Nos. 19-251, 19-255

In the
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
***Petitioner*,**

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent

and

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF *AMICI CURIAE* OF CONCERNED WOMEN FOR AMERICA, THE CONGRESSIONAL PRAYER CAUCUS FOUNDATION, AMERICANS UNITED FOR LIFE, THE NATIONAL LEGAL FOUNDATION, THE PACIFIC JUSTICE INSTITUTE, YOUNG AMERICANS FOR LIBERTY, THE FAMILY FOUNDATION, THE ILLINOIS FAMILY INSTITUTE, AND INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS

in Support of the Petitioners

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INTERESTS OF THE *AMICI CURIAE*[1]

The *Amici* are each non-profit organizations which respect the privacy of their donors and dues-paying members by not publicizing their identities without their consent. They each believe this is important to the vitality of their organization, even though they have various focuses, as demonstrated below.

Concerned Women for America is the largest women's public policy organization in the United States, with approximately 500,000 supporters from all 50 States.

The **Congressional Prayer Caucus Foundation,** with an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from forty-one states, protects religious freedoms and promotes prayer, including in public places.

Americans United for Life is a non-partisan organization advocating for pro-life policy at the state and federal levels.

The **National Legal Foundation** and the **Pacific Justice Institute** are public interest law firms dedicated to the defense of First Amendment liberties, including the freedoms of speech, assembly, and religion.

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[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Young Americans for Liberty focuses on speech and political advocacy among college students by building chapters on campuses across the United States.

The Family Foundation and the **Illinois Family Institute** engage in policymaking and advocacy relating to family issues.

The **International Conference of Evangelical Chaplain Endorsers** associates military chaplains and safeguards their religious liberties.

SUMMARY OF ARGUMENT

These cases call upon this Court to remember "the forgotten freedom,"[2] the "right of the people to peaceably assemble."[3] They should be resolved in favor of the organizations and their donors under the authority of *NAACP v. Alabama*.[4] But this Court in that decision coined the term "right of association,"[5] and, in the following years, this Court's sole focus has become that subsidiary right, elaborating on it in ways that hamstring the proper and historical reach of the Assembly Clause.

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[2] John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* 21 (Yale Univ. Press 2012) (hereinafter, "Inazu"), *available at* https://www.jinazu.com/libertys-refuge.

[3] U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble . . . .").

[4] 357 U.S. 449 (1958).

[5] *Id.* at 463 ("constitutionally protected right of association").

The text and historical context of the freedom of assembly, as well as early precedent of similar provisions in State constitutions, illuminate its proper reach. This Court, recognizing its importance as one of our basic freedoms, began to apply its protections against the States in the first half of the last century. However, in the second half of the century, by focusing solely on "freedom of association," the Court took a path often deviating from its fountainhead, the right of assembly.

This Court should base its decision in these cases on the text of the Constitution and recognize that certain of its decisions, most notably *Roberts v. United States Jaycees*[6] and *Christian Legal Society v. Martinez*,[7] have shortchanged the peoples' freedom of assembly. That right includes the right of societies to control their membership and the identity of their supporters. The freedom of assembly is cognate and coequal with the other First Amendment freedoms, and it should be read consistently with them, including that the State may only impinge on it by the least restrictive means when there is a compelling state interest.

ARGUMENT

This Court in *NAACP v. Alabama* and similar cases established that the freedom of assembly allows a group to keep its membership and donor lists private—for whatever reason. This is inherent in the group's right to define its own purpose and to protect

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6 468 U.S. 609 (1984).

7 561 U.S. 661 (2010).

its own existence, and it is consistent with the text and history of the First Amendment.

I. These Cases Are Controlled by *NAACP v. Alabama*

Your *Amici* will not belabor what Petitioners and other *Amici* have already briefed. We concur that these cases are controlled by *NAACP v. Alabama* ("*NAACP*") and the "right of association" as first articulated by this Court in that case.[8] The NAACP brought its action under the freedoms of assembly and speech to protect disclosure of its dues-paying membership rolls, and this Court recognized that donor privacy could "in many circumstances be indispensable to preservation" of the group and its effectiveness.[9]

The Petitioners here are non-commercial, non-profit societies of different types. One has more political and educational aims, while the other pursues religious freedom and pro-life agendas through litigation. This Court in *NAACP* instructed that the freedom of assembly covers societies of *all* types: "it is immaterial whether the beliefs sought to be advanced by association pertain to political,

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[8] *See* 357 U.S. at 460 ("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."); *see also NAACP v. Button*, 371 U.S. 415, 430-31 (1963) ("we have refused to countenance compelled disclosure of a person's political associations").

