN
AMERICA, INC.; SHAWNNA BOLICK, ARIZONA STATE SENATOR,
DISTRICT 2; MYRON EBELL, CHAIRMAN-ELECT, AMERICAN LANDS
COUNCIL; CHARLIE GEROW, FORMER VICE CHAIRMAN, AMERICAN
CONSERVATIVE UNION; TIM JONES, FORMER SPEAKER, MISSOURI
HOUSE, FOUNDER, LEADERSHIP FOR AMERICA INSTITUTE; JENNY
BETH MARTIN, HONORARY CHAIRMAN, TEA PARTY PATRIOTS
ACTION; JOHN SHADEGG, MEMBER OF CONGRESS, 1995-2010; AND
HON. WILLIAM WAGNER (RET), DISTINGUISHED PROFESSOR OF LAW
EMERITUS IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether New Mexico’s informational interest is sufficient under exacting scrutiny to justify applying its disclosure regime to issue advocacy organizations, like Petitioner, that engage in no express advocacy or its functional equivalent.
2. Whether applying New Mexico’s disclosure regime to an organization that does not meet *Buckley’s* “major purpose” test and does not engage in express advocacy, like Petitioner, constitutes narrow tailoring under exacting scrutiny absent donor earmarking.
3. Whether disclosure regimes applied to issue advocacy organizations, like Petitioner, that engage exclusively in political speech—without express advocacy or its functional equivalent—must satisfy strict scrutiny rather than exacting scrutiny.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including freedom from arbitrary power.¹ AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”² and believes American prosperity depends on ordered liberty and self-government.³ AAF believes that both individuals and organizations have the fundamental right to speak and associate freely, and that that freedom requires the ability to do so anonymously. AAF files this brief on behalf of its 161,715 members nationwide including 13,358 members in the State of California.

Amici American Values; Center for a Free Economy; Center for Urban Renewal and Education (CURE); Family Institute of Connecticut Action; James Dobson Family Institute; JCCWatch.org; Maryland Family Institute; Men and Women for a Representative Democracy in America, Inc.; North Carolina Values Coalition; Students for Life of

¹ All parties received timely notice of the filing of this amicus brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

² Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

³ Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at <https://advancingamericanfreedom.com/aaff-independence-index/>.

America; Sutherland Institute; Tea Party Express; The Family Foundation of Virginia; Unify.US; Women for Democracy in America, Inc.; Shawwna Bolick, Arizona State Senator, District 2; Myron Ebell, Chairman-elect, American Lands Council; Charlie Gerow, Former Vice Chairman, American Conservative Union; Tim Jones, Former Speaker, Missouri House, Founder, Leadership for America Institute; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action; John Shadegg, Member of Congress, 1995-2010; and Hon. William Wagner (Ret), Distinguished Professor of Law Emeritus also believe in protecting the speech and associational rights of organizations and their donors from compelled disclosure of donor information.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the New Mexico Campaign Reporting Act which requires any person making independent expenditures to disclose sensitive donor information if they name a candidate or specific ballot measure within so many days before an election. This law unconstitutionally infringes Petitioner's right to free association and speech. The Court should grant certiorari in this case and reverse the Tenth Circuit's decision.

The New Mexico Campaign Reporting Act ("the Act") defines an independent expenditure as a payment that is "not a coordinated expenditure," and is "made by a person other than a candidate campaign

committee,” to pay for an advertisement that meets one of three criteria.

First, such a payment is an independent expenditure if it “expressly advocates the election or defeat of a clearly identified candidate or the passage or defeat of a clearly identified ballot question.” N.M. Stat. Ann. § 1-19-26(Q)(3)(a). Second, it is an independent expenditure if it “is susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified candidate or ballot question.” N.M. Stat. Ann. § 1-19-26(Q)(3)(b). Finally, it is an independent expenditure if it “refers to a clearly identified candidate or ballot question and is published and disseminated to the relevant electorate in New Mexico within thirty days before the primary election or sixty days before the general election at which the candidate or ballot question is on the ballot.” N.M. Stat. Ann. § 1-19-26(Q)(3)(c).

