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

Brief *Amicus Curiae* of American Target Advertising, Inc. in Support of Petitioners

Mark J. Fitzgibbons
Counsel of Record
American Target Advertising, Inc.
9625 Surveyor Ct. #400
Manassas, VA 20110
(703) 392-7676
mfitzgibbons@americantarget.com
Counsel for Amicus Curiae

February 26, 2021

QUESTION PRESENTED

California's Attorney General demands that charities seeking annual licenses to communicate in his state using charitable solicitations must first disclose to his office Schedule B of Internal Revenue Service Form 990 showing names and addresses of certain donors. Does this demand for disclosure of donors in the charitable solicitation licensing process violate rights of private association and the First Amendment protections of charitable solicitations, including by creating an unconstitutional condition on the exercise of those rights, in addition to violating federal tax information confidentiality law.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. CONSTITUTION

STATUTES AND RULES

CASES

MISCELLANEOUS AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

American Target Advertising, Inc. has a strong interest in the matters raised in this litigation because it is America's oldest and largest for-profit agency of its type that provides creative services to nonprofit organizations that communicate about their tax-exempt missions and appeal for contributions. It is itself registered with the California Registry of Charitable Trusts, and its tax-exempt clients are harmed by Respondent's acts.

[1] It is certified that counsel for the parties were timely notified and have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than the *amicus curiae* made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Besides its arguments about the appropriate standard of review in this case, Petitioner Americans for Prosperity Foundation ("AFPF") raises numerous issues that your *amicus* American Target Advertising, Inc. ("American Target") respectfully argues deserve even more consideration, and which make this case even more important for certiorari to be granted.[2] Such issues underlying AFPF's Petition involve what should be proper checks on the discretionary, unilateral acts of the Respondent in the charitable solicitation licensing process. Here, innocence and valuable First Amendment rights were already subject to prior restraint. Charities must annually register and obtain licenses with the California Registry of Charitable Trusts before making communications that include charitable appeals to Californians. Because of the unilateral acts of Respondent, however, this prior restraint now employs indiscriminate, untargeted, dragnet violations of the right of private association as a condition to obtain a license to engage in charitable appeals. Much like unconstitutional general warrants, these trespasses on the right of private association are made without particularized or individualized suspicion and cause, and are not a narrowly drawn regulation of charitable solicitations.

Respondent's actions present a host of violations of, and greater dangers to, constitutionally and statutorily

---

[2] The case brought by Thomas More Law Center, No. 19-255, has been consolidated with the case brought by AFPF, and when this *amicus curiae* brief refers to the "Petition," it refers strictly to the one filed by AFPF.

protected rights for which Respondent should be checked and sternly rebuffed by the Court. Respondent's abuse of a licensing law, using dragnet collection of confidential donor information from Schedule B to Internal Revenue Service Form 990, also violates the federal statutory regime protecting confidential tax return information. Respondent cleverly but unlawfully evades the statutory and regulatory requirements for (1) access to, inspection of, and inter-office disclosure of confidential tax return information, (2) federal security protocols for those who are legally provided access to such information under the Internal Revenue Code, and (3) perhaps the concomitant civil and criminal penalties for violations of this federal regime protecting confidential federal tax return information. Respondent's violations involve unauthorized and therefore unlawful access to the identity of donors to not only AFPF and Thomas More Law Center, but other nonprofit organizations. Many of such organizations are at the center of controversial or unpopular political, social, and religious causes and debates that political officials may and often see as challenging to their own positions on such issues. Donors to such causes rightly feel threatened by violations of their right of private association with those causes. While AFPF's Petition focused on First Amendment issues, Respondent's acts in violation of the First Amendment are in fact an unattractive and legally unhealthy amalgamation of disregard for the rule of law, and deserve a stern rebuke.

