United States Court of Appeals

for the

Sixth Circuit

Case No. 25-3170

BUCKEYE INSTITUTE,

Plaintiff-Appellee,

– v. –

INTERNAL REVENUE SERVICE; WILLIAM LONG, in his official capacity as Commissioner of Internal Revenue; U.S. DEPARTMENT OF THE TREASURY; SCOTT BESSENT, in his official capacity as Secretary of the Treasury,

Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; ABUNDANCE INSTITUTE; CATHY ADAMS, 2ND VP EAGLE FORUM; ALABAMA POLICY INSTITUTE; AMERICAN CENTER FOR EDUCATION & KNOWLEDGE; AMERICAN CONSERVATIVE UNION FOUNDATION; AMERICAN FAMILY ASSOCIATION; AMERICANS FOR TAX REFORM; AFA ACTION; AMERICAN JURIS LINK; AMERICAN TARGET ADVERTISING, INC.; AMERICANS FOR FAIR TREATMENT;

(Amici Continued on Inside Cover)

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PRESIDENT, CENTER FOR FREEDOM AND PROSPERITY; MOMS FOR LIBERTY; CHUCK MUTH, PRESIDENT, CITIZEN OUTREACH FOUNDATION; MY FAITH VOTES; NATIONAL APOSTOLIC CHRISTIAN LEADERSHIP CONFERENCE; NATIONAL ASSOCIATION OF PARENTS, INC. DBA PARENTSUSA; NATIONAL CENTER FOR PUBLIC POLICY RESEARCH; NATIONAL COMMITTEE FOR RELIGIOUS FREEDOM; NATIONAL LEGAL AND POLICY CENTER; NATIONAL RELIGIOUS BROADCASTERS; NATIONAL RIGHT TO LIFE; NEVADA POLICY; NEW JERSEY FAMILY FOUNDATION; NEW JERSEY FAMILY POLICY CENTER; NEW YORK FAMILIES FOUNDATION; NEW YORK STATE CONSERVATIVE PARTY; NOAH WEBSTER EDUCATIONAL FOUNDATION; NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW; NORTH CAROLINA VALUES COALITION; NSIC INSTITUTE; SARA OLSON, CAO, INTERCESSORS FOR AMERICA; ORTHODOX JEWISH CHAMBER OF COMMERCE; PELICAN INSTITUTE FOR PUBLIC POLICY; PEOPLE UNITED FOR PRIVACY FOUNDATION; PROJECT 21 BLACK LEADERSHIP NETWORK; PRO-LIFE WISCONSIN; PROSPERITY FOR US FOUNDATION; RHODE ISLAND CENTER FOR FREEDOM & PROSPERITY; KEVIN RIFFE, CHAIRMAN, WEST VIRGINIA CENTER RIGHT COALITION; ROUGHRIDER INSTITUTE; RUSSELL KIRK CENTER FOR CULTURAL RENEWAL; DR. GREGORY P. SELTZ, EXECUTIVE DIRECTOR, LCRL, SPEAKER EMERITUS, THE LUTHERAN HOUR; 60 PLUS ASSOCIATION; SOUTHEASTERN LEGAL FOUNDATION; STAND FOR GEORGIA VALUES ACTION; STAND UP MICHIGAN; STARS AND STRIPES UNITED; STUDENTS FOR LIFE ACTION; STUDENTS FOR LIFE OF AMERICA; SUTHERLAND INSTITUTE; TAXPAYERS PROTECTION ALLIANCE; TEXAS VALUES; KERRI TOLOCZKO, CHAIR, SOUTHWEST FLORIDA CENTER RIGHT COALITION; THE COOLIDGE REAGAN FOUNDATION; THE FAMILY ACTION COUNCIL OF TENNESSEE, INC.; THE FAMILY FOUNDATION (KENTUCKY); THE FAMILY FOUNDATION OF VIRGINIA; THE FUND FOR AMERICAN STUDIES; THE INSTITUTE FOR FAITH & FAMILY; THE JUSTICE FOUNDATION; THOLOS FOUNDATION; TRADITION, FAMILY, PROPERTY, INC.; TRUTH IN ENERGY AND CLIMATE; UPPER MIDWEST LAW CENTER; RICHARD VIGUERIE, CHAIRMAN, CONSERVATIVEHQ.COM; ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS, 2018-2021, CHAIR, CENTER FOR AMERICAN SECURITY; WISCONSIN FAMILY ACTION, INC.; WISCONSIN INSTITUTE FOR LAW & LIBERTY; YANKEE INSTITUTE; YOUNG AMERICANS FOR LIBERTY FOUNDATION; AND TYLER YZAGUIRRE, PRESIDENT, SECOND AMENDMENT INSTITUTE
IN SUPPORT OF PLAINTIFF-APPELLEE

