Nos. 19-251 & 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of California,

Respondent.

THOMAS MORE LAW CENTER,

Petitioner,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of California,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CENTER FOR EQUAL OPPORTUNITY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

THOMAS G. HUNGAR
Counsel of Record
DOUGLAS R. COX
JASON J. MENDRO
KATHERINE L. MONTOYA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
(202) 955-8500
thungar@gibsondunn.com

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Center for Equal Opportunity is a nonprofit research and education organization committed to the idea that citizens of all races, colors, and ethnicities should be treated equally. Among other things, it publicly opposes racial or ethnic discrimination by the government or private entities.

CEO considers the "[i]nviolability of privacy in group association . . . indispensable to preservation of freedom of association"—especially for groups "espous[ing] dissident beliefs." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). CEO relies on donations to pursue its mission. Because CEO speaks on matters on which there is vigorous disagreement among advocates of competing viewpoints, protecting the identities of its donors who choose to support CEO anonymously is vital to its ability to speak.

CEO is concerned that if this Court adopts the analytical framework endorsed by the Court of Appeals for the Ninth Circuit, it will chill the associational activities of a wide array of charities and subvert the First Amendment to the United States Constitution.

---

[1] Pursuant to Supreme Court Rules 37.3(a) and 37.6, counsel for *amicus curiae* affirm that all parties have consented to the filing of this brief, that no counsel for any party authored it in whole or in part, and that no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The California Attorney General requires all charities that solicit donations in California to submit to the California Registry of Charitable Trusts their federal Schedule Bs, which are part of the tax returns they file with the Internal Revenue Service on Form 990. That requirement fails the exacting scrutiny standard this Court has applied to compelled disclosure requirements for more than sixty years. California's requirement is not closely drawn to further an important government interest, and it therefore violates petitioners' First Amendment rights. Furthermore, it cannot be sustained on the ground that the Internal Revenue Service also collects information about certain nonprofits' "substantial contributors" on Schedule B.

I. One of the First Amendment's proudest boasts is that it protects not only "free thought for those who agree with us but freedom for the thought that we hate." *Girouard* v. *United States*, 328 U.S. 61, 68 (1946) (quoting *United States* v. *Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). It guarantees that citizens may band together to advocate their shared viewpoints, even politically or culturally unpopular viewpoints, free from unjustifiable intrusion by government. Although the First Amendment offers solicitude for associations, American history is replete with examples of the intense, and even violent, opposition that advocates of various causes have endured. It is thus not surprising that Americans often have chosen to advance their causes anonymously, from the founding of the Nation to the present.

For more than sixty years, this Court rightly has protected the "privacy of association and belief guaranteed by the First Amendment." *E.g.*, *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982) (citation omitted). When the government burdens the right to associate freely by requiring disclosure of a group's members or donors, the government must prove that its disclosure requirement survives "exacting scrutiny," by showing that it furthers "a sufficiently important interest" commensurate with the infringement and that the disclosure is "closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley* v. *Valeo*, 424 U.S. 1, 25, 64 (1976) (per curiam).

The Ninth Circuit erred in upholding the California Attorney General's disclosure regime, because it misconstrued the substantive content of the exacting scrutiny standard. While that standard does not require the State to show that its chosen means are the least restrictive means of advancing a sufficiently important interest, it does require the State to prove that its disclosure requirement is closely tailored so as to avoid burdening substantially more associational activity than is necessary to achieve the State's goal. Although the Ninth Circuit conceded that the Attorney General's disclosure requirement imposed a burden on First Amendment rights, it did not require the Attorney General to show that this imposition was "closely drawn to avoid unnecessary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. Moreover, the Ninth Circuit held petitioners to an excessively demanding standard of proof for as-applied exemptions, which this Court explicitly has refused to do.

II. The California Attorney General compels every charity that collects donations in the State of California to submit to the State each year its Schedule B, which lists the names and addresses of its major donors. That intrusive requirement fails exacting scrutiny. The Attorney General has no interest in compelled disclosure of Schedule Bs that is sufficiently important to justify substantial burdens on associational rights. Even if he did, the First Amendment requires him to pursue his interest with precision. Instead, however, the Attorney General has imposed a categorical and vastly overbroad mandate that compels disclosure of unredacted compilations of highly sensitive information from each of the 115,000 charities registered in the State. Yet there are alternatives that would further the Attorney General's interest and substantially reduce the burden that disclosure imposes on associational rights. By insisting on this sweeping disclosure of vast amounts of information that bears little if any relationship to any realistic governmental need, the Attorney General unnecessarily burdens the associational rights of countless Americans across the country. And his office's loose handle on confidential information unacceptably increases the risk of public exposure with its attendant harms.

III. The California Attorney General's requirements cannot be sustained on the ground that the IRS also collects Schedule Bs from certain nonprofits. The IRS has a unique interest in enforcing federal tax laws that implicate substantial contributors. Obtaining the information on Schedule B may be substantially related to that interest. And unlike California, the federal government imposes stringent civil and crimi-

nal penalties for unauthorized disclosure of confidential information to guard against abridging associational rights more than necessary.