This Court has recognized that “First Amendment freedoms need breathing space to survive,” *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)). New Mexico’s donor disclosure law suffocates both free speech and free association.

Leading up to the November 2020 general election, Rio Grande Foundation, “a 501(c)(3) nonprofit ‘issue advocacy’ group [d]edicated to increasing liberty and prosperity for all of New Mexico’s citizens,” intended to mail its “Freedom Index,” “a scorecard about specific legislator’s votes,” to New Mexico voters within 60 days of the election. Petition for Certiorari at 8. Though the index “does not exhort the public to vote for or against a specific candidate,” it does name

incumbent legislators. *Id.* at 8. However, because of New Mexico’s donor disclosure law, it could not do so without the risk of being required to expose donor information to the state and the general public.

The freedom to speak about ideas and to associate with others to spread those ideas has always been an integral part of American liberty and self-government. The American Revolution itself was a marriage of freedom of speech and freedom of association in which colonists banded together because of their shared ideas about liberty and government. Thus, it is no surprise that these fundamental rights are cemented in the American conscience as both an end in themselves and a means to the protection of liberty.⁴

In recent years, the increasing illiberalization of political culture has created an environment in which bad actors seek to punish those who express ideas or engage in association with which they disagree. In response, people and organizations naturally self-censor. If people must disclose that they are engaged in communication that might elicit backlash, no matter how mainstream the views they express are, they are less likely to do so. Their speech will be chilled.

Anonymous political communication is an American tradition. The Federalist Papers, among the most well-known and most often cited discussions of the Constitution, were written pseudonymously.

⁴ The Founders, themselves, “saw the freedom of speech ‘both as an end and as a means.’” 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 22310 (2023) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

McIntyre v. Ohio Elec. Comm’n, 514 U.S. 334, 343 n. 6 (1995). So were many of the Antifederalists’ writings opposing the adoption of the Constitution. *Id.* As the Supreme Court has recognized, “[a]nonymity is a shield from the tyranny of the majority.” *Id.* at 357 (citation omitted). Anonymity thus “exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society.” *Id.*

The freedom of association is also a core tenet of the American tradition. As Alexis de Tocqueville noted, early Americans made a habit of forming associations. Unlike aristocratic societies where aristocrats hold the power and those beneath them carry out their will, in America, “all citizens are independent and weak; they can hardly do anything by themselves, and no one among them can compel his fellows to lend him their help. So they all fall into impotence if they do not learn to help each other freely.”⁵ Moreover, “[w]hen you allow [citizens] to associate freely in everything, they end up seeing in association the universal and, so to speak, unique means that men can use to attain the various ends that they propose.”⁶ In America, “[t]he art of association then becomes . . . the mother science; everyone studies it and applies it.”⁷

⁵ 3 Alexis de Tocqueville, *Democracy in America*, 898 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund, Inc. 2010) (1840).

⁶ *Id.* at 914.

⁷ *Id.*

Today, these fundamental rights, so widely employed at the founding and after, are under attack at both the state and federal level. Through its donor disclosure laws, New Mexico undermines the right of organizations like Rio Grande Foundation and its members to freely associate and thus to partake in America's long heritage of free and anonymous political association.

Before considering the merits, the district court dismissed this case for lack of standing. Petition for Certiorari at 9. On appeal, the Tenth Circuit reversed the district court's disclosure challenge, upheld the court's dismissal on standing as to the disclaimer challenge, and remanded. On remand, the district court upheld the disclosure law on the merits. The Tenth Circuit affirmed. The Supreme court should vacate the district court's ruling and strike down the donor disclosure requirements.

The Court should review any government action that impairs the freedoms of speech and association under strict scrutiny. Regulations that chill speech and association are only consistent with the First Amendment if they employ the least restrictive means to achieve a compelling government interest. However, because New Mexico's donor disclosure law does not even satisfy the lower standard of exacting scrutiny, and because the interests at stake in this case are so significant, the Court should grant certiorari in this case and rule for Petitioners.