[9] 357 U.S. at 462.

economic, religious or cultural matters . . . ."[10] Further, in *NAACP,* this Court established that "curtailing the freedom to associate is subject to the closest scrutiny."[11]

The judgments below should be reversed on the basis of *NAACP* alone. Later "freedom of association" decisions have become unmoored from the freedom of assembly, but the Assembly Clause has not been excised from the Constitution. This Court should reconfirm the continued breadth and vitality of the freedom of assembly and clarify in what limited circumstances it may legitimately be abridged by the State.

II. The Constitution's Text, Its Context, and Early Precedent Confirm the Reach of the "Right of the People to Peaceably Assemble"

The historical background for the freedom of assembly most naturally begins with William Penn. When in 1670 he was barred from entering a meeting house in London to participate in a Quaker service, he began to speak to a crowd in the street, for which he was arrested for unlawful assembly. His acquital by the jury garnered great publicity in England and the Colonies.[12]

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[10] *Id.* at 460.

[11] *Id.* at 461; *see, e.g.*, *N.Y. ex rel. Bryant v. Zimmerman*, 278 U.S. 63 (1928) (upholding statute requiring disclosure of Ku Klux Klan membership lists because of its engagement in criminal activity).

[12] *See* Inazu, *supra* note 2, at 24-25 (citing authorities).

A little over a century later, the Constitution was submitted to the States for their ratification. Many of the States pressed for a recitation of rights preserved by the poeple, and the "right to peaceably assemble together" was included by several of them with two similar, but different, conditioning clauses. Virginia and North Carolina would protect assemblies "for *the* common good," while New York and Rhode Island requested the protections of assemblies gathered "for *their* common good."[13] If the Virginia articulation had been adopted, it arguably would have given the State the power to determine the definition of "the" common good, which would be tied to public opinion at the time. However, if the New York articulation, or no modifying phrase, were applied, the implication would be that the assemblies themselves would determine what was in their best interests.

In the First Congress, James Madison, in his draft amendments, adopted the New York formulation ("for their common good"), rather than that of his own State. Elbridge Gerry of Massachusetts noted in the ensuing debates that, if the right of assembly were limited to "*the* common good" as defined by the State, then the right would be worthless.[14]

Nine days later, the House approved a version of the amendment that retained Madison's reference to "their common good," and, eleven days later, the

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[13] *See id.* at 21-22; *see also Debate on the Const., Pt. 2*, at 538 (N.Y.), 560 (Va.), 567 (N.C.) (Library of Am. 1993).

[14] *See* Inazu, *supra* note 2, at 21-22; Cong. Reg., Aug. 15, 1789, vol. 2, quoted in Neil H. Cogan, *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 145 (Oxford Univ. Press 1993) (hereinafter, "Cogan").

Senate defeated a motion to strike the reference to "their common good." But the following week, the phrase was dropped without recorded explanation or substitution.[15]

The best reading of this drafting history is that neither the House nor Senate intended to limit the right of assembly to gatherings benefitting "the" common good as determined by governmental authorities. Indeed, when Thomas Sedgewick of Massachusetts suggested that inclusion of the right of assembly was unnecessary, John Page of Virginia observed that all the other freedoms—of speech, press, and religion—could be eviscerated if assembly could be denied: "if the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause . . . ."[16]

The ratified text contains only one modifier: "peaceably." There is no restriction on the subject matter, the purpose of the gathering, or any group's membership requirements. Congress—based on both English and colonial experience—knew that governmental authorities had forbidden and punished assemblies for religious and political reasons to enforce majoritarian norms. The right of assembly—if exercised peaceably—protected group protest and dissent as recently exercised by the new nation's citizenry.

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[15] *See* Inazu, *supra* note 2, at 22 & n.5; Cogan, *supra* note 14, at 71, 77, 143.