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The amici curiae Advancing American Freedom, Inc.; Abundance Institute; Cathy Adams, 2nd VP Eagle Forum; Alabama Policy Institute; American Center for Education & Knowledge; American Conservative Union Foundation; American Family Association; Americans for Tax Reform; AFA Action; American Juris Link; American Target Advertising, Inc.; Americans For Fair Treatment; Americans for Limited Government; Anglicans for Life; Army of Parents; Association of Mature American Citizens Action; Gary L. Bauer, President, American Values; E. Calvin Beisner, Ph.D., President, Cornwall Alliance for the Stewardship of Creation; Shawnna Bolick, Arizona State Senator, District 2; Brian S. Brown, President, National Organization for Marriage; California Policy Center; Catholics Count; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Center of the American Experiment; Paul Chabot, Founder, FreeStyle Foundation; Christian Medical & Dental Associations; Christians Engaged; Citizen Action Defense Fund; Concerned Women for America; Gabe Conger, President, Bradley Impact Fund; Cornerstone Action; Daily Caller; Defense of Freedom Institute for Policy Studies, Inc.; Delaware Family Policy Council; Democrats for Life; Discovery Institute; DonorsTrust; Eagle Forum; Eagle Forum of Alabama; Eagle Forum of Georgia; Ryan Ellis, President, Center for a Free Economy; Faith and Freedom Coalition; Family Business Coalition; Family Institute of Connecticut

Action; Foundation for Government Accountability; Freedom Foundation of Minnesota; Frontline Policy Council; Georgia Public Policy Foundation; Charlie Gerow; Goldwater Institute; Heartbeat International; Jay D. Homnick, Senior Fellow, Project Sentinel; Idaho Family Policy Center; Idaho Freedom Foundation; Illinois Policy Institute; Independent Women's Forum; Independent Women's Law Center; Institute of Liberty; Institute for Policy Innovation; Institute for Reforming Government; International Conference of Evangelical Chaplain Endorsers; James G. Martin Center for Academic Renewal; James Madison Center for Free Speech; James Madison Institute; Job Creators Network Foundation; John Locke Foundation; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Josiah Bartlett Center for Public Policy; Kansas Policy Institute; Leadership Institute; Louisiana Family Forum; Lutheran Center for Religious Liberty; Maine Policy; Manhattan Institute; Jenny Beth Martin, Honorary Chairman, Tea Party Patriots Action; Maryland Family Institute; Minnesota Family Council; Daniel J. Mitchell, President, Center for Freedom and Prosperity; Moms for Liberty; Chuck Muth, President, Citizen Outreach Foundation; My Faith Votes; National Apostolic Christian Leadership Conference; National Association of Parents, Inc. dba ParentsUSA; National Center for Public Policy Research; National Committee for Religious Freedom; National Legal and Policy Center; National Religious Broadcasters; National Right to Life; Nevada Policy; New Jersey Family