ARGUMENT

Petitioner AFPF makes a compelling argument that the Court needs to resolve important issues affecting the standard of judicial review applied in this case. It seems even our courts, not to mention those who are regulating and regulated, have become increasingly confused about the various judicially-created levels of review that apply when government actions infringe on First Amendment and other constitutionally protected rights. That confusion has led in some cases, such as the present matter, to courts' increasingly acceding to government regulatory power -- even, as in this case, where Respondent's acts are not expressly directed or authorized by statute -- that infringes on protected rights, and even when prior decisions about the subject matter (state charitable solicitation laws) require statutes to be narrowly tailored. This hedge towards greater ability of government to infringe on rights can be, or is, dangerous for liberty. Respondent's acts in this case are inconsistent with other constitutional doctrines protecting liberty in the interplay of licensing and constitutionally protected rights.

AFPF's Petition identifies throughout how the Respondent steamrolled over the right of private association articulated in *NAACP v. Alabama*.[3] In their dragnet, shotgun violations of the right of private association, Respondent and his predecessor -- now Vice President Kamala Harris -- have exceeded and abused their authority to regulate charitable

[3] 357 U.S. 449 (1958).

solicitations in their capacities as head of the California Registry of Charitable Trusts. They have done so by requiring tax-exempt organizations seeking licenses to solicit contributions in California to, as a precondition of obtaining such licenses, disclose the identity of donors named in the confidential Schedule B to Form 990 filed with the Internal Revenue Service. Petitioner rightly tells the court, "No California law or regulation expressly requires charities to file their Schedule Bs with the California Attorney General" to obtain such licenses or to annually renew them. Pet. 6. Indeed, irrespective of the source being Schedule B, no California law requires registrants to disclose their donors to the Attorney General as a precondition to obtain licenses to solicit charitable contributions. Respondent's acts are therefore *ultra vires*. Inherently adding to the intimidating and chilling nature of his unconstitutional acts is that Respondent's position as Attorney General is as a politically elected official who has the power to investigate and prosecute in areas and matters far beyond fraud in the conduct of charitable solicitations and application of funds for charitable purposes.[4] Particularly because the causes of nonprofit organizations registering with Respondent may be ideologically critical of, or adverse to, his own political leanings, policies, and ambitions, donors rightfully may feel compromised through exposure of what is private and innocent association.

---

[4] "The Attorney General has charge, as attorney, of all legal matters in which the State is interested, except the business of The Regents of the University of California and of such other boards or officers as are by law authorized to employ attorneys." Cal. Gov't Code § 12511.

To justify his shotgun trespasses on the right of private association – extortionately using a licensing requirement (Cal. Gov't Code § 12585) that operates as a prior restraint on charitable solicitations protected by the First Amendment -- Respondent attempts to add to the existing unique justifications for regulating political candidate campaign committees -- which include the "historical role" of contributions in the corruption or the appearance of corruption in elections of public officials[5] -- with a comparably unremarkable law enforcement rationale: "By identifying the donor, the amount of the contribution, and the type of donation received (cash or in-kind), [Schedule B] provides information *that can indicate* misappropriation or misuse of charitable funds *and can help state investigators determine* whether the organization and its donors are engaging in self-dealing." Sup. Brief for Respondent 3 (emphasis added). As explained below, prophylactic, imprecise regulation for charitable solicitation licensing purposes has been rejected by this Court.

Respondent's stated motive for indiscriminately and extortionately trespassing on the right of private association in a way that *can indicate* need for law enforcement, *and can help state investigators*, may appear pure and honorable. However, law enforcement would always be so much easier for Respondent and

---

[5] *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 260 (1986), "In light of the historical role of contributions in the corruption of the electoral process, the need for a broad prophylactic rule was thus sufficient … to support a limitation on the ability of a committee to raise money for direct contributions to candidates."

other government officials when violating our fundamental and paramount law, the Constitution, and if Americans were to abandon many of their civil liberties, particularly those protecting privacy and private association.

Respondent would also have the Court focus on the perils to the right of private association only in cases of leaked public disclosure of Schedule B (which leaks already comes with potential civil and criminal penalties under federal law described herein below) instead of the inherent dangers of other abuses caused by the politics, ideology, policy goals, and power of government officials themselves that may be "weaponized." *See, e.g.*, Eric Swalwell, *President Trump Has Weaponized the Justice Department*, Newsweek.com, May 11, 2020, https://www.newsweek.com/president-trump-has-weaponized-justice-department-opinion-1503193 (last visited Feb. 22, 2021); Ilya Shapiro and Randal John Meyer, *Obama's Weaponized Justice Department*, Cato.org, Oct. 30, 2015, https://www.cato.org/commentary/obamas-weaponized-justice-department (last visited Feb. 22, 2021).