[16] *See* Inazu, *supra* note 2, at 24; Cogan, *supra* note 14, at 144 (quoting Cong. Reg., Aug. 15, 1789, vol. 2).

The First Amendment was not then applied to the States, but many State constitutions had almost identically phrased protections, and early State court decisions reinforce this broad reading of the freedom of assembly as protected in the Federal Constitution.[17] Importantly, the State courts recognized that inherent in the right of assembly was the freedom to decide who could and who couldn't join the association.

Although it may be hard to fathom why someone would sue over being rejected as an "Odd Fellow," a Missouri court in that context explained courts' lack of competence to adjudicate group membership, just as they have none to adjudicate that of a church:

> It is competent for the Baptist Church alone . . . to determine who is a Baptist; and it is, in like manner, competent for the Odd Fellows to determine who is an Odd Fellow; and these are questions into which the courts of this country have always refused to enter: holding that when men once associate themselves with others as organized bands, professing certain religious views, or holding themselves out as having certain ethical and social objects, and subject thus to a common discipline, they have voluntarily submitted themselves to the disciplinary power of the body of which they are members, and it is for that society to know its own. To deny to it the power of discerning who constitute its members, is to deny the existence of such a society, or that there is any meaning

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[17] Inazu, *supra* note 2, at 40-43.

> in the name which the Legislature recognizes when it grants the charter.[18]

In sum, prior to the Twentieth Century, the right of assembly was understood to cover non-profit gatherings of every stripe. That is clear from the First Amendment's text, which requires only that the right be exercised "peaceably"; from its context, which sought to protect freedoms that had been limited in England; from its textual history, which rejected limiting the right to "the" common good as would be determined by governmental authorities; and from early decisional law, which recognized that inherent in the right of assembly is the group's right to control its own membership.

III. This Court Recognizes the Importance of the Right of Assembly and Makes It Applicable to the States Via the Fourteenth Amendment

As the Twentieth Century began, the disfavored labor, women's, and communist movements exercised the right of assembly in the face of majoritarian and governmental opposition. These conflicts resulted in a number of decisions from this Court that confirmed the importance of the Assembly Clause.

The first significant opinion to affirm the freedom of assembly was Justice Brandeis's concurrence in *Whitney v. California*.[19] He linked assembly with speech, recognizing that, without the right to

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[18] *State ex rel. Poulson v. Grand Lodge of Mo. I.O.O.F.*, 8 Mo. App. 148, 155-56 (1879).

[19] 274 U.S. 357 (1927).

assemble, the right of speech can be enervated. Moreover, he recognized that, as with speech, prior restraints on assembly cannot be tolerated:

> The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. . . .
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> . . . .
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> Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

> Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it. [20]

This Court adopted the principles set out by Justice Brandeis in *Whitney* in its unanimous decision in *DeJonge v. Oregon*.[21] DeJonge was convicted under the State's criminal syndicalism statute when he spoke to a public meeting organized by the Communist Party.[22] This Court reversed, incorporating the protections of the Assembly Clause through the Fourteenth Amendment against the States.[23] It affirmed the co-equal importance of assembly with other First Amendment rights and recognized that it served a necessary protection for those other rights:

> The right of peaceable assembly is a right cognate to those of free speech and free press

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[20] *Id.* at 373, 375-77 (Brandeis, J., concurring) (citations and footnote omitted). This passage has been cited favorably in later opinions. *See, e.g.*, *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964). The majority opinion in *Whitney* is one of a series of decisions involving the Communist Party that are now largely discredited. *See also Am. Comm'ns Ass'n v. Douds*, 339 U.S. 382 (1950); *Dennis v. United States*, 341 U.S. 494 (1951); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1952). *See generally* Inazu, *supra* note 2, at 63-117.

[21] 299 U.S. 353 (1937).

[22] *Id.* at 358-60.

[23] *Id.* at 364.

> and is equally fundamental. . . . For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions . . . .
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> . . . The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[24]

This Court focused on when the right of assembly must submit to State interests in *Thomas v. Collins*.[25] Thomas spoke at a peaceful labor organizing rally for the CIO without first obtaining a required license.[26] This Court reversed his conviction, holding that freedom of assembly, like freedom of speech, could

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[24] *Id.* at 364-65; *see also W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (listing freedom of assembly along with speech, press, and worship as those that "depend on the outcome of no elections"); *Herndon v. Lowry*, 301 U.S. 242 (1937) (holding that freedom of assembly violated when organizer for Communist Party was convicted of insurrection).