ARGUMENT

New Mexico seeks to compel organizations that engage in certain forms of political speech to divulge

to the state and the public confidential information about donors who give as little as \$3,000. Under New Mexico law, any person making independent expenditures exceeding \$1,000 in a non-statewide election or \$3,000 in a statewide election is required to disclose the name and address of those who funded those expenditures. N.M. Stat. Ann. § 1-19-27.3(A)(1), (B).

Specifically, the Act requires disclosure for donors “who contributed more than \$200 and earmarked their contributions for independent expenditures” or who “contributed more than \$5,000 during the election cycle—a two year period—unless the donor affirmatively opted out of having their contribution used for independent expenditures.” N.M. Stat. Ann. § 1-19-27.3(D)(2). Donors who meet the dollar-amount threshold can only avoid disclosure by, in writing, directing the organization not to use the money they are donating to engage in what the statute defines as campaign speech. *Id.*

Yet donors would not know that they need to opt out. Donors could hardly expect that Rio Grande’s voting scorecard would trigger the disclosure requirement since it does not “expressly advocate for the election or defeat of a clearly identified candidate” and is not “susceptible to no other reasonable interpretation than as an appeal to vote for or against a clearly identified ballot question” Petition for Certiorari at 6. Still, because the advertisement “refers to a clearly identified candidate” the Act requires donor disclosure if Rio Grande publishes and disseminates the scorecard within thirty days before a primary election or within sixty days before a general

election. New Mexico's donor disclosure regime is unconstitutional.

I. Throughout Recent History, Americans Have Faced Retaliation for Their Speech and Association, Underscoring the Importance of the First Amendment-Protected Right to do So Anonymously.

Throughout recent American history, engaging in one's right to free speech or association has entailed certain risks. Americans today have reason to believe that, if they engage in speech or association others might interpret as politically controversial, they will suffer social, professional, and potentially physical consequences. There are numerous examples of this sort of backlash.

In 2017, James Damore, a Google engineer, was fired after he shared a memo internally, suggesting that there were fewer women employed in science, technology, engineering, and math (STEM) positions not because of sexism but because women, statistically, are less likely than men to be interested in STEM positions and the work that they entail.⁸

In 2008, California's Proposition 8 was a ballot measure that amended the state constitution with the

⁸ Daisuke Wakabayashi, *Google Fires Engineer Who Wrote Memo Questioning Women in Tech*, The New York Times (Aug. 7, 2017) <https://www.nytimes.com/2017/08/07/business/google-women-engineer-fired-memo.html>. Paul Lewis, *'I see things differently': James Damore on his autism and the Google memo*, The Guardian (Nov. 17, 2017) <https://www.theguardian.com/technology/2017/nov/16/james-damore-google-memo-interview-autism-regrets>.

language, “Only marriage between a man and a woman is valid or recognized in California.”⁹ Many people who supported the proposition faced backlash for their political activity. One, Richard Raddon, resigned from his position as director of the Los Angeles Film Festival in the face of threatening calls and emails in response to his \$1,500 donation in support of Proposition 8’s passage.¹⁰

Similarly, Scott Eckern resigned from his position as artistic director of the California Music Theater and Sacramento Music Circus after backlash, including a call for a boycott of the theater, in response to his donation of \$1,000 in support of Proposition 8.¹¹ Actress Susan Egan, who supported the boycott, resolved, “I think at this point I shall do my best to ‘out’ him and any others like him.”¹²

One supporter of Proposition 8 who had a sign in her yard had her home vandalized with spray paint.¹³

⁹ Bob Egelko, *Prop. 8 backers drop challenge on wording*, SFGate (Aug. 12, 2008) <https://www.sfgate.com/bayarea/article/Prop-8-backers-drop-challenge-on-wording-3199955.php>.

¹⁰ Rachel Abramowitz, *Film fest director resigns*, Los Angeles Times, (Nov. 26, 2008) <https://www.latimes.com/archives/la-xpm-2008-nov-26-et-raddonresigns26-story.html>.