Your *amicus* American Target has experience about which it may aid the Court, that helps explain why Respondent's law enforcement scheme is constitutionally unreasonable in key respects reminiscent of general warrants. American Target's founder and chairman Richard Viguerie[6] first

[6] Mr. Viguerie was the 1972 recipient of the Direct Marketing Association of Washington Hall of Leaders Award,

pioneered political and cause-related direct mail in the 1960s and 1970s. His methods have been copied and replicated by many nonprofit organizations, including charitable, ideological, and political. Using targeted direct mail that initially seeks donations far less than the Schedule B threshold, organizations are able to make first direct contacts with prospective donors and supporters. Those first contacts, if written well, introduce an organization to potential supporters, and describe the organization's mission in ways that hopefully make the mail recipients wish to become donors or even nonfinancial supporters. Those who respond to direct mail receive subsequent communications to further bond the supporters with the organization or cause. These communications may be interactive, asking supporters to complete surveys or take other actions consistent with the mission of the organization. Executives or other personnel of those organizations will often then try to develop deeper, more personal relationships between themselves, the organization, and the donors, and may succeed to the point that the supporters cross the Schedule B threshold with larger donations, gifts, and bequests.

---

https://www.dmaw.org/hall-of-leaders/ (last visited Feb. 22, 2021), is a member of the American Association Political Consultants Hall of Fame, https://theaapc.org/richard-a-viguerie/ (last visited Feb. 22, 2021), and in 2000 both he and his liberal colleague Roger Craver were awarded The Sisk Award for Direct Marketing Vision by the Direct Marketing Association of Washington Educational Foundation, https://www.dmawef.org/Awards/Awards/Sisk.html (last visited Feb. 22, 2021).

As explained below, Respondent and other state charitable solicitation officials may obtain Schedule B information from the Internal Revenue Service on a case-by-case basis. State charitable solicitation officials must comply with confidentiality protocols established under federal law. Instead, Respondent uses his licensing authority to coerce nonprofit registrants to relinquish rights of private association as a condition to exercising the constitutionally protected right to solicit donations. That's extortionate.

By his own justifications to this Court, Respondent uses his extortionate prior restraint to allegedly search or surveil for evidence of *misappropriation or misuse of charitable funds, or donors engaging in self-dealing*, but in ways akin to a general warrant's search without individualized, particularized, or reasonable cause or suspicion.[7] His

---

[7] The bases of individualized suspicion required for searches are centuries old. From the transcribed testimony of Recorder of London Eyre in *Wilkes v. Woods*:

> He then observed that the present cause chiefly turned upon the general question, whether a secretary of state has a power to force persons' houses, break open their locks, seize their papers, &c. upon a bare suspicion of a libel by a general warrant, without name of the person charged . . . Nothing can be more unjust in itself, than that the proof of a man's guilt shall be extracted from his own bosom. No legal authority, in the present case, to justify the action. No precedents, no legal determinations, not an act of parliament itself, is sufficient to warrant any proceeding contrary to the spirit of the constitution.

methods hopscotch over any Fourth Amendment protections for his targets. And, as pernicious as Alabama Attorney General Patterson's objectives against the NAACP were in the 1950s, at least Patterson used a subpoena, giving the NAACP an opportunity to object and have their objections heard before an independent judge before being ultimately compelled (or not, as the case turned out) to hand over its list of supporters.

Respondent's violations of the right of private association harm the rights of every charity attempting to register, and every donor listed on their Schedule Bs. It's brilliantly extortionate, depriving organizations that do not wish to comply with such demands from exercising rights to communicate using charitable appeals, and thereby cutting off donations to finance their programs.