Foundation; New Jersey Family Policy Center; New York Families Foundation; New York State Conservative Party; Noah Webster Educational Foundation; North Carolina Institute for Constitutional Law; North Carolina Values Coalition; NSIC Institute; Sara Olson, CAO, Intercessors for America; Orthodox Jewish Chamber of Commerce; Pelican Institute for Public Policy; People United for Privacy Foundation; Project 21 Black Leadership Network; Pro-Life Wisconsin; Prosperity for US Foundation; Rhode Island Center for Freedom & Prosperity; Kevin Riffe, Chairman, West Virginia Center Right Coalition; Roughrider Institute; Russell Kirk Center for Cultural Renewal; Dr. Gregory P. Seltz, Executive Director, LCRL, Speaker Emeritus, The Lutheran Hour; 60 Plus Association; Southeastern Legal Foundation; Stand for Georgia Values Action; Stand Up Michigan; Stars and Stripes United; Students for Life Action; Students for Life of America; Sutherland Institute; Taxpayers Protection Alliance; Texas Values; Kerri Toloczko, Chair, Southwest Florida Center Right Coalition; The Coolidge Reagan Foundation; The Family Action Council of Tennessee, Inc.; The Family Foundation (Kentucky); The Family Foundation of Virginia; The Fund for American Studies; The Institute for Faith & Family; The Justice Foundation; Tholos Foundation; Tradition, Family, Property, Inc.; Truth in Energy and Climate; Upper Midwest Law Center; Richard Viguerie, Chairman, ConservativeHQ.com; Robert Wilkie, Secretary of Veterans Affairs, 2018-2021, Chair, Center for American Security; Wisconsin Family Action, Inc.;

Wisconsin Institute for Law & Liberty; Yankee Institute; Young Americans for Liberty Foundation; and Tyler Yzaguirre, President, Second Amendment Institute are nonprofit corporations. They do not issue stock and are neither owned by nor are they owners of any other corporate entity, in part or in whole. They have no parent companies, subsidiaries, affiliates, or members that have issued shares or debt securities to the public. The corporations are operated by volunteer boards of directors.

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends the timeless, self-evident truths conservatives have always championed—individual liberty, personal responsibility, limited government, and the rule of law[2]—even as many abandon those principles in favor of political expedience. AAF will remain an anchor to windward and "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation"[3] and believes American prosperity depends on ordered liberty and self-government. AAF believes that Americans have the fundamental right to associate and disassociate freely. AAF files this brief on behalf of its 17,656 members in the Sixth Circuit including 6,470 members in Ohio.

Amici Abundance Institute; Cathy Adams, 2nd VP Eagle Forum; Alabama Policy Institute; American Center for Education & Knowledge; American Conservative Union Foundation; American Family Association; Americans for Tax

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[1] All parties have consented to 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] Independence Index: Measuring Life, Liberty and the Pursuit of Happiness, Advancing American Freedom available at https://advancingamericanfreedom.com/aaff-independence-index/.

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

Reform; AFA Action; American Juris Link; American Target Advertising, Inc.; Americans For Fair Treatment; Americans for Limited Government; Anglicans for Life; Army of Parents; Association of Mature American Citizens Action; Gary L. Bauer, President, American Values; E. Calvin Beisner, Ph.D., President, Cornwall Alliance for the Stewardship of Creation; Shawnna Bolick, Arizona State Senator, District 2; Brian S. Brown, President, National Organization for Marriage; California Policy Center; Catholics Count; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Center of the American Experiment; Paul Chabot, Founder, FreeStyle Foundation; Christian Medical & Dental Associations; Christians Engaged; Citizen Action Defense Fund; Concerned Women for America; Gabe Conger, President, Bradley Impact Fund; Cornerstone Action; Daily Caller; Defense of Freedom Institute for Policy Studies, Inc.; Delaware Family Policy Council; Democrats for Life; Discovery Institute; DonorsTrust; Eagle Forum; Eagle Forum of Alabama; Eagle Forum of Georgia; Ryan Ellis, President, Center for a Free Economy; Faith and Freedom Coalition; Family Business Coalition; Family Institute of Connecticut Action; Foundation for Government Accountability; Freedom Foundation of Minnesota; Frontline Policy Council; Georgia Public Policy Foundation; Charlie Gerow; Goldwater Institute; Heartbeat International; Jay D. Homnick, Senior Fellow, Project Sentinel; Idaho Family Policy Center; Idaho Freedom Foundation; Illinois Policy Institute; Independent Women's Forum;