¹¹ Jesse McKinley, *Theater Director Resigns Amid Gay-Rights Ire*, The New York Times (Nov. 12, 2008) <https://www.nytimes.com/2008/11/13/theater/13thea.html>

¹² Lisa Derrick, *Boycott Called: Musical Theatre’s Artistic Director Supported Prop 8*, Huffpost (Dec. 11, 2008) https://www.huffpost.com/entry/boycott-called-musical-th_b_142882.

¹³ *Anti-prop 8 vandals hit Alta Loma home*, KABC Television, LLC. (Oct. 26, 2008) <https://abc7.com/archive/6470557/>.

Other buildings were similarly targeted.¹⁴ A report in the aftermath of the backlash against Proposition 8 outlined dozens of incidents of vandalism, harassment, threats, and efforts to professionally harm the measure's supporters.¹⁵

Years later, in 2014, Brendan Eich resigned his position at Mozilla, of which he was a co-founder, after backlash to his 2008 donation in support of Proposition 8.¹⁶

More recently, perpetrators have targeted both pro-life facilities and abortion clinics in response to controversy about abortion law and policy. In 2022, a man in Pennsylvania was charged with a Freedom of Access to Clinic Entrances (FACE) Act violation for assaulting an abortion clinic escort, and a California man was charged under the same statute for causing damage to an abortion clinic.¹⁷ Pro-life pregnancy centers have been attacked, including in Longmont,

¹⁴ Barbara Giasone, *Vandals spray paint signs in downtown Fullerton*, The Orange County Register (Oct. 20, 2008) <https://www.ocregister.com/2008/10/20/vandals-spray-paint-signs-in-downtown-fullerton/>.

¹⁵ Thomas Messner, *The Price of Prop 8*, The Heritage Foundation (Oct. 22, 2009) <https://www.heritage.org/marriage-and-family/report/the-price-prop-8>.

¹⁶ *Mozilla CEO resignation raises free-speech issues*, USA Today (April 4, 2014) <https://www.usatoday.com/story/news/nation/2014/04/04/mozilla-ceo-resignation-free-speech/7328759/>.

¹⁷ *Recent Cases on Violence Against Reproductive Health Care Providers*, Department of Justice, <https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers> (Updated May 30, 2023).

Colorado, where activists set the Life Choices Pregnancy Center on fire at around causing extensive damage.¹⁸ Another pregnancy center in Winter Haven, Florida was vandalized with spray painted messages that read, “If abortions aren’t safe then neither are you,” “YOUR TIME IS UP!!,” “WE’RE COMING for U,” and “We are everywhere.”¹⁹ Similarly, in May of 2022 in Madison, Wisconsin, a vandal attacked the office of Wisconsin Family Action with Molotov cocktails.²⁰ The vandal wrote on an exterior wall, “If abortions aren’t safe then you aren’t either.”²¹ Further, the Department of Justice has tracked dozens of other attacks on pregnancy centers and abortion clinics.²²

¹⁸ Kieran Nicholson, *Longmont Christian pregnancy crisis center vandalized, catches fire overnight*, Denver Post (June 6, 2022) <https://www.denverpost.com/2022/06/25/life-choices-longmont-vandalized/>.

¹⁹ *Two Defendants Indicted for Civil Rights Conspiracy and FACE Act Offenses Targeting Pregnancy Resource Centers*, Department of Justice (Jan. 24, 2023) <https://www.justice.gov/opa/pr/two-defendants-indicted-civil-rights-conspiracy-and-face-act-offenses-targeting-pregnancy-0>.

²⁰ Todd Richmond, *Man charged with 2022 firebombing of Wisconsin anti-abortion office*, Wisconsin Public Radio (Mar. 28, 2023) <https://www.wpr.org/history/conflicts-disasters/wisconsin-family-action-firebomb-arrest-hridindu-sankar-roychowdhury>.

