

IN THE  
**Supreme Court of the United States**

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Americans for Prosperity Foundation,  
*Petitioner,*

v.

Xavier Becerra, in his official capacity as the Attorney General of California,  
*Respondent.*

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Thomas More Law Center,  
*Petitioner,*

v.

Xavier Becerra, in his official capacity as the Attorney General of California,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

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**UNOPPOSED JOINT MOTION OF PETITIONERS FOR DIVIDED  
ARGUMENT AND EXPANSION OF ORAL ARGUMENT**

Pursuant to Rules 21 and 28.4 of this Court, Petitioner in No. 19-251, Americans for Prosperity Foundation (“AFPF”), and Petitioner in No. 19-255, Thomas More Law Center (“TMLC”), jointly move for divided argument and an expansion of argument time in these consolidated cases.

AFPF and TMLC each request 15 minutes of argument time. This division of argument will ensure that the Court receives the benefit of each Petitioner’s distinct perspectives and arguments. And division will also ensure that both Petitioners have their interests fully represented. Because Petitioners have different legal theories and different trial-court records, requiring one attorney to represent both Petitioners in a single oral argument would prejudice Petitioners and lead to unnecessary confusion. As explained below, this Court has granted divided argument in other consolidated cases presenting similar situations, and the Court should follow the same approach here.

The United States has informed Petitioners’ counsel that it intends to file a motion for leave to participate in the oral argument as *amicus curiae* in support of vacating and remanding the judgment below, and that the 10 minutes it will request for oral argument should come equally from the time allotted to Petitioners and to Respondent, five minutes apiece. Accordingly, in the event that the United States files such a motion, Petitioners also respectfully request that the Court expand the argument time by 10 minutes for the United States while dividing the argument time for Petitioners, 15 minutes for AFPF and 15 minutes for TMLC. The United States has informed Petitioners’ counsel that it does not oppose expansion of the argument

time or the division sought by this motion, provided the United States is allotted 10 minutes of argument time. Respondent likewise has informed Petitioners' counsel that Respondent does not oppose the requests to enlarge the time by ten minutes and to divide petitioners' time equally between each petitioner.

In support of divided argument, Petitioners state:

1. These cases present First Amendment challenges to Respondent's requirement that all charities that operate or fundraise in California disclose to the California Attorney General's office the names and addresses of their major donors as listed on Schedule B to IRS Form 990.

2. Petitioners advance distinct arguments in this Court on the applicable standard of constitutional scrutiny. They agree that the Ninth Circuit erred in the standard of scrutiny it applied to California's disclosure demand. AFPP Br. 20; TMLC Br. 18. But whereas AFPP contends that this kind of blanket-disclosure demand must satisfy exacting scrutiny, including that it be narrowly tailored to the government's asserted interests, TMLC emphasizes that a blanket-disclosure requirement must withstand strict scrutiny, *i.e.*, serve a compelling government interest and be no broader than necessary to serve that interest. *Compare* AFPP Br. 20–30, *with* TMLC Br. 19–29. These complementary but distinct arguments are reflected in the distinct questions presented by the Petitioners' respective petitions for certiorari that this Court granted. So, while both Petitioners agree that California's blanket-disclosure mandate is unconstitutional, Petitioners have offered

different approaches for resolving the questions presented and will provide different perspectives on the legal issues at stake in these cases.

Divided argument will illuminate these distinct lines of argument and allow the Court to explore each. In recent Terms, this Court has granted divided argument in consolidated cases where the parties advanced different approaches to determining the constitutionality of challenged conduct or emphasizing different arguments in support of the same basic legal proposition. *E.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 230 (2020) (mem.); *Kelly v. United States*, 140 S. Ct. 661 (2019) (mem.); *Rucho v. Common Cause*, 139 S. Ct. 1316 (2019) (mem.); *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 951 (2019) (mem.); *Ala. Democratic Conference v. Alabama*, 135 S. Ct. 434 (2014) (mem.); *McDonald v. City of Chicago*, 559 U.S. 902 (2010) (mem.). Divided argument is similarly appropriate here.