The following passage from Respondent's Supplemental Brief responding to the invitation brief of the United States actually highlights his disregard the right of private association:

> This Court's decisions addressing demands for membership information from the *NAACP* involved circumstances quite different from this one. See U.S. Br. 21-22. In those cases, government officials demanded disclosure of the organization's rank-and-file members at the height of the civil rights movement—in some cases, for disclosure to the public—in the

---

Wilkes v. Wood, 19 How St. Tr. 1153, 1154-55 (C.P.) (1763).

> face of uncontroverted evidence that revelation of members' identities would lead to violence and other reprisals. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960). In view of the historical context, it is no surprise that those disclosure demands had nothing at all to do with the governments' purported regulatory interests. Such sweeping and pretextual demands for membership lists are not analogous to a state (or federal) requirement that entities enjoying tax-exempt status provide regulators with limited information about their major donors on a confidential basis, to advance compelling law enforcement and regulatory interests.

Supplemental Brief for Respondent (Dec. 9, 2020) at 3.

Putting aside the question not at issue in this case of whether collection of Schedule B information by the IRS is itself a violation of the right of private association, Respondent's arguments nevertheless fail to acknowledge the critical distinction that his status as a politically elected official, with broad powers (including prosecution) and reach under Title 2, Div. 3, Part 2, Ch. 6 of the California Code[8] legislatively establishing his powers, are incompatible with powers and authorities of the IRS for tax collection. Unlike the IRS, which must engage the separated United

[8] https://law.justia.com/codes/california/2018/code-gov/title-2/division-3/part-2/chapter 6/article-2/ (last visited Feb. 21, 2021).

States Department of Justice to bring enforcement actions in court -- thereby creating somewhat of a wall of objectivity -- Respondent heads his state's Department of Justice. His shotgun collection of donor information gives him surveillance into the major donors who privately associate with organizations that may be critical of Respondent's or California's public policies. That his trespasses against the right of private association may be *fewer* in number *per organization* than what the NAACP faced certainly does not cure Respondent's constitutional violations. Respondent's scheme allows him to create an "enemies list" that, regardless of whether or not it is leaked to the public, allow for targeting of politically motivated investigations (or not investigating allies even when there is cause), and more mischief.

I. RESPONDENT'S DRAGNET SCHEME VIOLATES THE REQUIREMENT THAT CHARITABLE SOLICITATION REGULATION BE NARROWLY TAILORED

This court has repeatedly affirmed charitable solicitations are protected by the First Amendment,[9]

[9] Four times since 1980 this Court has needed to rebuff the over-aggressiveness of state charitable solicitation licensing regulation to protect the vital First Amendment interests of charitable speech and publication. "Regulation of a solicitation must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech * * * and for the reality that, without solicitation, the flow of such information and advocacy would likely cease." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988), citing *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 632 (1980), *Secretary of State v.*

and not just as commercial speech: "[C]haritable solicitations 'involve a variety of speech interests . . . that are within the protection of the First Amendment, and therefore have not been dealt with as 'purely commercial speech.'" *Riley v. National Federation of the Blind*, 487 U.S. 781, 789 (1988). *Riley* is consistent with prior decisions that rejected regulation of charitable solicitations that is not "narrowly tailored" (id. at 798), rejecting the "prophylactic, imprecise, and unduly burdensome rule the State [had] adopted." Id. at 800.

California law requires that charities annually register and become licensed with the Registry of Charitable Trusts within the office of the Attorney General before -- and as a condition of -- soliciting donations from Californians. Petition 5, citing Cal Code Regs., tit 11, § 301. Respondent's dragnet, prophylactic, and imprecise regulation using demands for the names and addresses of certain donors to charitable organizations that register to solicit contributions -- regardless of innocence or lack thereof -- are by nature and reason the opposite of narrowly tailored regulation. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Riley*, 487 U.S. at 800, citing *NAACP v. Button*, 371 U.S. 415, 438 (1963).