In sum, where government action chills associational freedoms, the First Amendment will not tolerate any "means that unnecessarily restrict constitutionally protected liberty." *Kusper* v. *Pontikes*, 414 U.S. 51, 59 (1973). This Court should correct the Ninth Circuit's flawed interpretation of the First Amendment and hold unconstitutional the California Attorney General's disclosure requirement.

ARGUMENT

I. Disclosure Requirements Must Be Closely Drawn To Further A Sufficiently Important Government Interest.

This Court has long protected the freedom of association from compelled disclosure requirements where the government fails to show that its disclosure requirement survives exacting scrutiny. The Ninth Circuit's decision compromises that precedent by distorting the tailoring requirement and the standard of proof for obtaining an as-applied exemption.

A. The Freedom Of Association Is Crucial To Preserve Minority Viewpoints, And It Is Susceptible To Attack From Both The Government and Private Actors.

The freedom of association derives from the First Amendment's guarantees of "the freedom of speech" and "the right of the people peaceably to assemble." U.S. Const. Amend. I; *see NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). This "freedom to speak in association with other individuals," *Citizens United* v. *FEC*, 558 U.S. 310, 386 (2010) (Scalia, J., concurring), "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas," *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647–48 (2000).

Associational freedom also "encompasses protection of privacy of association," *Gibson* v. *Fla. Legis. Investigation Comm.*, 372 U.S. 539, 544 (1963), allowing Americans "to pursue their lawful private interests privately and to associate freely with others in so doing," *Patterson*, 357 U.S. at 466. The opportunity for

anonymity mitigates many concerns that might otherwise chill free association, including "fear of economic or official retaliation," "concern about social ostracism," or merely "a desire to preserve as much of one's privacy as possible." *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Vill. of Stratton*, 536 U.S. 150, 166 (2002) (citation omitted).

Given the importance of anonymity—particularly for unpopular groups—it is not surprising that compelled disclosure of a group's members or donors "can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976) (per curiam); *see, e.g.*, *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). For instance, disclosure "may induce members to withdraw from the [a]ssociation and dissuade others from joining it because of fear of exposure of their beliefs . . . and of the consequences of this exposure." *Patterson*, 357 U.S. at 463. The consequences may be especially acute for donors: "Financial transactions can reveal much about a person's activities, associations, and beliefs." *Buckley*, 424 U.S. at 66 (alteration and citation omitted). And for a charity, losing donors due to concerns about the consequences of exposure could undermine its operation. "[F]unds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Id*. at 65–66; *see Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

Throughout American history, both the government and private actors have threatened harassment or reprisals as a consequence for association. As the Second Circuit has put it, "[a] list of names in the hands of those with access to a state's coercive resources conjures up an uneasy number of troubling

precedents." *Citizens United* v. *Schneiderman*, 882 F.3d 374, 383 (2d Cir. 2018). This Court's own precedents chronicle attempts by governments to expose members of the NAACP and other civil rights organizations to various threats and reprisals. *E.g.*, *Shelton* v. *Tucker*, 364 U.S. 479, 486 n.7 (1960) (noting that a private actor intended to obtain lists of teachers' associational memberships from the government and "eliminat[e] from the school system" supporters of organizations like the American Civil Liberties Union); *see, e.g.*, *Gibson*, 372 U.S. 539; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Bates*, 361 U.S. 516; *Patterson*, 357 U.S. 449.

Private actors may also seek to suppress associational activity by intimidating known donors. They may "go[] for the jugular" by "alerting donors" of disfavored causes "to a variety of potential dangers, including legal trouble, public exposure and watchdog groups digging through their lives." *Citizens United*, 558 U.S. at 482–83 (Thomas, J., concurring in part and dissenting in part) (quoting Michael Luo, *Group Plans Campaign Against G.O.P. Donors*, N.Y. Times (Aug. 8, 2008), https://nyti.ms/3uvGyih). The Internet intensifies the risk of harassment and retaliation, instantaneously spreading public exposure to a vast audience and multiplying the risk of retribution for apparent affiliation with causes considered objectionable by some. Indeed, it is common knowledge in the modern era that people who advocate controversial

positions or unpopular causes are frequently subjected to intimidation, boycotts, economic reprisals, or even threats of bodily harm or death.[2]

The danger from disclosure respects neither party lines nor ideological divides. The records in the present cases illustrate how disclosure of donors threatens the associational activities of both the Thomas More Law Center and Planned Parenthood, for example. One of the Law Center's founders had his business boycotted by the National Organization for Women because of his opposition to abortion. *Thomas More Law Ctr.* v. *Harris*, No. CV 15-3048-R, 2016 WL 6781090, at *4 (C.D. Cal. Nov. 16, 2016). Similarly, when the California Registry of Charitable Trusts posted the Schedule B for Planned Parenthood on its public website, Planned Parenthood's counsel cautioned that "the unintended public availability of this information is potentially damaging to both our client and its donors, and the longer it remains available, the greater the risk it poses." Appellant-Cross-Appellee's Excerpts of Record, Vol. V at ER1139, *Ams for Prosperity Found.* v. *Becerra*, 903 F.3d 1000 (9th Cir. 2018) (No. 16-55727), ECF No. 13. This widespread