3. These consolidated cases also merit divided argument because they each involve distinct as-applied challenges dependent on facts unique to each Petitioner, as reflected in the separate trial records developed in each case. *Compare* AFPF Br. 47–53, *with* TMLC Br. 44–49. Indeed, the importance of these Petitioner-specific record materials prompted Petitioners to submit separate joint appendices. Divided argument will ensure that both Petitioners have an opportunity to present their separate as-applied challenges and to address any questions the Court may have pertaining to their respective trial-court records.

Indeed, given how important the specific facts of each case are, it would be difficult for one attorney to represent both Petitioners in the same oral argument. To

begin, while Petitioners’ arguments do not directly conflict, an attorney representing one Petitioner would emphasize points that are not necessarily in the other Petitioner’s interest. What’s more, requiring one attorney to jump between the specific facts at issue in each case in response to questions—and applying a different legal standard to each—would make argument more confusing than if the cases were separately presented. *See* Stephen M. Shapiro, *et al.*, *Supreme Court Practice* 777 (10th ed. 2013) (“Having more than one lawyer argue on a side is justifiable . . . when they represent different parties with different interests or positions.”).

Unsurprisingly, this Court frequently grants divided argument in consolidated cases where unique facts pertain to parties on the same side of a case. *E.g.*, *Rosen v. Dai*, \_\_ S. Ct. \_\_, 2021 WL 161007, at \*1 (Jan. 19, 2021) (mem.) (granting divided argument in consolidated cases presenting different evidentiary records in removal proceedings); *Abbott v. Perez*, 138 S. Ct. 1544 (2018) (mem.) (granting divided argument in consolidated cases presenting different claims of racial gerrymandering); *Turner v. United States*, 137 S. Ct. 1248 (2017) (mem.) (granting divided argument in consolidated cases presenting distinct *Brady* claims); *Ziglar v. Abbasi*, 137 S. Ct. 615 (2017) (mem.) (granting divided argument in consolidated cases presenting distinct *Bivens* claims); *Kansas v. Gleason*, 135 S. Ct. 2917 (2015) (mem.) (granting divided argument in consolidated cases presenting different sentencing issues); *Davis v. Washington*, 546 U.S. 1213 (2006) (mem.) (granting divided argument in consolidated cases presenting distinct Confrontation Clause claims); *Rapanos v. United States*, 546 U.S. 1000 (2005) (mem.) (granting divided argument

in consolidated cases presenting factually distinct positions concerning application of the Clean Water Act). The Court should do the same here.

4. These cases also present questions of extraordinary public importance. At the merits stage alone, these cases have already received 43 *amicus* submissions signed by over 200 organizations and 22 States. Groups representing a broad range of interests and ideas have submitted briefs urging this Court to reverse or vacate the Ninth Circuit's decision. These *amicus* filings cut across ideological lines in endorsing robust constitutional protection for anonymous charitable giving.

This Court has granted divided argument in cases that likewise implicated momentous issues of public importance. *E.g.*, *Brnovich v. Democratic National Committee*, \_\_ S. Ct. \_\_, 2021 WL 231550 (Jan. 25, 2021) (mem.) (Voting Rights Act litigation); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 466 (2017) (mem.) (Free Exercise Clause's requirement of religious neutrality); *United States v. Texas*, 136 S. Ct. 1539 (2016) (mem.) (validity of Deferred Action for Parents of Americans and Lawful Permanent Residents program); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 565 U.S. 1193 (2012) (mem.) (validity of the Affordable Care Act's insurance mandate). The Court should do the same here.

5. Counsel for Petitioners was informed that the Acting Solicitor General, on behalf of the United States, intends to move for leave to participate in oral argument as *amicus curiae*, and Petitioners will consent to that request. The United States apparently will seek to have its time drawn equally from Petitioners and Respondent, five minutes apiece. In the event that the United States so moves,

Petitioners respectfully request that the Court enlarge the oral argument by 10 minutes for the Solicitor General and divide Petitioners' argument time, 15 minutes for AFPF and 15 minutes for TMLC. That division of time would ensure that the Court receives a full and deliberate presentation of the important issues that these cases present, which is especially important here in light of the extensive factual record and the different arguments pressed by AFPF, TMLC, and the United States.

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For the foregoing reasons, Petitioners jointly request that the Court divide oral argument time equally between them. If the United States seeks to participate in oral argument, Petitioners further propose that the Court enlarge oral argument time by 10 minutes and grant 15 minutes to AFPF, 15 minutes to TMLC, and 10 minutes to the United States.

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