Munson, 467 U.S. 947, 959 - 960 (1984). *See also*, *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

Compounding the unlawfulness, such demands are acts of pure discretion by the Respondent in the licensing process, since they are not required by California law, as noted above. Discretion in the context of licensing where First Amendment rights are affected is dangerous and may be unconstitutional. ("At the root of this long line of precedent is the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988); "Only standards limiting the licensor's discretion will eliminate this danger by adding an element of certainty fatal to self-censorship." Id. at 758. While Petitioner shows no examples of viewpoint discrimination by Respondent in the licensing process itself, First Amendment rights are nevertheless directly harmed by this discretionary act in California's prior restraint licensing process.[10] Private association with causes that may be ideologically, religiously, or politically at odds with the Attorney General and those employees of his office who have access to Schedule B donor information, is thereby inherently placed at risk and chilled.

---

[10] "Prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976). "A system of prior restraint on expression comes to this Court bearing a heavy presumption against its constitutional validity." *Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968); citing *Bantam Books v. Sullivan*, 372 U. S. 58 (1963); *Freedman v. Maryland*, 380 U. S. 51 (1965).

As AFPF explains, "[a]ctual, potential, and even perceived donors report that they have been singled out for audits and investigations by government officials as a result of their donations (real or perceived)." AFPF Pet. at 13. One harm, therefore, is exposure of innocent association in what unfortunately can be a nasty, duplicitous, ambitious, and sometimes violent political world. Innocent anonymity and the right of private association free from the government's prying and sometimes politically, religiously, or other cause-related biased eyes is lost through Respondent's acts.

II. RESPONDENT'S ACTS CREATE AN UNCONSTITUTIONAL CONDITION ON OBTAINING A LICENSE TO ENGAGE IN FIRST AMENDMENT RIGHTS

Besides not being a narrowly tailored regulation of charitable solicitation, Respondent's dragnet demands for donor information in the annual registration process are an extortionate condition placed on registrants' obtaining a "prior restraint" license to engage in the First Amendment right of soliciting contributions. The Ninth Circuit did not give adequate consideration to the heavy presumption against prior restraint as a starting point in its analysis of Respondent's acts. Indeed, Respondent's unlawful scheme to violate the right of private association is quite cleverly extortionate, because it is solicitations by tax-exempt organizations resulting in donations that initially create the private association with supporters of the cause. The first precedes the second. It is a maxim of fundraising that there is only

one way to obtain a donation: ask. Therefore, the extortionate condition is a chicken-and-egg situation whereby registrants must forego rights of private association in order to engage in rights of charitable solicitation -- or be censored from asking for donations at all.

Respondent therefore violates multiple rights using the legally coerced, prior restraint need to obtain an annual license to solicit donations. It is extortionate because Respondent knows that without that license, tax-exempt organizations may not legally engage in the First Amendment right to make appeals that are the genesis of the right of private association being violated by Respondent. Organizations refusing to violate the right of private association with their donors by failing to file Schedule B with Respondent would be denied licenses to solicit contributions. Therefore, Respondent's demands interpose an unconstitutional condition to obtain such licenses to engage in constitutionally protected rights. As stated in *Regan v. Taxation With Representation*, "[T]he government may not deny a benefit to a person because he exercises a constitutional right." 461 U.S. 540, 545 (1983), citing *Perry v. Sindermann*, 408 U. S. 593 (1972), which had articulated the principle:

> [E]ven though a person has no "right" to a valuable governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a

> basis that infringes his constitutionally protected interest, especially his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." *Speiser v. Randall*, 357 U. S. 513, 357 … Such interference with constitutional rights is impermissible.

In further violation of the First Amendment, Respondent uses discretion in the licensing process to *create* an unconstitutional condition on the right of engaging in constitutionally protected charitable solicitations.

III. RESPONDENT'S ACTS VIOLATE CONSTITUTIONAL RIGHTS BY VIOLATING FEDERAL LAW PROTECTING CONFIDENTIAL TAX RETURN INFORMATION

Respondent's purported law enforcement objectives in obtaining and using Schedule B donor information may be achieved under the federal statutory regime that guards the confidentiality of tax return inform. The federal regime protects confidential tax return information, but authorizes the Secretary of the Treasury to make individualized disclosures to state officials -- as opposed to the mass,

untargeted, extortionate collection used by Respondent -- for specific law enforcement purposes.

