No. 25-10830

In the United States Court of Appeals for the Fifth Circuit

TONY MCDONALD,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee,

On Appeal from the United States District Court
for the Northern District of Texas, Fort Worth Division

PROPOSED BRIEF FOR AMICUS CURIAE PEOPLE UNITED FOR PRIVACY FOUNDATION IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

McDonald v. FEC, Case No. 25-10830

Pursuant to Fifth Cir. R. 29.2, undersigned counsel certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

Amicus Curiae: People United for Privacy Foundation

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INTEREST OF AMICUS CURIAE

People United for Privacy Foundation (PUFPF) is a nonprofit, nonpartisan 501(c)(3) organization that advocates for the right of individual Americans to come together in support of shared values and that provides information and resources to policymakers, media, and the public about the close and necessary relationship between citizen privacy and the freedoms of speech and association. Pursuant to that interest, PUFPF submits comments on proposed legislation and amicus briefs in cases concerning any government action that threatens to chill nonprofit advocacy by unlawfully unmasking organizations' members and financial supporters. PUFPF has an interest in ensuring the Federal Election Commission's (FEC) compelled disclosure of minor political contributors is subject to meaningful judicial review and held to an appropriately exacting standard of constitutional scrutiny.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, undersigned counsel for amicus curiae certify that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than amicus curiae and its counsel have contributed money for this brief.

INTRODUCTION

For nearly three quarters of a century, the Supreme Court and this Court have recognized the right to maintain the confidentiality of one's associations from undue government intrusion. The panel's decision guts those protections. Its two holdings dramatically limit individuals' ability to challenge compelled disclosure regimes—even where disclosure chills donor associational rights.

First, the panel held that associational harm via disclosure is not cognizable absent an *additional* injury like "threats or harassment." Second, the panel all but eliminated First Amendment chill as a cognizable donor injury, stating that the entire "chilled-speech line of cases only applies to pre-enforcement challenges where plaintiffs allege the imminent enforcement of a challenged law against them." Both conclusions are flawed and contrary to Supreme Court precedent. The full Fifth Circuit should grant review to correct these errors, which imperil core First Amendment activity.

The panel's decision flouts *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) ("*AFPF*"), which reaffirmed that compelled disclosure infringes on associational rights. When a plaintiff plausibly pleads a "risk of a chilling effect on association," the breathing space demanded by the First Amendment opens wide the courthouse doors. *Id.* at 618–19.

The panel's decision also bucks well-established precedent holding that Article III injury can "arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition." *See, e.g.*, *Laird v. Tatum*, 408 U.S. 1, 11 (1972). The First Amendment protects "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Since the civil rights movement, federal courts have struggled to meaningfully protect the right of Americans to join together and engage in "effective advocacy." *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (quoting *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460 (1958)). The panel's decision impedes that pursuit. It denies that disclosure alone can work Article III injury and it eliminates a chilling injury—a quintessential First Amendment harm—outside the preenforcement context. En banc review is essential to ensure that a plaintiff who pleads the "risk of a chilling effect on association," *AFPF*, 594 U.S. at 618–19, from compelled disclosure may access a federal forum. Because Supreme Court precedent compels that result, the Petition should be granted and the panel decision vacated.

ARGUMENT

I. The Panel Incorrectly Required Harm Beyond Compelled Disclosure.

"The Constitution protects against the compelled disclosure of political associations and beliefs." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982). "The freedom to associate ... for the common advancement of ... beliefs and ideas," *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973), "lies at the foundation of a free society," *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). It furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *AFPF*, 594 U.S. at 606–07 (citation modified). Long ago the NAACP explained, "[t]he right of anonymity is an incident of a civilized society and a necessary adjunct to freedom of association and to full and free expression in a democratic state." Pet'r's Reply Br. at 3, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (No. 91).

As the Supreme Court has recognized, donor disclosure demands "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. In stark juxtaposition to the panel's conclusion that disclosure alone *never* constitutes Article III injury, the Supreme Court has "repeatedly found that compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief

guaranteed by the First Amendment." *Ibid.* (emphasis added). And just four years ago, a controlling plurality of the Supreme Court held that (at minimum) exacting scrutiny "is appropriate" because a "'deterrent effect on the exercise of First Amendment rights' … arises as an '*inevitable result* of the government's conduct in requiring disclosure'" of donor identities. *AFPF*, 594 U.S. at 607 (emphasis added) (quoting *Buckley*, 424 U.S. at 65). Indeed, the dissenters in *AFPF* complained that "the Court abandon[ed] the requirement that plaintiffs demonstrate that they are chilled" and castigated the majority for "presum[ing]… that all disclosure requirements impose associational burdens." *Id.* at 629 (Sotomayor, J., dissenting).[1]