²¹ *Id.*

²² *Recent Cases on Violence Against Reproductive Health Care Providers*, Department of Justice, <https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers> (Updated May 30, 2023). AAF is now engaged in litigation in the Federal District Court for

Members of the federal government have likewise faced threats to their safety. On June 14, 2017, a man opened fire on members of the Republican congressional baseball team while they were practicing for the annual congressional baseball game. GOP House Majority Whip Steve Scalise was critically injured, and several others were hurt.²³ Similarly, members of this Court have been threatened and harassed for their work.²⁴

Activists have also sought to use the court system as a tool of harassment. In one case, activists and the

the District of DC challenging the DOJ's failure to respond to a Freedom of Information Act request regarding violence against pro-life pregnancy centers. *Advancing American Freedom v. U.S. Dept. of Justice*, No. 23-cv-743. AAF's follow up FOIA request regarding attacks against pregnancy centers, joined by Americans United for Life, CatholicVote, Center for Urban Renewal and Education, Concerned Women for America, The Ethics and Public Policy Center, Faith Wins, Heritage Action for America, Heritage Oversight Project, Human Coalition, Keystone Policy, Students for Life Action, and Susan B. Anthony Pro-Life America, available at <https://advancingamericanfreedom.com/wp-content/uploads/2022/09/FOIA-Request-to-DOJ-on-Violence-Against-Pro-Life-Orgs.pdf>.

²³ Michael D. Shear, Adam Goldman, and Emily Cochrane, *Congressman Steve Scalise Gravely Wounded in Alexandria Baseball Field Ambush*, The New York Times (June 14, 2017) <https://www.nytimes.com/2017/06/14/us/steve-scalise-congress-shot-alexandria-virginia.html>.

²⁴ Maria Cramer and Jesus Jiménez, *Armed Man Traveled to Justice Kavanaugh's Home to Kill Him, Officials Say*, The New York Times (June 8, 2022) <https://www.nytimes.com/2022/06/08/us/brett-kavanaugh-threat-arrest.html>.

DOJ subpoenaed records from Eagle Forum, a nonparty to the litigation. Both of those subpoenas were quashed.²⁵

Nor have Americans failed to notice the threat that comes along with expressing their political views. For example, a study by professors within the University of North Carolina system found that 70% of conservative students and 22% of liberal students are afraid to express their opinions.²⁶ Similarly, a Cato Institute study found that 62% of Americans say they have political views they are afraid to share. Of “strong liberals” who answered the survey, 50% thought that being a Trump donor should be a fireable offense.²⁷ Among “strong conservatives,” 36% believe Biden donors should be fired.²⁸

²⁵*Forum of Alabama fights Trans Activists Subpoena* (Mar. 19, 2024) <https://eagleforum.org/publications/press-releases/eagle-forum-of-alabama-fights-trans-activists-subpoena.html>.

Further, the DOJ failed to respond to AAF’s Freedom of Information Act request relating to DOJ coordination with outside of organization to intimidate Eagle Forum, a pro-family grass roots group. AAF’s FOIA is available at <https://alabamaeagle.org/wp-content/uploads/2022/09/FOIA-Request-to-DOJ-on-EFA-Advancing-American-Freedom.pdf>.

²⁶ *Nearly 70% of Conservative Students Fear Social Repercussions for Opinions, Study Finds*, Young Americans Foundation (July 19, 2023) <https://yaf.org/news/nearly-70-of-conservative-students-fear-social-repercussions-for-opinions-study-finds/>.

²⁷ Emily E. Ekins, *Poll: 62% of Americans Say They Have Political Views They’re Afraid to Share* (July 22, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659953.

²⁸ *Id.*

This Court has noted the pervasiveness of the threat donor disclosure laws pose to liberty. In *Americans for Prosperity Foundation*, the Court recognized “[t]he gravity of the privacy concerns in this context” as “underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners” in that case. 141 S. Ct. at 2388. Those amici’s concerns related to the “real and pervasive” “deterrent effect” of the disclosure laws challenged in that case. *Id.*

The instances of backlash are by no means exhaustive. They merely demonstrate the pervasiveness of efforts to retaliate against those who speak or associate in favor of political or social causes. Thus, there is a cultural pressure that chills Americans’ exercise of their speech and associational rights. It is no surprise, then, that Americans would desire opportunities to advance their political and social goals by anonymous means.