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INTRODUCTION

This case concerns the freedom of organizations and their supporters to exercise their First Amendment protected rights to speech and association. Political association is central to America's history of liberty. Alexis de Tocqueville, in observing Americans, wrote that, "[t]he art of association" was "the mother science; everyone studie[d] it and applie[d] it."[4] The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others," *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 606 (2021) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)) and that right includes the right to do so anonymously. *Id*. at 619-20 (Thomas, J., concurring in part and concurring in the judgment). *See also, McIntyre v. Ohio Elec. Comm'n,* 514 U.S. 334, 362-63 (1995) (Thomas, J., concurring in the judgment) (noting that, in 1784, New Jersey Governor William Livingston, under the pseudonym Scipio, "was at work writing anonymous articles that defended the right to publish anonymously as part of the freedom of the press").

Yet the Internal Revenue Service (IRS) conditions charitable tax exemptions for some organizations on their relinquishing those rights for themselves and their substantial supporters. Pursuant to 26 U.S.C. § 6033(b)(5), "many 501(c)(3)

[4] 3 Alexis de Tocqueville, *Democracy in America*, 914 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis: Liberty Fund, Inc. 2010) (1840).

organizations must annually disclose to the Secretary of the Treasury 'the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors.'" *The Buckeye Institute v. Internal Revenue Service*, No. 2:22-cv-04297, slip op. at 2 (S.D. Ohio Nov. 9, 2023). Substantial contributors are those who contribute "an aggregate total of $5,000 per tax year, if the contributed amount is more than two percent of the total contributions the organization receives in a tax year." *Id*. (citing 26 U.S.C. § 507(d)(2)(A)). Although the IRS is required to keep this donor information confidential, a significant amount of donor data has nonetheless been leaked or hacked. *Id*. at 2-3. The district court thus rightly found that the IRS donor disclosure policy must survive heightened scrutiny. *Id*. at 12.

Freedom of association is an American tradition and is enshrined in the First Amendment. The government cannot condition participation in benefit programs on sacrificing a constitutionally protected right without that condition facing heightened scrutiny. And the government cannot collect massive amounts of data about Americans merely for its own convenience. As former Attorney General William Barr observed about the Consolidated Audit Trail, and Securities and Exchange Commission data collection project, "If the government can collect this information just in case, that's the big-brother surveillance state."[5]

[5] Zach Kessel, *SEC Finalizing a 'Big Brother' Database to Track Americans'*

ARGUMENT

I. The Freedom of Association is Just as Central to American Ordered Liberty as the Freedom of Speech and of the Press.

The Freedom of Association is an American tradition and is among those fundamental liberties protected by the Constitution. In early America, "[t]he art of association" is "the mother science; everyone studie[d] it and applie[d] it."[6] Alexis de Tocqueville observed that early Americans made a habit of forming associations. Unlike in 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."[7]

The American tradition of association is older than the nation itself. Early colonists left Europe for the New World hoping to establish societies where they could worship freely. Over a century and a half later, the American people similarly disassociated from the English Crown while retaining those institutions that

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Stock Trades in Real Time (July 23, 2024 1:58 PM) https://www.nationalreview.com/news/sec-finalizing-a-big-brother-database-to-track-americans-stock-trades-in-real-time/.

[6] Tocqueville, *supra* note 4 at 914.

[7] *Id*. at 898.

experience had taught best vouchsafed their liberties. The freedom to associate and disassociate was, for the founding generation, at the heart of the American project.

The right to free association has thus long been recognized in American law. The Declaration of Independence explains that "Governments are instituted among Men" to secure the fundamental rights of the people. The Declaration of Independence para. 2 (U.S. 1776). The Declaration also describes the higher law upon which government is based and illuminates the "inalienable rights" that are "embedded in our constitutional structure." *McDonald v. City of Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment).

