No. 16-743

In The Supreme Court of the United States

INDEPENDENCE INSTITUTE,
Appellant,
v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANT

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INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a nonpartisan, nonprofit § 501(c)(3) educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a 501(c)(3) nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

The three-judge panel in the U.S. District Court for the District of Columbia held that an issue advertisement triggered the disclosure requirements under the Bipartisan Campaign Reform Act ("BCRA"), 52 U.S.C. § 30104(f), on the ground that it named a State's two sitting U.S. Senators and directed the audience to contact their offices to express their support for proposed legislation. *Indep.*

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[1] *Amici* state that no counsel for a party to this case authored this brief in whole or in part; and no person or entity, other than *Amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties were asked and consented to the filing of this *Amici Curiae* brief.

Inst. v. Fed. Election Comm'n, No. 14-CV-1500, 2016 WL 6560396 (D.D.C. Nov. 3, 2016). Because one of the named Senators was also a candidate for reelection, the panel determined that the issue advertisement constituted an electioneering communication as defined by 52 U.S.C. § 30104(f)(3)(i). The Court reached this conclusion even though the advertisement made no reference to the Senator's candidacy, did not advocate the election or defeat of the Senator (expressly or otherwise), and referenced the State's other U.S. Senator, who was not then up for reelection. As a result of this decision, organizations that are not engaged in any express advocacy could be subject to the BCRA's disclosure requirements. An organization would be required to report the names and addresses of all donors giving more than $1,000 whenever the organization produced an issue advertisement simply naming an elected official during a covered time period.

Amici submit that the district court's decision raises important issues of constitutional law, and that it will have substantial adverse effects on nonprofit, 501(c)(3) organizations only concerned with policy issues, not the outcome of elections. The Court long has recognized that there is vital relationship between freedom to associate and privacy in one's associations. *Amici* submit that organizations engaged in issue advocacy play a critical role in preserving and facilitating this vital relationship. If allowed to stand this decision will chill and deter speech. As set forth below, *Amici* know firsthand that disclosure, or even the threat of

disclosure, may impair the ability of organizations – in particular, of conservative organizations – to conduct issue advocacy. Accordingly, *Amici* respectfully submit that the Court should note probable jurisdiction and set the case for oral argument.

ARGUMENT

I. Given the Potential Infringement of First Amendment Rights and Harm to an Informed Society, the Court Has Required a Compelling Interest, Subject to Exacting Scrutiny, to Justify the Forced Disclosure of Donor Records.

The rights of free speech and free association are fundamental and highly prized. *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963), citing *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963). The Court has recognized, moreover, that the "constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression." *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of California*, 475 U.S. 1, 8 (1986), citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." *Pac. Gas & Elec. Co.*, 475 U.S. at 8 (citations omitted).

Organizations play a critical role in this process by preserving the right to associate and by facilitating speech, popular or otherwise. "Effective

advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (citations omitted). These groups facilitate "the speech of many individual Americans, who have associated in a common cause, giving the leadership of the [organization] the right to speak on their behalf." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 392 (2010) (Scalia, J., dissenting).

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433 (1963), citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). In particular, to warrant public disclosure of an organization's members, a government actor must "demonstrate[] so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will effect." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960). Such a "significant encroachment upon personal liberty" may only be justified by "showing a subordinating interest which is compelling." *Id.* (citations omitted). "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

In evaluating the burdens imposed by the forced disclosure of donor lists, the *Bates* Court noted the "harassment" and "fear of community hostility and

economic reprisals" that followed "public disclosure of the membership lists," all of which "discouraged new members from joining the organizations and induced former members to withdraw." 361 U.S. at 524; *see Talley v. State of California*, 362 U.S. 60, 65 (1960) (fear of reprisal "might deter perfectly peaceful discussions of public matters of importance"). Even where this "repressive effect" was "in part the result of private attitudes and pressures," it was "brought to bear only after the exercise of governmental power had threatened to force disclosure of the members' names." *Bates*, 361 U.S. at 524, citing *NAACP*, 357 U.S. at 463.