---

[2] *E.g.*, Trial Tr., Day 1, Vol. I at 57, *Ams. for Prosperity Found. v. Harris*, No. 2:14-cv-09448-R-FFM (C.D. Cal. Mar. 8, 2016), ECF No. 170 (death threat and intimidation); Sam Shead, *Parler CEO Says App Will Be Offline "Longer Than Expected" Because of Amazon, Apple and Google*, CNBC (Jan. 11, 2021), https://cnb.cx/3ax71UB (economic reprisal); Airbnb, *Airbnb Announces "Capitol Safety Plan" for the Inauguration*, (Jan. 11, 2021), https://bit.ly/2NC6pUr (same); Jia Lynn Yang & Dan Eggen, *Exercising New Ability to Spend on Campaigns, Target Finds Itself a Bull's-Eye*, Wash. Post (Aug. 19, 2010), https://wapo.st/2NdzSUV (boycott).

harm from disclosure requirements is undoubtedly why organizations of various political stripes appeared before the Ninth Circuit in support of petitioners.[3]

B. Compelled Disclosure Requirements Are Subject To Exacting Scrutiny.

For decades, this Court has described First Amendment freedoms as "delicate and vulnerable" and in need of "breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). This Court has therefore subjected disclosure requirements to "the closest scrutiny," *Patterson*, 357 U.S. at 461, or, by another name, "exacting scrutiny," *Buckley*, 424 U.S. at 64.

Under this rigorous standard, the government must first prove that its disclosure requirement furthers a "sufficiently important interest" commensurate with "the burden that [it] place[s] on individual rights." *Buckley*, 424 U.S. at 25, 68; *see, e.g.*, *Brown*, 459 U.S. at 92; *Gibson*, 372 U.S. at 546; *Bates*, 361 U.S. at 524; *Patterson*, 357 U.S. at 463. To make this showing, the government must prove that "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights." *Davis* v. *FEC*, 554 U.S. 724, 744 (2008); *accord Buckley*, 424 U.S. at 68, 71. Second, the government must demonstrate that its disclosure requirement is substantially related to its asserted interest, *e.g.*, *Doe* v. *Reed*, 561 U.S. 186, 196 (2010); *Citizens United*, 558 U.S. at 366–67; *Brown*, 459 U.S. at 92, or in other words, is "closely drawn to avoid unnecessary

---

[3] *Amici curiae* before the Ninth Circuit included the NAACP Legal Defense and Educational Fund, Inc., the Campaign Legal Center, the Cato Institute, and the Pacific Legal Foundation.

abridgement of associational freedoms," *Buckley*, 424 U.S. at 25; *see, e.g.*, *McCutcheon* v. *FEC*, 572 U.S. 185, 218 (2014) (plurality); *Gremillion*, 366 U.S. at 296–97; *Shelton*, 364 U.S. at 488. Even if the government makes these showings, groups resisting disclosure may obtain as-applied exemptions from facially valid requirements by establishing "a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Reed*, 561 U.S. at 200 (alterations omitted) (quoting *Buckley*, 424 U.S. at 74); *see, e.g.*, *Citizens United*, 558 U.S. at 370.

With respect to the burden on associational rights considered at the first step of exacting scrutiny, it is evident "that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective . . . restraint on freedom of association." *Patterson*, 357 U.S. at 462. Such a restraint may take various forms. For example, this Court has held that "not insignificant burdens" on associational rights include the concern that "public disclosure . . . will deter some individuals who otherwise might contribute" and the mere possibility that disclosure of donors could "expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68. Likewise, this Court recognized in *Shelton* that an Arkansas statute requiring every teacher to disclose every organization to which he belonged or regularly contributed infringed on the teacher's associational rights because of "the pressure" imposed "to avoid any ties which might displease those who control his professional destiny." 364 U.S. at 486. The burden on associational freedoms is especially onerous where disclosure would expose members or donors to "economic reprisal, loss of employment, threat of physical coercion, and other

manifestations of public hostility." *Patterson*, 357 U.S. at 462. Whatever the nature of the imposition on associational rights, the strength of the government's interest in disclosure must be sufficient to justify the weight of the burden. *E.g.*, *Davis*, 554 U.S. at 744; *Buckley*, 424 U.S. at 68, 71.[4]

To satisfy exacting scrutiny's second requirement that the means must be "closely drawn," *Buckley*, 424 U.S. at 25, the government must prove that it "employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective," *McCutcheon*, 572 U.S. at 218 (alteration and citation omitted). A "broad[]" imposition on associational rights is not closely tailored if "the end can be more narrowly achieved." *Shelton*, 364 U.S. at 488. "[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper* v. *Pontikes*, 414 U.S. 51, 58–59 (1973).