Here, Rio Grande merely seeks to ensure voters can make informed decisions by publishing a voting record for incumbents. While social pressure is not unconstitutional, when the government weaponizes that pressure by compelling disclosure of speakers’ identities, it crosses the constitutional line. The New Mexico law at issue in this case undermines New Mexicans’ ability to speak and associate anonymously and thus should face strict scrutiny.

II. Only Strict Scrutiny Provides Sufficient Protection for Anonymous Association and Speech.

A. The freedom of association protected in the First Amendment is just as central to the scheme of American liberty as is the freedom of speech and of the press.

There is no question that “The First Amendment protects political association as well as political expression.” *Citizens Against Rent Control v. Berkley*, 454 U.S. 290, 295 (1981) (internal quotation marks omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 15 (1976)). The Court’s explication of that right “stemmed from the Court’s recognition that ‘[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.’” *Buckley*, 454 U.S. at 15 (alteration in original) (quoting *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449, 460 (1958)). As the Court said in *NAACP v. Alabama*, “It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” 357 U.S. at 460 (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Cantwell*, 310 U.S. at 303; *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958)).

Because effective expression so often depends on effective association, in the constitutional scheme, association, like speech, is of “transcendent value.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“Where the transcendent value of speech is involved, due

process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech.”). As Luke Sheahan writes, “Associations in a democracy are not a means to self-government; they are self-government. They are not one option for the ordering of human life; they are the order of human life.”²⁹ The rights free speech and free association strike at the heart of human liberty.

The freedom to associate, protected by the Assembly Clause of the First Amendment, includes not only the right to associate, but the right to do so anonymously. *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2390 (2021) (Thomas, J., concurring in part and concurring in the judgement) (“The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously.”).

B. Laws impairing the rights of anonymous expression and association should face strict scrutiny review.

As discussed in Section I, those who exercise their rights of association and expression face the risk of retaliation in various forms. For this reason, the Court has recognized that the rights of speech and association include the right to speak or associate anonymously.

As Justice Thomas has explained, “This Court has long recognized the ‘vital relationship between’

²⁹ Luke C. Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* 17 (2020).

political association ‘and privacy in one's associations,’ and held that ‘[t]he Constitution protects against the compelled disclosure of political associations and beliefs.” *Doe v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) (quoting *NAACP v. Alabama*, 357 U.S. at 462; *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982)).

This protection of anonymity is in keeping with the Court’s approach to anonymous speech. In *Buckley v. American Constitutional Law Foundation*, the Court explained that it had previously applied “‘exacting scrutiny’ to Ohio’s fraud prevention justifications,” and thus “held that the ban on anonymous speech violated the First Amendment.” 525 U.S. 182, 199 (1999) (citing *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347-357 (1995)).

Because “disclosure requirements can chill association ‘[e]ven if there [is] no disclosure to the general public,’” *Ams. for Prosperity Found.*, 141 S. Ct. at 2388 (alterations in original) (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)), disclosure laws threaten not only anonymous speech, but also the anonymous association. Yet the Court’s precedent does not reflect the fundamentality of the interests protected in the First Amendment.

In cases of content-based regulations of speech, the Court rightly gives the rights enshrined in the First Amendment its most protective form of review; strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163-64 (2015). On the other hand, as noted above, when reviewing government regulations that undermine anonymous expression, the Court has applied exacting

scrutiny. *American Constitutional Law Found.*, 525 U.S. at 199 (citing *McIntyre*, 514 U.S. at 347-357)).