II. *Amici* Have Firsthand Knowledge that a Fear of Public Disclosure of Donations and of Consequent Harassment Diminishes Individuals' Willingness to Donate to or Join Conservative Organizations.

Amici are both nonpartisan, nonprofit 501(c)(3) foundations, with a conservative orientation regarding public policy issues. *Amici* scrupulously avoid engaging in any type of electioneering communications or other election advocacy, but know well the fear of "harassment" and "community hostility and economic reprisals" that afflicts potential donors to conservative organizations regardless of whether those organizations are engaged in issue advocacy or electioneering. *Bates*, 361 U.S. at 524. In consequence, *amici* are acutely aware of the chilling effect that expanding compelled, public disclosure of tax-exempt organizations' donors may have on organizations' activities.

Amici's firsthand experience indicates that donors may materially reduce their support if there is a greater risk of a government-ordered disclosure. To begin with, donors and potential donors to *Amici* care about their privacy, as indicated by the fact that they routinely inquire as to whether their contributions will remain confidential. Further, both current and prospective donors routinely express concerns about possible retaliation for contributing to *Amici*. For example, contributors to Judicial Watch often tell its fundraisers that they "expect to

be audited" for contributing to the organization. Potential contributors have told the organization that they would like to contribute, but have chosen *not* to do so because of fear of retaliation. Other contributors choose to donate anonymously. And some contributors choose to forego available tax deductions for their contributions.

A substantial portion of *Amici's* yearly income comes from donations in excess of $1,000. Any rule that potentially deterred such givers would threaten *Amici* with a significant loss of income. Moreover, charitable and 501(c)(3) foundations almost invariably receive most of their donations from a relatively small proportion of their total membership. While Judicial Watch receives a relatively wide range of contribution amounts each year, *Amici* know that most 501(c)(3) organizations rely on a few, large contributors. Any rule that deters larger givers will threaten the continued viability of such institutions.

The fear of negative consequences arising from public disclosure expressed by those contemplating donations to conservative organizations are founded on recent events. As has been widely reported, monetary support for conservative causes, when disclosed pursuant to campaign finance laws, can subject individuals and organizations to attack and retaliation. Such targeting has been carried out by governmental and non-governmental sources.

One particularly vivid example is the targeting of California citizens who supported Proposition 8 in

2008. Proposition 8, which defined marriage as between one man and one woman under California law, received a majority of votes in the November 2008 election. At that time, the traditional view of marriage adopted by that law was also the publicly-expressed view of President Obama, who also was on the ballot in 2008 and received a majority of California voters' support. During the election campaign, however, opponents of Proposition 8 developed an online database of the names, addresses (with maps), and places of employment of all individuals who had donated more than $100 in support of Proposition 8.[2] The opponents obtained this information through the State's campaign finance disclosure laws. During the campaign, supporters were subjected to various kinds of harassment, including intimidation, vandalism, and loss of income or employment. This harassment was the direct result of targeting facilitated by the State's campaign disclosure laws.

The targeting of Proposition 8 supporters even continued years after the election. In April 2014, Mozilla Chief Executive Officer Brendan Eich resigned following boycotts, protests, and intense public scrutiny of Eich's 2008 financial support for Proposition 8.[3] When Mozilla announced that Eich would become the company's new CEO in March 2014 a firestorm erupted almost immediately over

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[2] Thomas M. Messner The Price of Prop 8, THE HERITAGE FOUNDATION, (Dec. 31, 2016), https://goo.gl/KV7Dbv.

[3] *FAQ on CEO Resignation*, MOZILLA.ORG, https://goo.gl/MgyaDg (last visited on Dec. 31, 2016).

Eich's six-year old $1,000 donation.[4] Despite Eich's attempts to address his critics' concerns, he was was forced to resign two weeks later. The Mozilla affair illustrates that even where positions on controversial issues enjoy majority support, public disclosure of donations may affect an individual's personal and professional interests. For Mozilla's CEO, it led him to resign and leave from the company he co-founded sixteen years earlier.