Many disclosure requirements have failed exacting scrutiny. This Court has held unconstitutional a state attorney general's demand for the names of members of the NAACP where the disclosure had no "substantial bearing" on the State's asserted interest in enforcing its foreign corporation registration statute. *Patterson*, 357 U.S. at 464–66. It has deemed

---

[4] *See also Perry* v. *Schwarzenegger*, 591 F.3d 1126, 1141 (9th Cir. 2009) (observing that disclosure of internal campaign communications for the California Proposition 8 campaign could have a "deterrent effect" on the protected activity of "participation in campaigns" and thus infringed the freedom of association); *AFL-CIO* v. *FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003) (finding a burden on the constitutional right to association where the groups resisting disclosure asserted that disclosure would "make it more difficult for the organizations to recruit future personnel").

invalid a city ordinance demanding the names of organizations' members and contributors for purposes of occupational license taxes where the city failed to show any relation between disclosure and a "controlling justification." *Bates*, 361 U.S. at 525, 527. And it has held unconstitutional a requirement compelling teachers to disclose their associational memberships as a condition of employment because the "completely unlimited" disclosure had "no possible bearing upon" the State's interest in ensuring teacher competence. *Shelton*, 364 U.S. at 488.

In sum, more than sixty years of precedent has taught that where the government burdens the freedom of association, the First Amendment demands "precision of regulation." *In re Primus*, 436 U.S. 412, 432 (1978) (quoting *Button*, 371 U.S. at 438) (alteration omitted). "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights," *Davis*, 554 U.S. at 744, and even a "legitimate and substantial" governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved," *Shelton*, 364 U.S. at 488.

C. The Ninth Circuit Misapplied This Court's Exacting Scrutiny Standard.

The Ninth Circuit departed from this Court's well-established framework for analyzing compelled disclosure requirements in at least two ways. First, the Ninth Circuit misapplied the substantive content of this Court's exacting scrutiny standard by failing to require the Attorney General to show that his disclosure requirement was "closely drawn to avoid unnec-

essary abridgement of associational freedoms." *Buckley*, 424 U.S. at 25. Second, the Ninth Circuit held petitioners to an excessively demanding standard of proof for as-applied exemptions.

To start, the Ninth Circuit erred in applying this Court's formulation of the exacting scrutiny standard by failing to require the Attorney General to show that his disclosure requirement was closely tailored, i.e., that it did not impinge upon associational freedoms in a substantially more burdensome manner than is necessary to advance the asserted governmental interest. Instead of enforcing that narrow tailoring requirement in accordance with this Court's cases, the panel found it sufficient that the disclosure requirement "clearly further[ed]" the State's interest, thereby justifying the burden imposed. Pet. App. at 22a, 39a (No. 19-251) (citation omitted).

Exacting scrutiny does not "require the state to choose the least restrictive means of accomplishing its purposes." Pet. App. at 16a (No. 19-251). But it does require "a means narrowly tailored to achieve the desired objective," *McCutcheon*, 572 U.S. at 218 (quoting *Bd. of Trs. of State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 480 (1989))—one that "avoid[s] unnecessary abridgement of associational freedoms," *Buckley*, 424 U.S. at 25, and does not "broadly stifle fundamental personal liberties when the end can be more narrowly achieved," *Shelton*, 364 U.S. at 488. Here, where the "evidence plainly show[ed] at least the *possibility*" that the disclosure requirement might burden associational activity, Pet. App. at 33a (No. 19-251)—and indeed where there was "ample evidence" that "donors face[d] public threats, harassment, intimidation, and retaliation," *id.* at 49a—the Ninth Circuit should have

required the Attorney General to prove that his compelled disclosure requirement is not "disproportionate to the [State's] interest," *McCutcheon*, 572 U.S. at 220, or a "means that unnecessarily restrict[s] constitutionally protected liberty," *Pontikes*, 414 U.S. at 59.

To the extent the Ninth Circuit relied on *Reed*, 561 U.S. at 196, in not requiring the Attorney General to show narrow tailoring, its reliance was misplaced. In *Reed*, this Court held that "public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process." *Id.* at 199. The Court did not explicitly address whether the State's interest could "be more narrowly achieved." *Shelton*, 364 U.S. at 488. *Reed*, however, followed *Buckley* in upholding an election-related disclosure requirement as appropriately tailored to promote electoral transparency. *Buckley* established that "when the free functioning of our national institutions is involved" and the government seeks to "curb[] the evils of campaign ignorance and corruption" by "deter[ring] actual corruption and avoid[ing] the appearance of corruption," then disclosure of campaign contributions is in fact "the least restrictive means" of furthering the government's interests. 424 U.S. at 66–68 (quotation marks and citation omitted). Outside of this unique context of curbing election corruption, however, the government must prove that its regulation is "narrowly drawn to prevent the supposed evil." *Gremillion*, 366 U.S. at 297 (citation omitted). Because California's disclosure requirement does not curb campaign corruption, the Ninth Circuit should have required the Attorney General to satisfy narrow tailoring.