Similarly, the Court has explained that “it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the *closest scrutiny*.” *NAACP v. Alabama*, 357 U.S. at 460-61 (emphasis added). Yet, when reviewing laws that undermine associational anonymity, the Court has applied merely exacting scrutiny. *Ams for Prosperity Found.*, 141 S. Ct. at 2382-83.

The interests at stake here are too important to be reviewed under even exacting scrutiny. The ability to advocate for one’s political views should never be subject to the goodwill or peaceable nature of those with whom one disagrees. The First Amendment protects all, not just popular, speech. Yet, when the government demands that speakers and those exercising their right to associate reveal themselves, it exposes them to retaliation. As the Court explained in *NAACP v. Alabama*, because the NAACP had “made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members ha[d] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility,” it was “apparent that compelled disclosure of petitioner’s Alabama membership [was] likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” 357 U.S.

at 462. When government demands the disclosure of speakers and associates to the public, it inevitably invites harassment of those groups and their members.

Because exacting scrutiny does not sufficiently protect the First Amendment rights to anonymous association and speech, and because the harms that result from disclosure of the identity of those engaged in expression and association will continue to pose a serious danger until those interests are sufficiently protected, the Court should grant certiorari and rule for Petitioner under strict scrutiny.

III. Even Under Exacting Scrutiny, New Mexico’s Donor Disclosure Law Violates the First Amendment-Protected Right of Free Association.

According to the Supreme Court, “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.” *NAACP v. Alabama*, 357 U.S. at 460. The fundamental right to free association includes the fundamental right to do so anonymously. *Ams. for Prosperity Found.*, 141 S. Ct. at 2390 (Thomas, J., concurring in part and concurring in the judgement) (“The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously.”). Today, however, local, state, and federal laws curtail that freedom by requiring disclosure of private associations.

Because New Mexico’s disclosure law violates Rio Grande Foundation’s and its donors’ right to freely associate, that law must survive at least exacting scrutiny. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2383. “Exacting scrutiny is just what its name says—exacting. It is just short of strict scrutiny.” *Dakotans for Health v. Noem*, 52 F.4th 381, 389 (8th Cir. 2021). Exacting scrutiny requires “a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted)). Further, the policy must “be narrowly tailored to the government’s asserted interest.” *Id.* If the policy fails on any of these three counts, it must be set aside as an unconstitutional invasion of the First Amendment-recognized right to free association.

A. *Public disclosure of an organization’s donor names does not provide useful information to the electorate.*

To survive exacting scrutiny, the law in question must serve some “sufficiently important governmental interest.” *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Reed*, 561 U.S. at 196) (internal quotation marks omitted). Further, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Id.* (internal quotation marks omitted). “[E]ven a ‘legitimate and substantial’ government interest ‘cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.’” *Id.* at 2384 (quoting *Shelton*, 364 U.S. at 488).

The Tenth Circuit, affirming the district court, found that New Mexico's law served the state's legitimate informational interest. The court reasoned that "independent expenditures under section (3)(c) are inherently made for a political purpose by their very definition," and thus, applying *Citizens United*, concluded "that New Mexico has an important governmental interest to give the electorate useful information about who is paying for these advertisements." App. 32a.

The Supreme Court has recognized an informational interest in disclosure to the voting public relating to electioneering communications. *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 223-224 (2014) (plurality opinion). However, the informational interest here is not compelling because whatever information New Mexico's donor disclosure law provides to voters is not helpful enough to overcome the significant harm it does to First Amendment interests.

That compulsory public disclosure of donor information provides useful information to the electorate is dubious. First, the claimed government interest in providing information to the public about those funding communication is merely a weaponization of the ad hominem fallacy. That an argument is made by an organization supported by another entity that has some reputation is not a legitimate shortcut to the truth. That some people may take that shortcut is their own business. But the government cannot legitimately facilitate a birds-of-a-feather assertion at the expense of the rights of its citizens.