The statutory tax information confidentiality regime begins with 26 U.S.C. § 6103. The general theme and core principles of this primary statute governing the regime are rather explicit and plain: "Returns and return information shall be confidential . . . *except as authorized by this title*." 26 U.S.C. § 6103(a) (emphasis added). The detailed statutory regime that follows this plain, overarching directive shows that it is ample and serious in its protection of confidential tax return information, complete with criminal and civil penalties for violations, found at 26 U.S.C. §§ 7213, 7213A, and 7431, which are addressed below. Yet this regime is also designed to provide structured, regulated, and tightly guarded access to tax return information when federal and state law enforcement needs, including inspection, must be fulfilled.

Because of the unique nature of tax-exempt organizations, this confidentiality regime includes some special rules found at 26 U.S.C § 6104 ("Publicity of information required from certain exempt organizations and certain trusts") for the tax information of tax-exempt organizations filed with the Internal Revenue Service.

The regime that is initiated at § 6103(a) applies to "any return or return information obtained by [an official] in any manner in connection with his service," and includes certain information of tax-exempt organizations under § 6104:

> [N]o officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(1)(C) or (7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104(c) . . . .

26 U.S.C. § 6103(a)(2). As explained in greater detail below, Schedule B donor information must be deemed confidential and subject to the confidentiality regime even under the special rules for greater disclosure of tax information returns, Form 990, filed with the Internal Revenue Service by tax-exempt organizations.

Having first established the overarching rule of confidentiality of tax information filed with the Internal Revenue Service as the starting point and general principle, Congress then identifies at § 6103(d) – (m) the federal and state law enforcement matters for which the Secretary of the Treasury may disclose to government officials -- i.e., provide access to -- confidential tax information. This federal regime makes inherent sense because it (1) strictly guards confidential tax information, yet (2) authorizes state officials to obtain confidential tax information from the Internal Revenue Service (the Treasury Secretary's designee) when such information is needed for authorized, legitimate law enforcement purposes.

In other words, the regime provides for controlled release to, and access by, government officials. Under the federal regime protecting the confidentiality of federal information, state licensing schemes are not identified as a method by which confidential tax information may be unilaterally or otherwise accessed by state officials. The rights Respondent has violated are intertwined with this federal statutory confidentiality regime protecting Schedule B donor information.

Respondent's demand that nonprofits file their Schedule Bs in the licensing process itself creates unlawful inspection or disclosure under the federal regime. "The term 'disclosure' means the making known to any person in any manner whatever a return or return information." § 6103(b)(8). *The prohibition therefore is not merely on disclosure to the general public*. A reading of the statutory regime shows "any person" certainly must include officials and employees within state (or federal) government whose offices are not expressly authorized to view confidential tax information under the federal regime. That reading is not only consistent with the federal statutes, but seems required because the federal regime expressly applies to state officials and employees.[11] Viewing confidential tax information is not a government free-for-all. IRS Publication 4639, for example, interprets legal

[11] This brief does not address the split in the circuits about disclosure in certain other circumstances, such as publication after trial in which confidential tax information was used at trial, since that split does not address whether licensing is unauthorized disclosure.

disclosure for purposes of whether to assess liability as only that which is authorized by statute: "For a disclosure of any return or return information to be authorized by the Code, there must be an affirmative authorization because section 6103(a) otherwise prohibits the disclosure of any return or return information by any person covered by section 7213(a)(1)." Disclosure & Privacy Law Reference Guide, Publication 4639 (Rev. 10-2012) 1-49, https://www.irs.gov/pub/irs-pdf/p4639.pdf (last visited Feb. 20, 2021). Respondent's dragnet licensing scheme is not an affirmatively authorized method of viewing confidential tax information.