Next, the Ninth Circuit compounded its error and disregarded *Buckley* by imposing an "unduly strict requirement[] of proof" for plaintiffs seeking an as-applied exemption from disclosure, instead of extending "sufficient flexibility . . . to assure a fair consideration of their claim." 424 U.S. at 74. In rejecting the district court's finding that the Attorney General's "current confidentiality policy cannot effectively avoid inadvertent disclosure," Pet. App. at 53a (No. 19-251); *see id.* at 38a–39a, the Ninth Circuit placed a nearly impossible burden on plaintiffs. Petitioners supplied evidence of what the Second Circuit separately characterized as California's "systematic incompetence" at keeping Schedule Bs confidential. *Schneiderman*, 882 F.3d at 384. For example, just a week before trial, the Thomas More Law Center's expert was able to access forty confidential Schedule Bs on the Registry of Charitable Trusts website. Supp. Excerpts of Record, at SER134, *Ams. for Prosperity Found.* v. *Becerra*, 903 F.3d 1000 (9th Cir. 2018) (No. 16-56902), ECF No. 27. Yet the Ninth Circuit would have an organization provide even more compelling evidence to show a "reasonable probability" of public disclosure and its consequences. *Buckley*, 424 U.S. at 74.

The Ninth Circuit's decision distorts the precedents that have protected the freedom of association for decades. And this error not only operates to the detriment of petitioners; it threatens to undermine constitutional protections for any organization resisting disclosure in the future. If the California Attorney General's position prevails, the government may justify an intrusion on First Amendment rights simply by asserting a general interest in efficient law enforcement and a means that will further that end in some fashion, without regard to whether the "means . . . broadly stifle[s] fundamental personal liberties when

the end can be more narrowly achieved." *Shelton*, 364 U.S. at 488; *see McCutcheon*, 572 U.S. at 218; *Buckley*, 424 U.S. at 25; *Pontikes*, 414 U.S. at 58–59; *Gremillion*, 366 U.S. at 296–97. Further, a plaintiff could not obtain an exemption except by proving a likelihood of future disclosure with evidence that somehow goes beyond establishing the government's unmitigated record of empty assurances and failed efforts to preserve confidentiality and the substantial risk of harm from any future breaches.

II. The California Attorney General's Disclosure Requirement Fails Each Prong of Exacting Scrutiny.

The California Attorney General's disclosure requirement fails exacting scrutiny. The Attorney General has no sufficiently important government interest to override the chill on associational rights that disclosure may impose, particularly given the Registry of Charitable Trusts' abysmal record of keeping Schedule Bs confidential. And even if he had a sufficiently important interest, mandatory disclosure from each of the 115,000 charities that are registered with his office is not a requirement closely drawn to avoid unnecessarily burdening the constitutional rights of donors across the nation.

A. The Attorney General's Disclosure Requirement Does Not Further A Sufficiently Important State Interest.

The Ninth Circuit held that the Attorney General's "disclosure requirement clearly furthers the state's important government interests in preventing fraud and self-dealing in charities by making it easier to police for such fraud." Pet. App. at 22a (No. 19-251) (quotation marks, alterations, and citation omitted).

"[Q]uick access to Schedule B filings increases the Attorney General's investigative efficiency and allows him to flag suspicious activity." *Id.* at 19a (quotation marks, alteration, and citation omitted). Respondent reprises that interest before this Court. *See* Brief in Opposition at 1.

States undeniably have an important interest in policing fraud and ensuring that charities comply with applicable state laws. But there are limits on how a State may further that interest. "'Broad prophylactic rules in the area of free expression," in this context as in others, "are suspect." *Primus*, 436 U.S. at 432 (quoting *Button*, 371 U.S. at 438) (alteration omitted). And when it comes to restrictions on charities' abilities to collect donations, this Court consistently has found unconstitutional "prophylactic statutes designed to combat fraud." *Illinois ex rel. Madigan* v. *Tele. Assocs., Inc.*, 538 U.S. 600, 612 (2003); *see also, e.g.*, *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Vill. of Schaumburg*, 444 U.S. 620.

This Court's refusal to condone intrusions on expressive freedom based on a State's generalized interest in efficient law enforcement is well founded. Any state agency tasked with executing or administering state laws could require the compilation of any number of otherwise protected details under the guise of efficiency. *Cf. Patterson*, 357 U.S. at 464 (finding the State's asserted interest in "determin[ing] whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute" insufficient to justify the burden imposed by compelled disclosure of membership lists). The

State's interest in disclosure must therefore be important enough to justify the burden imposed by a broad, prophylactic disclosure requirement.