Second, even if using a donor's identity were a legitimate means of understanding the validity of an organization's communication, most voters will be unfamiliar with most donors, meaning that disclosure will not provide additional meaningful information about the communication. Further, it is probable that the people who do know the names of disclosed donors are also the people most informed and thus least in need of additional information about political communications. Less informed voters who lack context for the communications they are receiving are the least likely to know the names of top donors meaning they will be least able to benefit from the additional disclosure. Thus, the supposed information that is being communicated to the electorate by New Mexico's disclosure law is of little value to few voters and of no value to most voters.

As noted above, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ams. for Prosperity Found.*, 141 S. Ct. at 2383 (quoting *Reed*, 561 U.S. at 196) (internal quotation marks omitted) Because the disclosure law here potentially exposes donors to significant retaliation for their First Amendment-protected association while providing at most minimal useful information to the electorate, New Mexico's informational interest is insufficient to satisfy exacting scrutiny.

B. New Mexico’s disclosure law infringes the First Amendment-recognized right to free association because it is not narrowly tailored to achieve a sufficiently important interest.

To survive exacting scrutiny, a law must be narrowly tailored to achieve a sufficiently important interest. *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (“[A] substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored.”). Even if New Mexico’s informational interest in this case were sufficiently important to justify its invasion of the right to anonymous association, the law is not narrowly tailored to achieve its goal.³⁰ According to the Court, “[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—‘[b]ecause First Amendment freedoms need breathing space to survive.’” *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)) (second alteration in original). Here, New Mexico is stifling the First Amendment rights of

³⁰ This Court held that disclosure laws must be both substantially related to a sufficiently important interest and narrowly tailored but then went on to suggest that substantial relation is subsumed by narrow tailoring. *See Ams. for Prosperity Found.*, 141 S. Ct. at 2383-84 (“The United States and the Attorney General respond that exacting scrutiny demands no additional tailoring beyond the ‘substantial relation’ requirement noted above. We think that the answer lies between [substantial relation and the least restrictive means]. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government’s asserted interest.”).

organizations to freely and anonymously associate with their donors.

The test for narrow tailoring is not merely the severity of the harm caused by the law in question, but the breadth of its infringement on fundamental rights. *Ams. for Prosperity Found.*, 141 S. Ct. at 2384-85 (quoting *Shelton*, 364 U.S. at 488). “[A] reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.” *Id.* at 2385. A law is not narrowly tailored if it is either “hopelessly underinclusive,” *See Reed v. Gilbert*, 576 U.S. 155, 171 (2015), or if it proscribes “more speech than necessary.” *See Turner Broadcasting System, Inc. v. FCC.*, 520 U.S. 180, 189 (1997). The donor disclosure law at issue in this case is not narrowly tailored to achieve this interest because it is both over- and underinclusive.

New Mexico’s donor disclosure law is underinclusive. If the interest the state intends to advance by the law is providing useful information to voters, there is much theoretically useful information that is not provided. First, there may be undisclosed donors who would either be more recognizable to voters or were more influential in the creation of the communication and yet are not disclosed because their donation did not meet the statutory requirements.

Further, a law that restricts fundamental personal liberties, even if it does so in pursuit of a legitimate government interest, is not narrowly tailored “when the end can be more narrowly achieved.” *Ams. for Prosperity Found.*, 141 S. Ct. at 2384 (quoting *Shelton*, 364 U.S. at 488) (internal quotation marks omitted).

Here, assuming that the informational interest is legitimate, the most useful information to voters is likely to be the organization directly sponsoring the communication. Such sponsors are likely to have a website or social media accounts that explain their purpose. Thus, a voter who sees an advertisement and wants to know more about the issue and the source of the communication can research that organization directly. The additional benefit of being able to research donors is limited, if it exists at all, and may well lead to more confusion for voters rather than greater clarity.

Because the New Mexico law at issue in this case fails exacting scrutiny, the Court should grant Rio Grande's petition for certiorari to protect essential First Amendment interests. Because exacting scrutiny is insufficiently protective of the rights enshrined in the First Amendment, should the Court find that New Mexico's donor disclosure law satisfies that standard, the Court should review New Mexico's donor disclosure law under strict scrutiny.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

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