The Supreme Court has recognized the right to associate freely among those fundamental rights enumerated in the First Amendment. U.S. Const. amend. I. As the Court said in *NAACP v. Alabama ex rel. Patterson*, "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. 449, 460 (1958) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Palko v. Connecticut*, 302 U.S. 319, 324 (1937); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958)).

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." *NAACP*, 357 U.S. at 460-61. The freedom of association "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.'" *Id*. (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

Because effective expression so often depends on effective association, association, like speech, is of "transcendent value." *See 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."). The Court's explication of the right of freedom of association "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 v. Valeo*, 424 U.S. 1, 15 (1976) (alteration in original) (quoting *NAACP*, 357 U.S. at 460). 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."[8] The right to freely speak, and freely associate, strike at the heart of human freedom.

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. *McIntyre*, 514 U.S.at 343 n. 6. 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.*

It is thus natural that the right to associate anonymously is within the activity protected by the First Amendment. The Supreme Court has explained that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action." *Bonta*, 594 U.S. at 606 (internal quotation marks omitted) (alteration in original) (quoting *NAACP*, 357 U.S. at 462). Further, "[t]he text and history of the Assembly Clause suggests that the right to assemble includes the right to associate

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

anonymously." *Id*. at 619-20 (Thomas, J., concurring in part and concurring in the judgment). The IRS's mass collection of donor information and the risk of exposure that comes with it does "constitute . . . a restrain on freedom of association," *id*. at 606, and thus should be subject to heightened scrutiny.

II. The Supreme Court has Recognized in Other Contexts that the Government May Not Condition Benefits on the Recipient's Relinquishing of Constitutionally Protected Rights.

When the government conditions a public benefit on a beneficiary's sacrifice of constitutionally protected rights, those conditions face heightened scrutiny. In this case, the IRS requires some 501(c)(3) organizations to disclose private information about substantial donors meaning that donors who wish to support such organizations are forced to sacrifice their First Amendment-protected right to associate anonymously.

In *Mahmoud v. Taylor*, the Supreme Court considered a policy of the Montgomery County Public School District in Montgomery County, Maryland. This school district, serving America's "most religiously diverse county," would not allow parents to opt their children out of reading books with part of a curriculum directed at "disrupt[ing]" "heteronormativity" and "cisnormativity." 606 U.S. ___, No. 24-297, slip op. at 2, 4 (2024) (internal quotation marks omitted). As the Court decided, compelling students to receive such ideologically driven instruction against the will of their parents likely violated the parents' religious liberty. *Id*. at 41 ("[I]n

light of the strong showing made by the parents here, and the lack of a compelling interest supporting the Board's policies, an injunction is both equitable and in the public interest.").

The Court explained that, "when the government chooses to provide public benefits, it may not 'condition the availability of those benefits upon a recipient's willingness to surrender his religiously impelled status.'" *Id*. at 32 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). There, the Court determined that the appropriate test to apply in its assessment of the school district's no-opt-out policy was strict scrutiny, under which "the government must demonstrate that 'its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest.'" *Id*. at 35-36 (quoting *Kennedy v. Bremerton School Dist.*, 597 U.S. 507, 525 (2022)).

In *Carson v. Makin*, the Court considered a Maine program that provided vouchers for private secondary education that was not available to students attending religious schools. 596 U.S. 767, 771-73 (2022). As the Court explained, "[b]y 'condition[ing] the availability of benefits' in that manner, Maine's tuition assistance program . . . 'effectively penalize[d] the free exercise' of religion." *Id*. at 780 (second alteration in original) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017)). Such laws "must be subjected to 'the strictest scrutiny.'" *Id*. at 780 (quoting *Espinoza v. Montana Department of Revenue*, 591 U.S. ___, 140

S. Ct. 2246, 2257 (2020)). As the Court made clear in *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

In the case before this Court, the question is analogous to the above religious liberty cases in that it, too, challenges a government's conditioning of a benefit on the sacrifice of a First Amendment-protected right. Just as state governments in *Makin* and *Mahmoud* effectively conditioned access to government funded education on parents forgoing a degree of their right to freely exercise their religious beliefs, so the donor disclosure requirement requires donors and 501(c)(3) organizations to forgo their right to associate anonymously if they wish to take advantage of relevant tax benefits. Just as heightened scrutiny was appropriate in *Mahmoud* and *Makin*, so it is here. The Court should affirm the district court's decision that exacting scrutiny is applicable here.