IV. SPECIAL RULES FOR TAX-EXEMPT ORGANIZATIONS STILL PROTECT DONOR CONFIDENTIALITY

§ 6104 of Title 26, entitled "Publicity of information required from certain exempt organizations and certain trusts," provides some unique rules for tax and tax return information filed with the IRS by tax-exempt organizations, including IRS Form 990, and how those Form 990s are made available for public inspection. § 6104(c) covers "Publication to State officials," and paragraph (2)(C) provides "Procedures for disclosure." Again, this re-enforces that the term "disclosure" in the context of the federal confidentiality regime means making confidential tax information available to government officials, even in the context of their work, and not just disclosure to the public. Respondent therefore incorrectly focuses merely on disclosure of this confidential information to the public, such as through

leaks and Internet publication, and AFPF highlights its concerns about public disclosure in the Petition's section "The Demonstrated Pattern of Confidentiality Violations By California." AFPF Pet. at 7-10. But those concerns skip right over one of the significant purposes of the federal tax information confidentiality regime, which is to define and limit the conditions *under which even state officials may access and inspect confidential tax return information.*

Under § 6104(c) "Publication to state officials," "[i]nformation may be inspected or disclosed" only upon written request "by an appropriate State officer," (§ 6104(c)(2)(C)) and restricts inspection and inter-office disclosure:

> Such information may only be inspected by or disclosed to a person other than the appropriate State officer if such person is an officer or employee of the State and is designated by the appropriate State officer to receive the returns or return information under this paragraph on behalf of the appropriate State officer.

This provision further justifies the interpretation that restriction on "disclosure" in this confidentiality regime not only applies to publication to the general public, but is a restriction on access by state officials and employees. Respondent's focus on publication to the general public, and not on access by Respondent himself and his employees -- or other state employees -- therefore would allow him to evade the law, i.e., his obligations to comply with the federal tax information

confidentiality regime. § 6104(c)(2)(D) also provides:

> The Secretary may make available for inspection or disclose returns and return information of an organization to which paragraph (1) applies to an appropriate State officer of any State if the Secretary determines that such returns or return information may constitute evidence of noncompliance under the laws within the jurisdiction of the appropriate State officer.

Not only has the Secretary not authorized collection of Schedule Bs via licensing, but the statute indicates the Secretary's purview to disclose tax information to state officials when it may constitute *evidence of noncompliance*. The dragnet, prophylactic method employed by Respondent targeting innocently exercised rights -- and only incidentally capturing any guilt -- is inconsistent with lawful methods by which Respondent may access Schedule Bs for law enforcement purposes. This further demonstrates that Respondent's untargeted, general warrant-like collection of Schedule Bs is unlawful under the confidentiality statutes in addition to being unconstitutional.

While IRS Form 990s are required to be available to the public under the unique rules of § 6104(d) -- "Public inspection of certain annual returns, reports, applications for exemption, and notices of status" -- the donor information filed on Schedule B is not available to the public under the express language

of § 6104(d)(3), "Nondisclosure of contributors, etc.," which states in relevant part:

> In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization.

§ 6104(d)(3)(A). Schedule B donor information therefore remains confidential tax return information under the overarching rule of confidentiality, and restricted by that regime in how it may be accessed, despite all the hopping around through the statutory regime one must follow to reach that very simple, certain, pragmatic, and constitutionally sound conclusion. That this regime may be less convenient for Respondent to gather Schedule B information for his law enforcement purposes is irrelevant to the protection of confidential tax information. In fact, it is a feature, not a bug.

The federal regime's protocols protecting confidential tax return information when and after the IRS lawfully provides it to state officials are rigid, and guard against misuse. Those state officials to whom the IRS discloses confidential tax information are obligated to sign "Disclosure Agreements" agreeing to strict security arrangements and even audits to ensure compliance. See Internal Revenue Manual 7.28.2.2 (09-22-2015), "Disclosure Agreements," \

https://www.irs.gov/irm/part7/irm_07-028-002 (last visited Feb. 20, 2021), which states, "[T]he IRS will only make disclosures under IRC 6104(c) to those state agencies that have submitted their Safeguard Security Report (SSR) to [the IRS office of Privacy, Governmental Liaison, and Disclosure] and have entered into a disclosure agreement with the IRS regarding IRC 6104(c)." Respondent's scheme to surveil Schedule B information in a shotgun manner not only violates the statutory and constitutional safeguards pertaining to access, but evades the federal oversight, compliance, and security protocols for federal tax return information.