Under exacting scrutiny, the state must show an important interest to justify compelled disclosure of donors or members. This strikes a balance between protecting core First Amendment activity and permitting disclosure narrowly tailored to the government's demonstrated interest. *See, e.g.*, *Burson v. Freeman,* 504 U.S. 191, 198 (1992) (plurality). Yet the Court nowhere suggested that someone resisting a state demand for constitutionally protected information must demonstrate follow-on harms resulting from that disclosure to satisfy Article III. Instead, *AFPF* was clear that—where First Amendment rights, which need "breathing space" to survive, are implicated—the "risk of a chilling effect … is

[1] Justice Thomas would have gone further and applied strict scrutiny. 594 U.S. at 619 (Thomas, J., concurring in the judgment).

enough." 594 U.S. at 618–19 (citation modified). The Court emphasized that "[e]xacting scrutiny is triggered by 'state action which may have the effect of curtailing the freedom to associate,' and by the 'possible deterrent effect' of disclosure." *Id.* at 616 (quoting *NAACP*, 357 U.S. at 460–61).

Government demands for donor identities satisfy Article III because they strike at the heart of the associational right. They necessarily give rise to an objective "fear of exposure of [donors'] beliefs shown through their associations." *NAACP*, 357 U.S. at 463. That objective fear of disclosure risks "induc[ing] [supporters] to withdraw from the [a]ssociation" and refuse to support it. *Ibid.* "Such risks are heightened in the 21st century and seem to grow with each passing year, as anyone with access to a computer can compile a wealth of information about anyone else, including such sensitive details as a person's home address or the school attended by his children." *AFPF*, 594 U.S. at 617 (citation omitted) (cleaned up).

In short, "compelled disclosure" imposes an unacceptable "risk of a chilling effect on association," *id.* at 618–19, which is why "privacy of association and belief" is *itself* a core constitutional liberty "guaranteed by the First Amendment[,]" *Buckley*, 424 U.S. at 64 (*citing Gibson v. Florida Legislative Comm.*, 372 U.S. 539 (1963)); *accord Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1247 (10th Cir. 2023) (noting that "[c]ompliance with [compelled disclosure] requirements *necessarily*

burdens WyGO's First Amendment right to association") (emphasis added) (citation omitted). As *AFPF* held, "[w]hen it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual's ability to join with others to further shared goals. The risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive." 594 U.S. at 618 (cleaned up).

Here, Appellant plausibly alleged that 52 U.S.C. § 30116(a)(8)'s requirement that conduit platforms publicly report all donations burdens associational rights. The panel's conclusion that he needed to plead *more* (*i.e.*, threats or harassments) defies *AFPF* and adopts the position of its dissenters. It reduces the right to "privacy in group association," *NAACP*, 357 U.S. at 462, and the right "not to disclose [one's] true identity," when pursuing protected associational activity, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341 (1995), to the right to be free from harassment. But associational freedoms include the right to associate *privately*. *Gibson*, 372 U.S at 555 (maintaining privacy is a "strong associational interest"); *AFPF*, 594 U.S. at 619–20 (Thomas, J., concurring) (explaining that the "right to assemble includes the right to associate anonymously.").

In fact, *AFPF* expressly rejected California's argument—adopted by the panel here—that First Amendment plaintiffs must establish harm, *i.e.*, reprisals or harassment, above and beyond disclosure. *Id*. at 617. If

the "risk of a chilling effect" is enough to facially invalidate government action on the merits, then it is sufficient to constitute Article III harm. *Id*. at 618.

Further, the panel's approach all but forecloses donor-disclosure claims. While the Supreme Court has made clear that additional harm is not required to trigger exacting scrutiny, the panel imposes such a requirement for standing. That cannot be right. And there is good reason why the Supreme Court has not required more than the disclosure harm itself, particularly at the threshold:[2] "additional" harm is inherently difficult to plead. For example, campaign finance law permits many small-dollar donors to remain anonymous, leaving organizations unable to plead more than the First Amendment injury itself without revealing the very donor identities at issue. By requiring a plaintiff to show more than the "risk of a chilling effect," the panel not only ignored the harm suffered from a loss of privacy but created a pleading trap. Avoiding these precise problems is why *AFPF* decided what it did.

At day's end, the panel erred in concluding that a donor disclosure demand is not a cognizable Article III injury. This Court should grant the Petition and vacate the panel decision.