[25] 323 U.S. 516 (1945).

[26] *Id.* at 520-24.

only be curtailed if there were a "clear and present danger":

> [W]hatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, and therefore are united in the First Article's assurance.
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> This conjunction of liberties is not peculiar to religious activity and institutions alone. . . . Great secular causes, with small ones, are guarded. The grievances for redress of which the right of petition was insured, and with it the right of assembly, are not solely religious or political ones.
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> . . . .
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> The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. . . .

> . . . Where the line shall be placed in a particular application rests . . . on the concrete clash of particular interests and the community's relative evaluation both of them and of how the one will be affected by the specific restriction, the other by its absence. . . . And the answer, under [our constitutional] tradition, can be affirmative, to support an intrusion upon this domain, only if grave and impending public danger requires this.[27]

As discussed above, this Court applied the principles of *Thomas, DeJonge*, and other cases in *NAACP* to safeguard the right to assemble by recognizing that state actions that repress an organization's viability abridge the right.[28] As of *NAACP*, this Court's decisions defined the freedom of assembly as follows:

- It is a fundamental First Amendment right incorporated by the Fourteenth Amendment.

- It is a co-equal right with the other First Amendment rights of speech, press, and religion and is often used in conjunction with them. Thus, protection of the right of assembly also normally protects other First Amendment rights.

- It includes the right of groups to decide for themselves whom to include and exclude from membership. That very decision expresses the

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[27] *Id.* at 530-32.

[28] *See* 357 U.S. at 462.

identity of the group. If a group wishes to keep its supporters secret, that also is protected.

- The reason for assembly is wholly of the group's choosing and may include, for example, religious, social, economic, and political purposes.

- The State may restrict the freedom only if it has a compelling reason to do so, such as to respond to a clear and present danger. Prior restraints are subject to strict scrutiny.

IV. The Right of Assembly Goes Missing from This Court's Jurisprudence, Being Replaced with a More Limited "Right of Association"

After *NAACP*, this Court has neglected the right of assembly and replaced it with a narrower "right of association," developing that new right on its own track. As a result, this Court has allowed majoritarian and governmental interests to override "association" rights when its Assembly Clause precedent would dictate that the State interests were not sufficiently compelling to do so. This has been especially telling when this Court in "right of association" cases has given insufficient weight to the significance of membership control by the groups involved.

The change of nomenclature did not, at first, make a change of substance. In *Bates v. Little Rock*,[29] this Court prohibited enforcement of Arkansas city

[29] 361 U.S. 516 (1960).

ordinances that required the local NAACP chapter to disclose the names of all its dues-paying members and contributors.[30] The Court first identified the right involved as that of assembly, but then immediately switched in the remainder of its opinion to the right of association, equating the two:

> Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.[31]

It found that disclosing membership and contributor lists could endanger a group, especially if it were unpopular, and reiterated that, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[32] Justices Black and Douglas in their concurrence noted that freedom of association is a subset of freedom of assembly:

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[30] *Id.* at 517-18.

[31] *Id.* at 522-23 (citations omitted).

[32] *Id.* at 524 (citing *NAACP*; *Kovacs* v. *Cooper,* 336 U. S. 77 (1949); *Prince* v. *Mass.,* 321 U. S. 158 (1944); *Murdock* v. *Pa.,* 319 U. S. 105 (1943); *Cox* v. *N.H.,* 312 U. S. 569, 574 (1941); *Schneider* v. *N.J.,* 308 U. S. 147 (1939); *Jacobson* v. *Mass.,* 197 U. S. 11 (1905)).

"freedom of assembly[] includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right . . . ."[33]

A few months later in *Shelton v. Tucker*,[34] this Court built upon that teaching by applying the narrow tailoring required for regulation of other fundamental rights. *Shelton* addressed an Arkansas statute that required teachers to list every organization to which they had contributed regularly for the prior five years, with those lists open to the public. This Court, while speaking only in terms of the "freedom of association," applied narrow tailoring to any regulation that would potentially repress membership or support of a group: "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[35]

Implicit in the *Shelton* Court's discussion was the recognition that the very fact of joining a group or contributing to it makes a statement, both by the individual and about the group.[36] And this Court in

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[33] *Id.* at 528 (Black and Douglas, JJ., concurring).