"Disclosure," therefore, is not merely disclosure to the public or disclosure by the IRS, but internal *disclosure* by state government agencies to employees not authorized to possess the information. Respondent has thus boldly and flagrantly transgressed the federal statutory regime that expressly provides the terms, circumstances, and conditions under which confidential tax return information may be accessed and used in state law enforcement matters, and which guard against unauthorized disclosure and inspection of such confidential tax return information. Respondent's disregard and violations of constitutional rights go hand-in-hand with his violations of federal tax information confidentiality law, yet he asks this Court to *trust him*.

This federal regime includes criminal and civil penalties for state officials and employees, which Respondent's actions seem designed to allow the Registry of Charitable Trusts to evade by hopscotching

over the federal laws and protocols zealously protecting confidential tax information. The criminal and civil penalties for unauthorized disclosure or inspection of confidential tax information are found at 26 U.S.C. § 7213 ("Unauthorized disclosure of information," which makes willful violations a "felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both"), § 7213A ("Unauthorized inspection of returns or return information," making violations "punishable upon conviction by a fine in any amount not exceeding $1,000, or imprisonment of not more than 1 year, or both"), and § 7431 ("Civil damages for unauthorized inspection or disclosure of returns and return information" providing the greater of actual damages or "$1,000 for each act of unauthorized inspection or disclosure of a return or return information"). These statutory penalties further evidence the serious congressional purpose of protecting confidential federal tax information.

It seems quite contrary to the existential purposes of the federal statutory regime protecting confidential federal tax information filed with the federal tax service if it were to be construed to allow states or state officials acting unilaterally to evade its strict protocols and concomitant penalties through dragnet licensing schemes like the one employed by Respondent. The federal regime is clear that it applies to, and restricts access by, state officials and employees. Such access is a danger in and of itself, especially with regard to sensitive federal tax information such as Schedule B donor names and addresses. But especially in the age of the Internet,

Registry of Charitable Trust employees could widely leak such confidential federal tax information with less or no fear of the federal civil or criminal penalties that apply under the confidentiality regime. Respondent's actions, unless rebuked, encourage every state to now follow his bad example, opening floodgates to evade the strict protocols and security measures that (1) only legally authorized state officials with genuine law enforcement needs *may be granted access* to such private information, (2) such information is not abused for political or discriminatory purposes, (3) such information is not leaked through back channels to the media or widely disclosed on the Internet to the public, and (4) state officials and employees do not evade the federal civil and criminal penalties in this federal regime.

This federal regime does not seem to impose -- and your *amicus* does not suggest -- a restriction on the authority of states to use legally issued subpoenas or civil investigative demands to obtain Schedule B information from individualized targets of investigations on a case-by-case basis. Respondent's shotgun, *Precrime Division* collection of Schedule B, however, does not meet the criteria of reasonable cause and the opportunity to challenge in court such investigations.

This federal regime, if it were properly applied to the California Attorney General's dragnet gathering the Schedule B donor information at issue in this case, is consistent with this Court's rebuke of Alabama Attorney General Patterson in *NAACP v. Alabama*.

CONCLUSION

Respondent's violations of rights are many and dangerous to liberty and the rule of law over government officials, and need to be rebuked. Respondent's exercise of power is not expressly authorized by California's charitable solicitation law, which law is already a prior restraint on the First Amendment right to engage in charitable solicitation, and comes with a heavy burden on the Respondent to justify its constitutionality. Respondent's acts are not narrowly tailored regulation affecting the important First Amendment rights inherent in charitable solicitations, and should be deemed constitutionally unacceptable. His office's annual collection of individuals' donor information are mass, untargeted "trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment" (*NAACP v. Alabama*, 357 U.S. at 460), and violate the right of private association. Respondent's acts create an unconstitutional condition, making registrants trade off First Amendment rights against rights of private association. Respondent's acts in violation of these rights also are rogue violations of federal law expressly governing access to, disclosure of, examination of, and federally required security of confidential federal tax return information by state officials and employees. This Court should rule for the petitioners.

Respectfully submitted,

MARK J. FITZGIBBONS
Counsel of Record
AMERICAN TARGET
ADVERTISING, INC.
9625 Surveyor Ct. #400
Manassas, VA 20110
(703) 392-7676
mfitzgibbons@americantarget.com

Counsel for Amicus Curiae