Here, the Attorney General's interest in obtaining Schedule Bs is not sufficiently weighty to justify burdening the associational rights of every charity registered with his State. The record establishes that the Attorney General rarely employs Schedule Bs either in daily operations or during investigations. For example, the Americans for Prosperity Foundation registered with the Attorney General's office for ten years before learning that a registration was incomplete for lack of a Schedule B. Pet. App. at 44a (No. 19-251). "The only logical explanation for why AFP's 'lack of compliance' went unnoticed for over a decade," the district court explained, "is that the Attorney General does not use the Schedule B in its day-to-day business." *Id.* at 45a.

The evidence also shows that Schedule Bs do not play a significant role in the Attorney General's law enforcement efforts. To the contrary, the record "lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory, or enforcement efforts." Pet. App. at 47a (No. 19-251). Indeed, over a ten year period, only five out of 540 investigations "involved the use of a Schedule B." *Id.* at 45a. And as to those five investigations, "the relevant information . . . could have been obtained from other sources." *Id.*

In short, given the Attorney General's lack of reliance on Schedule Bs, he has not "demonstrated an interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect" on associational

rights. *Patterson*, 357 U.S. at 463. His compelled disclosure requirement does not "ha[ve] a substantial bearing" on his asserted interest in efficient and effective law enforcement, *id.* at 464, and he has therefore failed to show an interest "sufficient to justify . . . the burden that [disclosure] place[s] on individual rights," *Buckley*, 424 U.S. at 68; *accord Patterson*, 357 U.S. at 465.

B. The Attorney General's Disclosure Requirement Is Not Tailored To Avoid Unnecessarily Burdening Associational Freedoms.

Additionally, the Attorney General's disclosure requirement is not closely drawn to avoid unnecessarily trampling First Amendment rights.

First, the disclosure requirement is not closely drawn because the Attorney General has other tools at his disposal to combat unlawful charitable activity, including audits, subpoenas, or requesting Schedule Bs on an as-needed basis. The records in these cases indicate that his office has long employed other tools in audits and investigations. *See* Pet. App. at 45a (No. 19-251). In fact, one of "the Attorney General's investigators" "admitted that he successfully audited charities for years before the Schedule B even existed" and "found wrongdoing without the use of Schedule Bs." *Id.* at 47a. That admission is not surprising, because forty-seven other States and the District of Columbia successfully monitor charities without indiscriminately mandating disclosure of Schedule Bs. Those jurisdictions instead employ "traditional methods like

compliance audits and subpoenaing donor information after developing a particularized suspicion of wrongdoing."[5]

The Ninth Circuit asserted that "nothing in the substantial relation test requires [the Attorney General] to forgo the most efficient and effective" means of furthering his ends. Pet. App. at 23a (No. 19-251). But that is simply not true where, as here, the chosen means are vastly broader in their adverse impact—but not meaningfully more effective—than alternatives that would eliminate nearly all of the challenged burden on associational interests. Indeed, this Court has "reaffirm[ed] simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency," *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988), where its method involves "unnecessary abridgement of associational freedoms," *Buckley*, 424 U.S. at 25.

The Attorney General is therefore mistaken in asserting that he does not need to employ the same tools as other States. Brief in Opposition at 23–24. "In the First Amendment context, fit matters," *McCutcheon*, 572 U.S. at 218, and methods that comparably advance the State's interests while dramatically reducing the burdens on associational rights are required, *id.* at 221–23. *McCutcheon* is illustrative. There, this Court invalidated an aggregate limit on the number of candidates and committees a donor could support, because "the indiscriminate ban" was "disproportion-

---

[5] Brief for the States of Arizona, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia, and Governor Phil Bryant of the State of Mississippi, as *Amici Curiae* in Support of Petitioner at 8 (No. 19-251); *see id.* at 5–8.

ate to the Government's interest." *Id.* at 220. Although the ban was certainly an effective and efficient means of furthering the government's anticircumvention interest, this Court required Congress to pursue its interest through an "appropriately tailored" means that would "avoid[] 'unnecessary abridgment' of First Amendment rights." *Id.* at 220–21 (quoting *Buckley*, 424 U.S. at 25). And it did not matter that an alternative method might not be as effective: Even if an alternative means was not "a perfect substitute" for the challenged ban, this Court found it sufficient that it would "mitigate" the problem that Congress was targeting. *Id.* at 221.

Second, the Attorney General's disclosure requirement is substantially broader than necessary to accomplish the asserted interest in law enforcement. The Attorney General does not require charities to disclose only the names and addresses of donors from California, nor does his disclosure requirement apply only to charities organized under California law. Rather, his disclosure requirement applies to any donor in any State, and it covers charities irrespective of whether they are organized under another State's laws. The Attorney General has not explained why his interest in enforcing California's laws extends to out-of-state contributors to out-of-state charities.

The Attorney General counters that "[t]he information collected extends no further than what organizations already must report to the IRS." Brief in Opposition at 23. But the IRS is responsible for applying federal tax laws to every tax-exempt charity, and every donor, in the country. *See infra* III.A. And even so, the IRS has begun to curtail unnecessary disclosures. It recently limited the number of tax-exempt organizations that are required to file Schedule Bs

and noted that it will collect Schedule Bs from many organizations only as needed.[6] By contrast, the California Attorney General demands Schedule Bs from every charity soliciting donations in California, without regard to whether he needs the information to address a particular law enforcement concern.