[34] 364 U.S. 479 (1960).

[35] *Id.* at 488 (footnote citations omitted).

[36] *See id.* at 486-87 ("Even if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy. Public exposure, bringing with it the possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would

Louisiana v. NAACP[37] rebuffed enforcement of a State statute that, like that of Alabama, required disclosure of membership lists, again pointing out that any regulation of fundamental rights, there described only as "association" rather than "assembly," must be narrowly tailored.[38]

After this series of pro-NAACP cases, this Court began to speak of the right of association as a freestanding right unconnected to its Assembly Clause precedent. In *Griswold v. Connecticut*,[39] this Court identified the right of association as a right, like privacy, that emanated from the Bill of Rights even though not given express mention.[40] In *Eisenstadt v. Baird*,[41] this Court basically merged the right of association with an individual's privacy right of

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simply operate to widen and aggravate the impairment of constitutional liberty.").

[37] 366 U.S. 293 (1961).

[38] *Id.* at 296-97. In *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), this Court prohibited Florida's attempt to publicize NAACP membership lists to discover whether contributors were communists. The majority decision did not mention freedom of assembly, only "rights of association," *id.* at 543, 544, 547, but Justices Black and Douglas in their concurring opinions did so. *Id.* at 558 (Black, J., concurring), 562 (Douglas, J., concurring) ("'Peaceably to assemble' as used in the First Amendment necessarily involves a coming together, whether regularly or spasmodically.").

[39] 381 U.S. 479 (1965).

[40] *Id.* at 503 (White, J., concurring).

[41] 405 U.S. 438 (1972).

personal autonomy.[42] This transmogrification of the right of association into a specie of privacy interest would serve to cut back on the protections provided groups by the Assembly Clause, protections repeatedly recognized by this Court.[43] In relation to the membership and contributor interests protected by the right to assembly and at issue in these cases, that is most clearly seen in *Roberts v. United States Jaycees*[44] and *Christian Legal Society v. Martinez*.[45]

A. This Court in *Roberts v. United States Jaycees* Unduly Restricted the Right to Assembly *Sub Silentio*

At issue in *Roberts* was the Jaycees's policy to allow women as associates in their service clubs, but not as full voting members. Minnesota cited the organization for violation of its civil rights law prohibiting sex discrimination, and the Jaycees defended on the basis of their right of association.[46] Justice Brennan, in a lead opinion only fully joined by three other justices, divided the "freedom of association" cases into "intimate" and "expressive"

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[42] *Id.* at 453 ("Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."

[43] *See generally* Inazu, *supra* note 2, at 119-50.

[44] 468 U.S. 609 (1984).

[45] 561 U.S. 661 (2010).

[46] 468 U.S. at 612-15.

categories.[47] He first held that the Jaycees were not entitled to the right of "intimate association" such as had been recognized in *Griswold* and *Eisenstadt* and so were not entitled to strict scrutiny analysis.[48] Turning to expressive association, which he defined as the right when it operated to support and enhance other First Amendment rights of speech, press, religion, and petition, he applied a less rigorous test and found that the Jaycees's rights were outweighed by the compelling interests of the state in eliminating sex discrimination in a sufficiently narrowly tailored manner. Devoting much of his text to extolling the importance of eliminating sex discrimination, he gave short shrift to the interests of the Jaycees, finding that the regulation was viewpoint neutral and that there was "no basis in the record for concluding that admission of women as full voting members will impede the organization's ability to engage in these protected activities or to disseminate its preferred views."[49]

Justice O'Connor, concurring solely, voted to uphold the regulation of the Jaycees's membership, but on a different ground. She criticized Justice Brennan's reasoning that the organization's membership criteria did not materially affect its message: "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the

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[47] *Id.* at 617-18.

[48] *Id.* at 618-21. Justice O'Connor, concurring, basically agreed with this part of Justice Brennan's opinion. *Id.* at 631.