A similar kind of story occurred during the 2012 general election campaign. After Idaho businessman Frank VanderSloot contributed to a PAC supporting Mitt Romney, he and seven other private contributors were publicly identified by name and occupation. Within days, an investigator for an opposition research firm was researching Mr. VanderSloot's divorce records. He subsequently was audited by the IRS for the first time in his career. And within days of being notified of the audit, Mr. VanderSloot was informed by the Department of Labor that it would be auditing his employees under a federal visa program for temporary agriculture workers.[5]

More recently, shortly after the Court's ruling in *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010), staff inside the Internal Revenue Service began targeting applications for tax-exempt status

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[4] Alistair Barr, *Mozilla CEO Brendan Eich Steps Down*, WALL ST. J., April 3, 2014, https://goo.gl/6cevCo.

[5] Kimberley A. Strassel, *Obama's Enemies List—Part II*, WALL ST. J., July 19, 2012, https://goo.gl/WtBiq3.

filed by conservative non-profit groups.[6] What followed was one of the most troubling instances in recent memory of public officials using government resources to try to silence political opponents.

After widespread reports and Congressional inquiries regarding selective targeting of conservative organizations, the U.S. Treasury Inspector General for Tax Administration ("TIGTA") audited the unit responsible for processing applications by organizations seeking tax-exempt status under I.R.C. §§ 501(c)(3) and 501(c)(4). *Id.* at 3. TIGTA's report on the matter showed that there had been a deliberate, systematic targeting of conservative groups. U.S. Treas. Insp. Gen. for Tax Admin., Ref. No. 2013-10-053, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* 30 (May 14, 2013). The audit focused on allegations that the IRS targeted specific groups, delayed the processing of certain applications, and requested unnecessary information from certain applicants. *Id.* TIGTA found that the IRS unit responsible for processing tax-exempt applications used inappropriate criteria for selecting and referring applications for additional scrutiny by the IRS. *Id.* at 5. Initially, IRS staff conducted ad hoc application reviews looking for conservative terms such as "Tea Party," "Patriots," "9/12," "We the People," or "Take Back the Country." *Id.* A few weeks later, the IRS systematized this process, developing a formal "Be On the Look Out" list of buzzwords staff should search for to identify

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[6] Judicial Watch, *ABCs of IRS Mess; Justice Dept. Is Tainted Too* (last visited Dec. 29, 2016), https://goo.gl/rtDGoS.

conservative organizations. *Id.* at 6. Applications containing these buzzwords were referred for further scrutiny. *Id.* Further, the IRS ordered additional scrutiny for applications based on political views such as concern with issues of government spending, government debt, taxes, or that were generally critical with how the country was being run. *Id.* at 6 and 35.

As a result, conservative organizations seeking tax exempt status experienced delays in receiving final IRS determinations ranging from more than two years to over 1,000 days. *Id.* at 11, 14. These delays caused some applicants to withdraw their applications or abandon their constitutionally protected activities. *Id.* Many targeted applicants were subjected to highly-invasive requests for additional information. *Id.* at 18-20. TIGTA determined that several of the questions sent to targeted groups were unnecessary and may have caused donors to withhold donations or grants. *Id.* 18-20. Among its several invasive, irrelevant requests, the IRS sought the names of the applicant's donors. *Id.* at 20.

TIGTA's findings have been reported widely. However, the IRS has not shown the type of contrition one would expect from an Executive Agency found to be targeting citizens based on their political views. *U.S. v. NorCal Tea Party Patriots (In re United States)*, 817 F.3d 953, 955 (6th Cir. 2016); *True the Vote, Inc. v. Internal Revenue Serv.*, 831 F.3d 551, 561 (D.C. Cir. 2016). Newly discovered

information shows that the IRS's targeting was even more pervasive than TIGTA reported.[7]

The victims of this targeting have come forward to speak publicly about their ordeals. Catherine Engelbrecht testified about how the IRS, and possibly several other federal agencies, targeted her, her family, and their business after her organization filed an application for tax-exempt status. *The IRS Targeting Investigation: What is the Administration Doing? Hearing Before Subcomm. on Econ. Growth, Job Creation and Regulatory Affairs of the H. Comm on Oversight and Gov't Reform*, 113th Cong. 2-3 (Feb. 6, 2014) (statement of Catherine Engelbrecht, Founder and President of True the Vote and King Street Patriots). Ms. Engelbrecht, a former client of Judicial Watch, testified that she and her family experienced 15 different instances of audit or inquiry into their affairs by various federal agencies.[8] *Id.* Previously, neither Ms. Engelbrecht nor her family business had ever experienced similar audits or inquiries by federal agencies. Leaders of other conservative organizations have testified about the

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[7] *See Notice of Compliance With Court's Order*, Ex. 2 at 1-10, *NorCal Tea Party Patriots, et al. v. I.R.S., et al.*, No. 1:13-CV-341 (S.D. Ohio May 24, 2016), ECF No. 265-2.