Finally, the Attorney General's disclosure requirement is not closely drawn to avoid abridging more First Amendment rights than necessary, because his assurance that Schedule Bs will not be publicly disclosed is both dubious and toothless. While the IRS's Schedule B disclosure requirement makes unauthorized disclosures a felony, *see infra* III.A., California's confidentiality regulation has no bite. It imposes no penalty on unauthorized disclosure and provides merely that Schedule Bs "shall be maintained as confidential" and disclosed only in court or administrative enforcement proceedings or in response to a search warrant. Cal. Code Regs. tit. 11, § 310(b) (2016). As the district court found, "given the history of the Registry completely violating the longstanding confidentiality policy, the Attorney General's assurances that . . . the same exact policy will prevent future inadvertent disclosures rings hollow." *Thomas More Law Ctr.*, 2016 WL 6781090, at *5 (quotation marks omitted).

At bottom, although the First Amendment requires a scalpel where possible, the California Attorney General has taken up a "blunderbuss." *Reed*, 561 U.S. at 234 (Thomas, J., dissenting) (citation omitted). As Judge Ikuta noted in her dissent from denial of en

---

[6] *See* Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959, 31963 (May 28, 2020).

banc rehearing, the Attorney General's sweeping collection of sensitive documents that "demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years" impermissibly chills protected activity nationwide. Pet. App. at 93a (No. 19-251) (citation omitted). And his record of empty promises of confidentiality—matched with a lack of penalties for those who might expose information—means that he pursues his purpose with "means that broadly stifle fundamental personal liberties." *Shelton*, 364 U.S. at 488. This Court should correct this unconstitutional overreach, which may "subject[] citizens of this Nation to death threats, ruined careers, damaged or defaced property, or preemptive and threatening warning letters as the price for" exercising their constitutional right of association. *Citizens United*, 558 U.S. at 485 (Thomas, J., concurring in part and dissenting in part).

III. The Fatal Constitutional Flaws In The California Attorney General's Compelled Disclosure Regime Render It Meaningfully Distinct From The IRS's Schedule B Requirement.

For all the foregoing reasons, the California Attorney General's disclosure requirement cannot withstand exacting scrutiny. That conclusion does not necessarily entail the invalidation of the IRS's requirement that charities must annually submit their Schedule Bs, however, because the IRS's requirement is different in constitutionally important ways. In particular, unlike the Attorney General's regulation, the Schedule B requirement is much more closely linked to the IRS's distinct, important interest in administering federal tax laws. Moreover, because Congress has imposed stringent penalties for unauthorized disclosure of Schedule Bs, the federal disclosure

requirement is less likely than California's requirement to unnecessarily abridge associational freedoms, at least in the absence of a record establishing that the IRS's record of preserving confidentiality is as spotty as California's. These factors meaningfully distinguish the IRS's disclosure demands from the California regime at issue here.

A. The IRS's Schedule B Requirement May Satisfy The First Amendment.

The IRS is required by statute to collect "the names and addresses of all substantial contributors" from most organizations enjoying tax-exempt status under section 501(c)(3) of the Internal Revenue Code. *See* 26 U.S.C. § 6033(b)(5). Unlike the California Attorney General's disclosure requirement, the IRS disclosure requirement arguably furthers important governmental interests, and the burden it imposes on First Amendment freedoms is much more closely linked to furthering those interests than is true of California's regime.[7]

---

[7] At the certiorari stage, the United States argued that because the IRS's Schedule B requirement was "imposed as a condition of administering a voluntary governmental benefit program or similar administrative scheme," the government need only show that disclosure "is germane to the government's administration of that program." Brief for the United States as *Amicus Curiae* at 12–13 (Nos. 19-251 & 19-255). It based this contention on *Regan* v. *Taxation With Representation of Washington*, 461 U.S. 540 (1983), which held that the government is not obligated to extend the tax-exemption "subsidy" to activities such as lobbying that the government does not wish to subsidize. *Id*. at 546, 548–49. Whatever the merit of the *Regan* rationale, however, it has no application to the IRS's Schedule B disclosure requirement, because there is no distinct activity that the government is choosing not to subsidize but that the charity may

First, the IRS's interest in collecting Schedule Bs is unique and compelling. "No power is more basic to the ultimate purpose and function of government than is the power to tax," and its "proper and efficient exercise . . . may sometimes entail the possibility of encroachment upon individual freedom." *Bates*, 361 U.S. at 524–25. As part of its role in implementing the federal tax system, the IRS must enforce federal laws that turn directly on the identity of substantial contributors to charitable organizations. For instance, section 4958 of Title 26 forbids "excess benefit transaction[s]" between a tax-exempt organization and a substantial contributor. 26 U.S.C. § 4958(c). This provision bars "any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person"—defined in relevant part as a substantial contributor or his family—and levies taxes on both the organization and the contributor for prohibited transactions. *Id.* § 4958(a), (c)(1), (e)(1), (f)(1)(A)–(B). Accurately administering this aspect of the federal tax regime is plainly an important government interest.