[49] *Id.* at 622-29.

definition of that voice."[50] She saw the Jaycees, however, as a *commercial* association that has less rights than an expressive association. An "organization engaged in commercial activity enjoys only minimal constitutional protection of its recruitment, training, and solicitation activities," and regulation of such activities, she wrote, should receive only rational basis review.[51] The Jaycees, for her, fell on the commercial side of the line because it, "first and foremost, . . . promotes and practices the art of solicitation and management."[52]

The principles of this Court's Assembly Clause cases should have been applied in *Roberts*, and, under them, it was wrongly decided. While the purpose of anti-discrimination laws in promoting equality are praiseworthy, the very purpose of the right of assembly is to allow our citizenry to establish groups by "discriminating" using criteria of their own choosing. That freedom guards dissent and free expression, which are also values of fundamental importance in our constitutional system. The right of assembly "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions."[53] Only "the gravest abuses, endangering paramount interests, give occasion for permissible limitation."[54]

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[50] *Id.* at 632-34 (O'Connor, J., concurring in part and concurring in the result).

[51] *Id.* at 634-35.

[52] *Id.* at 639-40.

[53] *DeJonge*, 299 U.S. at 364; *accord Bates*, 361 U.S. at 522-23; *Barnette*, 319 U.S. at 638; *Whitney*, 274 U.S. at 375-77 (Brandeis, J., concurring).

[54] *Thomas*, 323 U.S. at 530.

The perceived harm of the Jaycees not extending full membership privileges to women did not rise to this level. Historically, we have allowed association under the freedom of assembly for expression of opinions considered reprehensible by the majority.[55] To allow that freedom to be abridged simply because it does not accord with majoritarian sensibilities regarding "the" common good makes the freedom "nothing," as Elbridge Gerry put it when supporting the provision.[56]

Justice O'Connor rightly criticized Justice Brennan's linchpin that forcing the Jaycees to change their membership criteria would not alter their group expression.[57] The very statement of the proposition defeats it, because membership criteria *always* define the message of the group, whether they be Odd Fellows or sorority sisters, libertarians or communists, Catholics or Muslims. The Jaycees *qua* organization is a valid form of expression; its membership criteria define who they are and proclaim a message. As the First Circuit noted in the context of a gay club, the very fact that people had formed such a group made a statement, one that at the time was decidedly not majoritarian: "beyond the specific

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[55] *See Gilmore v. Montgomery*, 417 U.S. 556, 575 (1974) ("The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.").

[56] *See* Cogan, *supra* note 14, at 145.

[57] *See Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the result).

communications at [its] events is the basic 'message' [Gay Students Organization] seeks to convey—that homosexuals exist, that they feel repressed by existing laws and attitudes, that they wish to emerge from their isolation, and that public understanding of their attitudes and problems is desirable for society."[58] When the government forces a change to membership, it changes the group's composition and character, thus changing its common message. Compelled association is just as unconstitutional as compelled speech. Indeed, Justice Brennan in *Roberts* recognized as much:

> There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.[59]

In summary, both opinions in *Roberts* failed to apply the basic principle articulated by this Court in its Assembly Clause precedent that the very fact of gathering in a particular group and jointly articulating membership criteria is central to the message, purpose, and identity of the group and deserves the highest constitutional protection. Justice Brennan diluted this principle by dividing

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[58] *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652, 661 (1st Cir. 1974).

[59] 468 U.S. at 623.

groups between the intimate and the expressive,[60] drawing a line nowhere found in the text of the First Amendment.[61] Justice O'Connor gave less weight to the Jaycees because they engaged in commercial activities (even while admitting that their meetings also had a significant social component and that they engaged in speech and petition).[62] Her formulation fails both because if finds no support in the text and because it is easily manipulable. As she applied it, groups such as labor unions, which are fully protected by the freedom of assembly,[63] would lack robust association rights.

After *Roberts*, this Court's opinions were mixed when viewed through the lens of this Court's Assembly Clause precedents.[64] This Court came closest to following them in *Boy Scouts of America v. Dale* when it stated, "The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's

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[60] *See id.* at 618-20.

[61] *See* Richard A. Epstein, "The Constitutional Perils of Moderation: The Case of the Boy Scouts," 74 *So. Cal. L. Rev*. 122 (2000) (arguing that the distinction between expressive and nonexpressive association "is indefensible both as a matter of political theory and constitutional law").