III. The Collection of Data Invites Hacking and Abuse as Demonstrated Over and Over Again by Both Private and Government Information Databases.

Large, centralized government databases are catnip to hackers seeking troves of Americans' personal information. In December 2024, "Chinese state-sponsored hackers breached the U.S. Treasury Department's computer security guardrails"

stealing "documents in what Treasury called a 'major incident.'"[9] The "hackers compromised third-party cybersecurity service provider BeyondTrust and were able to access unclassified documents."[10] Similarly, In 2016, hackers broke into the Securities and Exchange Commission's Electronic Data Gathering, Analysis, and Retrieval system (EDGAR).[11] EDGAR processes over 1.7 million electronic filings annually, and "traded on at least nonpublic 157 earnings releases," enriching themselves by over $4 million.[12] In 2018, a hacker breached 60 million records of US Postal Service user account details even after being warned a year prior.[13] Hackers stole the personal information of 21.5 million current and former federal government employees from Office of Personnel Management files in 2015.[14] 26,000 current and former Defense Intelligence Agency employees experienced a

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[9] Raphael Satter and A.J. Vicens, *US Treasury says Chinese hackers stole documents in 'major incident'*, Reuters (Dec. 31, 2024, 2:27 PM) https://www.reuters.com/technology/cybersecurity/us-treasurys-workstations-hacked-cyberattack-by-china-afp-reports-2024-12-30/.

[10] *Id*.

[11] Amir Bibawy, *SEC reveals 2016 hack that breached its filing system*, Associated Press (Sep. 20, 2017, 11:37 PM) https://apnews.com/article/d81daf569c75472bbcba22d2f5ba0f34.

[12] Craig A. Newman, *A Closer Look: SEC's Edgar Hacking Case*, Patterson Belknap Data Security Law Blog (Feb. 12, 2019) https://www.pbwt.com/data-security-law-blog/a-closer-look-secs-edgar-hacking-case.

[13] Paul Bischoff, *A recent history of US Government Breaches – can you trust them with your data?*, Comparitech (Nov. 28, 2023) https://www.comparitech.com/blog/vpn-privacy/us-government-breaches/.

[14] *Id*.

breach of personally identifiable information in 2023.[15] A British teenager published the contact information of 20,000 FBI agents in 2016.[16] United States Army soldier Chelsea Manning infamously handed over 750,000 classified documents to WikiLeaks.[17] The healthcare information of 4.6 million active duty servicemembers, veterans, and their family members was compromised in a 2011 Tricare breach.[18] GovPayNow.com, which is used by thousands of state and local governments, leaked 14 million records in 2018, including addresses, phone numbers and partial credit card numbers.[19] Additionally, a hacker exposed 191 million records from a database of American voters in 2015.[20]

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[15] David DiMolfetta, *The Pentagon is notifying individuals affected by 2023 email data breach*, Government Executive (Feb. 15, 2024) https://www.govexec.com/technology/2024/02/pentagon-notifying-individuals-affected-2023-email-data-breach/394184/.

[16] Mary Kay Mallonee, *Hackers publish contact info of 20,000 FBI employees*, CNN (Feb. 8, 2016, 8:34 PM) https://edition.cnn.com/2016/02/08/politics/hackers-fbi-employee-info/index.html.

[17] Bill Hutchinson, *Chelsea Manning speaks of solitary confinement during New Year's Day poetry event*, ABC News (Jan. 2, 2024, 4:29 PM) https://abcnews.go.com/US/chelsea-manning-speaks-solitary-confinement-new-years-day/story?id=106043233.