---

otherwise freely pursue without a subsidy. Instead, the government is simply compelling disclosure of contributor information and thereby burdening the associational rights of all charities and all major donors, regardless of the activities the charity chooses to perform. Accordingly, the IRS's Schedule B requirement, which compels disclosure of Schedule B information as a condition of granting tax-exempt status, must satisfy exacting scrutiny. It is well established that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Rumsfeld* v. *Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 59 (2006) (alteration omitted) (quoting *United States* v. *Am. Library Ass'n*, 539 U.S. 194, 210 (2003)).

Moreover, the IRS's disclosure requirement directly serves the government's interest in effective tax administration, and unlike California's regime, the burdens it imposes on associational freedoms do not sweep far more broadly than any plausible justification for the impositions. There is an obvious correlation between proper administration of the prohibited transactions statute and the information recorded in Schedule B. Accordingly, there may be a "reasonable" fit, *McCutcheon*, 572 U.S. at 218 (citation omitted), between requiring section 501(c)(3) organizations to submit Schedule Bs with their annual returns and the IRS's interest in administering the prohibited transactions statute.

Finally, stringent civil and criminal penalties for unauthorized disclosure of, or even unauthorized *access* to, Schedule B information further lessen the potential burden on First Amendment activity. By statute, the IRS is expressly forbidden "to disclose the name or address of any contributor to any organization," 26 U.S.C. § 6104(b), and the unauthorized disclosure of "any return or return information" by any IRS officer or employee is a "felony punishable by" a fine of up to $250,000 and up to five years' imprisonment, *id.* § 7213; 18 U.S.C. § 3571(b). The unauthorized inspection of returns or return information by federal personnel is punishable by a fine of up to $100,000 or imprisonment for one year. 26 U.S.C. § 7213A; 18 U.S.C. §§ 3559(a), 3571(b). And Congress has also provided a civil action for statutory or compensatory damages for any taxpayer whose return or return information is knowingly or negligently inspected by an employee of the United States or any other person without authorization. 26 U.S.C. § 7431.

B. The California Attorney General's Disclosure Requirement Is Dissimilar On Every Point.

The Attorney General of California's disclosure requirement cannot compare. In the first place, unlike the IRS regime, the California requirement cannot be defended on the ground that it furthers any interest in administering laws governing tax-exempt organizations. The reason is simple: The California Attorney General is not responsible for administering California's tax laws. Instead, as relevant here, the California Franchise Tax Board determines initial and continuing eligibility for tax-exempt status. Cal. Rev. & Tax. Code § 23701. Thus, by virtue of the structure of the California government, the Attorney General's disclosure requirement cannot be justified by the State's interest in administering California's tax laws.

Nor would California's requirement be narrowly tailored even if it were imposed for the purpose of administering state tax laws. Unlike the IRS, California requires both tax-exempt and non-exempt charities wishing to solicit donations in California to register with the Attorney General.[8] And of course, California has no basis for or interest in the tax consequences of contributions from non-California residents to non-California charities, yet it demands disclosure of information about such matters from all non-California charities that solicit donations within California. The Attorney General's broad application of the disclosure

[8] Cal. Dep't of Justice, Charitable Trusts Section, *Attorney General's Guide for Charities* 21 (April 2020), available at https://bit.ly/3pn6sAV.

requirement thus burdens far more associational activity than would be necessary to administer laws governing tax-exempt organizations.

Finally, California imposes no penalty on unauthorized disclosure of Schedule B information, nor has it created a private right of action against state employees who willfully or negligently disclose such information. *See* Cal. Code Regs. tit. 11, § 310 (2016). And although the IRS's record of maintaining sensitive information is not perfect, there is no indication that it has disclosed repeatedly to the public thousands of Schedule Bs, unlike the California Registry of Charitable Trusts. Thus, in contrast to the IRS regime, the California Attorney General's disclosure requirement is far more likely to result in public disclosure and its attendant harms.

In sum, the IRS's Schedule B disclosure requirement may further the IRS's important government interest in administering tax laws in a manner that "reflect[s] the seriousness of the actual burden on First Amendment rights." *Davis*, 554 U.S. at 744. Even if it is "not necessarily the single best disposition," it is arguably a requirement "whose scope is in proportion to the interest served." *McCutcheon*, 572 U.S. at 218 (quotation marks and citation omitted). Those factors distinguish the IRS's disclosure requirement from that of the California Attorney General.

CONCLUSION

This Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted.

THOMAS G. HUNGAR
Counsel of Record
DOUGLAS R. COX
JASON J. MENDRO
KATHERINE L. MONTOYA
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
(202) 955-8500
thungar@gibsondunn.com

Counsel for Amicus Curiae

March 1, 2021