[62] *See Roberts*, 468 U.S. at 639-40.

[63] *See, e.g.*, *Thomas*, 323 U.S. at 520-24.

[64] This Court followed *Roberts* in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Association v. City of New York*, 487 U.S. 1 (1988), in which cases the foundational reasoning also ignores Assembly Clause precedent.

ability to advocate public or private viewpoints."[65] But associations have no burden to prove that compelled changes to their membership criteria would affect them in a "significant" way. As this Court held in *NAACP*, determining membership is an inherent and inviolable part of the right of assembly.[66]

B. This Court in *Christian Legal Society v. Martinez* Wrongly Disregarded the Organization's Freedom of Assembly

Christian Legal Society v. Martinez ("*CLS*") presented this Court with a direct attack on the leadership criteria of a religious association by a public university. True to its name, the society required its leadership to be Christian and to behave accordingly. And true to its Scriptures, CLS believed it un-Christian to engage in homosexual activity or to advocate for it as normative behavior.[67] The university found that the society had violated the school's proscription of discrimination on the basis of religion and sexual orientation that it interpreted as making all students eligible for all club positions ("all-comers" policy). It refused to recognize CLS as a school club, denying it monetary, publicity, and other benefits available to other campus voluntary organizations.[68]

If this Court's Assembly Clause precedent had been applied, it would have been an open-and-shut case. Of course the society violated an "all-comers"

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65 530 U.S. 640, 648 (2000).
66 357 U.S. at 460-62.
67 561 U.S. at 708, 727 (Alito, J., dissenting).
68 *Id.* at 671-73.

rule; all assemblies do, because the act of selection and discrimination among a general population defines their very nature. Of course CLS, gathered around its religion, was protected by the freedom of assembly, which is a correlative right to freedom of religion and allows it to be freely exercised; after all, the freedom of assembly was insisted upon originally at least in part to protect those with unfavored religious views, such as William Penn and the Quakers. Of course the leadership criteria for CLS was instrumental in its assembly, as it prescribed and protected the organization's very purpose. And of course the school had no compelling interest justifying its repression of the Christians' freedom of assembly, any more than the States that sought to repress membership in NAACP had a compelling interest in limiting that organization's assembly and activities.[69]

But this Court did not apply its Assembly Clause precedent when it ruled against CLS. Instead, it basically disregarded the society's association argument and found that, as a speech restriction, the "all-comers" policy was "reasonable" and "viewpoint neutral."[70] The Court brushed aside as "more hypothetical than real" CLS's argument that, by requiring it to admit those to leadership who did not share its formative principles, it would be changing its very character, claiming there had been no showing of such attempts.[71] But this is not an issue that should be dependent on factual development; it is a

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[69] *See also Healy v. James*, 408 U.S. 169 (1972) (striking down university's refusal to recognize as a campus club Students for a Democratic Society).

[70] 561 U.S. at 669.

[71] *Id.* at 692.

definitional constant that must be respected, if the Assembly Clause is to have any force at all.[72] Otherwise, the freedom of assembly will be forgotten and converted into an instrument for the people to voice what the State at the time considers to fall within "the public good." This is a concept the Framers considered and rejected, as it makes the freedom of assembly meaningless. It is perhaps no surprise, then, that in decisions such as *CLS* the freedom of assembly played no part, when it should have been determinative.

V. This Court's Precedent with Respect to First Amendment Freedoms Cognate with Assembly Should Guide This Court's Assembly Jurisprudence

The road to recapture a proper understanding of the freedom of assembly is paved with recognition that, as the Court expressed it in *DeJonge*, that freedom is "cognate" with other First Amendment rights and "equally fundamental."[73] It is cognate in both senses of the word: (a) it derives from the same original text as the rights of speech, press, religion, and petition; and (b) it is a related, correlative right to each of those, embellishing, sustaining, and interlocking with them. As this Court has done in the past, it should look to applicable precedent regarding those other freedoms, especially speech and religion, when adjudicating the contours of the freedom of assembly.

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[72] *See Roberts*, 468 U.S. at 623.

[73] 299 U.S. at 364; *see also Thomas*, 323 U.S. at 530; *Barnette*, 319 U.S. at 638.