[18] Jim Forsyth, *Records of 4.9 mln stolen from car in Texas data breach*, Reuters (Sep. 29, 2011, 6:00 PM) https://www.reuters.com/article/us-data-breach-texas-idUSTRE78S5JG20110929/.

[19] Bischoff, *supra* note 13.

[20] Thomas Brewster, *191 Million US Voter Registration Records Leaked In Mystery Database*, Forbes (Dec. 28, 2015, 8:50 AM) https://www.forbes.com/sites/thomasbrewster/2015/12/28/us-voter-database-leak/.

The IRS itself has repeatedly leaked information related to nonprofit organizations.[21] In 2022, the IRS accidentally posted taxpayer information associated with 501(c)(3)s that had been reported through Form 990-T.[22] In 2012, the IRS leaked information relating to application for tax exempt status of several organizations to *ProPublica* and similarly disclosed information about 31 other groups in 2013.[23] And an IRS employee disclosed an unredacted Form 990 for the National Organization for Marriage to a person claiming to be a reporter who then passed the information on to the Human Rights Campaign.[24] Further, in 2021, *ProPublica* obtained personal tax information for "thousands of the nation's wealthiest people, covering more than 15 years."[25] These leaks, further, do not

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[21] Brief of Amici Curiae Advancing American Freedom et al. at 13-18, *The Buckeye Institute v. IRS*, No. 2:22-cv-04297 (S.D. Ohio Nov. 9, 2023) available at: https://advancingstg.wpenginepowered.com/wp-content/uploads/2023/09/2023-09-27-AAFF-et-Amici-motion-and-brief-Buckeye-Inst-v-IRS-SD-Ohio-1.pdf.

[22] Brian Fung, *IRS says it mistakenly exposed taxpayer data belonging to non-profits*, CNN (Sep. 2, 2022 7:03 PM) https://www.cnn.com/2022/09/02/politics/irs-taxpayer-data-nonprofits/index.html.

[23] Kim Barker and Justin Elliott, *IRS Office that Targeted Tea Party Also Disclosed Confidential Docs from Conservative Groups*, PROPUBLICA (May 13, 2013 5:40 PM) https://www.propublica.org/article/irs-office-that-targeted-tea-party-also-disclosed-confidential-docs.

[24] Mackenzie Weinger, *IRS pays $50K in Confidentiality Suit*, Politico (June 24, 2014 8:28 PM) https://www.politico.com/story/2014/06/irs-nom-lawsuit-108266.

[25] Jesse Eisinger, Jeff Ernasthausen, and Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021 5:00 AM) https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax.

include the threat posed by outsiders taking advantage of weak cybersecurity or poorly designed software.

The private sector has experienced massive breaches as well. On July 12, 2024, AT&T announced that someone illegally obtained records of phone calls and text messages from almost all its wireless customers,[26] and an April 2024 nationalpublicdata.com breach exposed 2.7 billion records, including names, addresses, dates of birth, phone numbers, and even Social Security numbers.[27]

Whenever data is collected, privacy is at risk. The Supreme Court has recognized that fact as it did in *NAACP v. Alabama*. If the government wishes to collect data about Americans, and thereby threaten to expose their private associations, it should at least have to show that the policy in question can clear the bar of heightened scrutiny. This Court should affirm the district court's decision that exacting scrutiny is the applicable test in this case.

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[26] Jon Haworth and Luke Barr, *AT&T says hacker stole some data from 'nearly all' wireless customers*, ABC News (Jul. 12, 2024, 12:24 PM) https://abcnews.go.com/US/att-hacker-stole-data-wireless-customers/story?id=111874118.

[27] Aimee Picchi, *Hackers may have stolen the Social Security numbers of many Americans. Here's what to know.*, CBS News (Aug. 15, 2024, 6:15 PM) https://www.cbsnews.com/news/social-security-number-leak-npd-breach-what-to-know/.

CONCLUSION

For the foregoing reasons, this Court should rule for Plaintiff-Appellee.

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Dated: November 25, 2025

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