[8] These included IRS audits of her personal and business tax returns, unscheduled OSHA inspections, two comprehensive audits by the ATF in back to back years, and several calls by the FBI requesting it access to her organizations' membership information to facilitate unspecified domestic terrorism investigations. *Id.*

scrutiny they received after submitting applications for tax-exempt status.[9]

Amicus Judicial Watch has itself been the target of IRS scrutiny of its tax-exempt status by the Clinton administration in 1998.[10] Documents obtained several years later through the Freedom of Information Act confirmed that the IRS targeted Judicial Watch within a week of receiving information from the White House. *Id.* During the audit, the IRS requested the names and addresses of Judicial Watch's directors and its relationship with political parties and political groups. *Id.*

Nor is such abusive political targeting by the Executive Branch restricted to one party. In 1973, the IRS Commissioner needed to intervene to prevent the Nixon administration from using IRS staff to target individuals hostile to the

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[9] Becky Gerritson described how her organization received a request for additional information from the IRS in response to its application for tax-exempt status. *The IRS Targeting Investigation: What is the Administration Doing? Hearing Before Subcomm. on Econ. Growth, Job Creation and Regulatory Affairs of the H. Comm on Oversight and Gov't Reform*, 113th Cong. 2-3 (Feb. 6, 2014) (statement of Becky Gerritson, Founder and President, Wetumpka TEA Party, Inc). Among other things, the IRS requested detailed information about her organization's donors. *Id.*

[10] Tom Fitton, THE CORRUPTION CHRONICLES 18 (Simon & Schuster, 2014).

Administration and the Vietnam War.[11] Just as TIGTA reported in 2013, IRS staff in 1973 was using the "available federal machinery" to target political opposition to the government.[12]

Donors are often aware of instances of political targeting or harassment, as shown by the fact that they have raised the foregoing examples with *Amici*. In *Amici's* experience, any rule that expands the definition of "electioneering communication" so as to require additional disclosure of donor data has the real potential to chill speech in non-electioneering contexts. The intimidating effect of the district court's ruling is only enhanced by the fact that the rule it approves is so apparently arbitrary and unrelated to any true intention to favor one candidate over another.

Naturally, expanding the definition of "electioneering communication" for disclosure purposes does not affect only donors. It also influences *Amici's* issue advocacy. Because the possibility of compelled disclosure, even if remote, affects the willingness of donors to give, *Amici* must accommodate their donors' concerns. What this means, as a practical matter, is that *Amici* must be much more circumspect in mentioning the names of

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[11] Patricia Sullivan, *IRS Chief Successfully Fought Efforts To Use Tax Audits Against Nixon Foes,* WASH. POST, Feb. 6, 2009, https://goo.gl/XYJxnd.

[12] Don Edwards, WATERGATE HEARINGS, BOOK 31, "33. Book VIII, Vol. 1: Alleged Efforts by White House Officials to Acquire Information from the Internal Revenue Service and to Direct Certain IRS Activities" (1974), https://goo.gl/rnsjPk.

both candidates for public office and elected public officials in their issue advocacy. This circumspection directly affects *Amici*'s current plans to educate the public on the issues about which *Amici* are concerned through broadcast and other media.

In short, the District Court's ruling makes *Amici* wary about how they fulfill their public interest missions. Other issue advocacy groups would be well advised to follow suit. The resultant public atmosphere is antithetical to true "[f]reedom of discussion," which "must embrace all issues about which information is needed." *Thornhill*, 310 U.S. at 102.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court note probable jurisdiction and set this matter for oral argument.

Respectfully submitted,

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