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[2] And even the lower courts that have struggled to apply *AFPF* to exacting scrutiny have not made the threshold error of kicking the First Amendment plaintiffs on standing grounds. *See No on E v. Chiu*, 85 F.4th 493, 509 (9th Cir. 2023), *cert. denied sub nom. No on E, San Franciscans v. Chiu*, 145 S. Ct. 136 (2024); *Lichtenstein v. Hargett*, 83 F.4th 575, 603 (6th Cir. 2023); *Gaspee Project v. Mederos*, 13 F.4th 79, 92 (1st Cir. 2021).

II. The Panel's Decision Incorrectly Limits First Amendment Chill to the Preenforcement Context.

The panel concluded that "the chilled-speech line of cases only applies to pre-enforcement challenges where plaintiffs allege the imminent enforcement of a challenged law against them." The panel went even further, questioning whether an objective chill is an Article III injury *at all*. "Our chilled speech cases," the panel wrote, "are best understood as an exception to the ordinary way standing works."

There are two key problems with this conclusion. Practically, the Federal Election Campaign Act typically requires reporting by FEC-registered filers (such as campaigns and PACs), *not* the individual donors being disclosed. The panel's reasoning would prevent those donors—who are not subject to the FEC's reporting requirements and enforcement in this context—from litigating to assert their own First Amendment interests.

Doctrinally, it is at odds with black-letter law that "First Amendment plaintiffs can assert standing based on a chilling effect … even where the plaintiff is not subject to criminal prosecution, civil liability, regulatory requirements, or other direct effects." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1096 (10th Cir. 2006) (en banc) (citation modified) (McConnell, J.). To be sure, "chilling effect" cases "most often involve speech deterred by the threat of criminal or civil liability." *Id.* at 1095. But that is not the sine qua non of a chilled speech claim. *Id.*

Consider first *Meese v. Keene,* 481 U.S. 465, 473–74 (1987). There, the Supreme Court held that a politician had standing to challenge the government's identification of films as "political propaganda." The challenged statute "d[id] not have a direct effect on the exercise of his First Amendment rights; it d[id] not prevent him from obtaining or exhibiting the films." *Id.* There was zero preenforcement threat. *Ibid.* Yet the Supreme Court held that the alleged injury—the chilling effect on plaintiff's desire to exhibit the films—was a "cognizable injury." *Id.* at 473.

Or consider *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). There, the Supreme Court held that an informal threat of enforcement—one the plaintiff could have ignored—satisfied Article III. In so doing, it directed lower courts to "recognize that *informal censorship* may sufficiently inhibit" the exercise of First Amendment freedoms to confer standing. *Id.* at 67 (emphasis added). The Court made clear that not only the "threat" of government action (*e.g.,* civil or criminal prosecution), but "other means of coercion, persuasion, and intimidation," can warrant a judicial remedy. *Ibid.*

The panel's decision is similarly at odds with *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 198 (2024), which held that harm from third-party threats may violate the First Amendment. Unsurprisingly, then, numerous courts of appeal have reached the merits of First Amendment claims despite no credible threat of enforcement. *See Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005) (state constitutional provision

limiting popular initiatives found chilling); *Marijuana Pol'y Project v. United States*, 304 F.3d 82, 86 (D.C. Cir. 2002) (federal law limiting initiatives on certain subjects found chilling); *Wellwood v. Johnson*, 172 F.3d 1007, 1008–09 (8th Cir. 1999) (Arkansas signature requirement found chilling).

Because the panel also erred in limiting chilling injuries to the preenforcement context, this Court should grant the Petition and vacate the panel decision.

* * *

The First Amendment's delicate freedoms need breathing space to survive. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court held "that compelled disclosure ... may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Id.* at 462. But the panel obliterated the ability of most donors to bring their First Amendment claims in federal court by holding that compelled disclosure is not itself an Article III injury and by limiting chilling injuries to the preenforcement context. This Court should grant review and vacate the panel's decision to ensure that donors and other nonregulated parties are not denied access to the federal courts when compulsory disclosure regimes (and other exercises of the coercive power of government) chill their First Amendment rights.

CONCLUSION

The Court should grant the Petition.

Dated: April 23, 2026

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the length limitations of Fed. R. App. P. ("Rule") 32(a)(7)(B) and Rule 29(b)(4) because—according to Microsoft Word—it is 2,469 words, excluding the parts that are exempted under Rule 32(f). It complies with the typeface and type-style requirements of Rule 32(a)(5), Rule 32(a)(6), and 5th Cir. R. 32.1 because it is printed in 14-point Century Schoolbook font (12-point for footnotes), a proportionally spaced typeface with serifs.

Dated: April 23, 2026

/s/ Anne Marie Mackin
ANNE MARIE MACKIN

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2026 a true and correct copy of the foregoing was filed via the Court's CM/ECF system and served via electronic filing upon all counsel of record in this case.

Dated: April 23, 2026

/s/ Anne Marie Mackin
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