Assembly is perhaps most closely associated with speech, for these freedoms are mutually reinforcing: the act of assembly itself makes a statement, and speech does little good if it has no audience. The particular protections provided to speech that are equally applicable to assembly include the prohibition of prior restraints, including licensing requirements. The Court properly noted and relied on this overlap in *Thomas v. Collins.*[74]

Subject matter protections of speech and assembly also should overlap. While this Court has cautiously applied somewhat more limited protections to speech of a purely commercial nature, almost all speech is broadly protected, be its subject matter political, religious, economic, social, civic, or professional.[75] This Court recognized that the freedom of assembly has the same reach in *NAACP*.[76] And, of course, this Court should protect assembly even if its purpose and what it communicates is unpopular or considered wrongheaded or reactionary, just as it does speech.[77] This Court recognized as much in *Dale*, relying on speech precedent to do so: "As is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."[78]

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[74] 323 U.S. at 530-34.

[75] *See generally NIFLA v. Bacerra*, 138 S. Ct. 2361 (2018).

[76] 357 U.S. at 460; *see also Whitney*, 274 U.S. at 373 (Brandeis, J., concurring).

[77] *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Snyder v. Phelps*, 562 U.S. 443 (2011).

[78] 530 U.S. at 651 (quoting *United States* v. *Wis. ex rel. La Follette,* 450 U. S. 107, 124 (1981)).

This Court has also frequently held that a necessary corollary to the right to speak is the right *not* to speak; compelled speech is prohibited.[79] Assembly also carries with it the right *not* to assemble with others. Compelled assembly is the antithesis of the essence of the right, voluntariness. What Justice Brennan wrote with respect to "freedom of association" in *Roberts*, that "[f]reedom of association . . . plainly presupposes a freedom not to associate,"[80] is no less true of its generating right of assembly.

This Court's speech jurisprudence allows time, place, and manner restrictions by the State, but such regulation must be content and viewpoint neutral.[81] These precedents are equally applicable to assembly.[82] Such precedent must not be misused, however, as this Court did in *CLS*, to gloss over that the determination of who should and should not be admitted to membership and leadership in a group is, by definition, expressing the viewpoint of those forming the society, a central protection of the Assembly Clause.

This central point, which applies most directly to the member-donors in these cases, is also a central

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[79] *See, e.g.*, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013); *Wooley v. Maynard*, 430 U.S. 705 (1977).

[80] 468 U.S. at 623. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), decided on compelled speech grounds, could even more appropriately have been considered unconstitutional compelled assembly.

[81] *See generally Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

[82] *See, e.g.*, *Roberts*, 468 U.S. at 622-29.

principle in this Court's precedent upholding freedom of religion. This Court has recently reaffirmed, based on the historical purpose and understanding of the Religion Clauses, that the state may not interfere with a religious organization's determination of who will be its leaders and teachers, as this is integral to the organization's very character and existence.[83] This holds true with all assemblies. As Justice Brennan ackowledged in *Roberts*, "there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."[84]

And there is an overarching principle that is applied to both speech and religious regulation that also should be applied to restriction and repression of the right of assembly. Restrictions of the State on speech and religion can only stand if they serve a compelling interest and are implemented by the least restrictive means, i.e., they receive "strict scrutiny."[85] This Court applied these principles to assembly and association in *NAACP*, holding that "curtailing the freedom to associate is subject to the closest scrutiny."[86] It should reaffirm here that freedom of assembly not only deserves, but requires, the same protections as its cognate, co-equal, First Amendment freedoms.

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[83] *See Hosanna-Tabor Evan. Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012); *see also Our Lady of Guadalupe Sch. v. Morrisey-Berru*, 140 S. Ct. 2049 (2020).

[84] 468 U.S. at 623.

[85] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010) (speech); *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (religion).

[86] 357 U.S. at 461.

CONCLUSION

After this Court's decision in *CLS*, "the right of association bore little resemblance to the right of assembly that had existed for almost two hundred years of our nation's history."[87] In deciding these cases, this Court should return to the text of the First Amendment and reconfirm its earlier precedent that the right of assembly stands on a co-equal footing with other First Amendment freedoms.

Respectfully submitted,
this 25th day of February, 2021,

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[87] Inazu, *supra* note 2, at 149.