Nos. 19-251 and 19-255

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
v.
XAVIER BECERRA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
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Respondent.

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

BRIEF OF NATIONAL TAXPAYERS UNION FOUNDATION AND THE PUBLIC POLICY LEGAL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The National Taxpayers Union Foundation and

[1] Pursuant to Supreme Court Rule 37, all parties were timely notified and consented to the filing of this brief. Counsel for *Amici* represents that none of the parties or their counsel, nor any other person or entity other than *Amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

the Public Policy Legal Institute submit this brief as *amici curiae* in support of Petitioners in the above-captioned matter.

Founded in 1973, the National Taxpayers Union Foundation (NTUF) is a non-partisan research and educational organization dedicated to showing Americans how taxes, government spending, and regulations affect them. NTUF advances principles of limited government, simple taxation, and transparency on both the state and federal levels.

The Public Policy Legal Institute (PPLI) is a national non-profit educational organization dedicated to protecting the right of Americans to advocate for and against public policies. PPLI seeks to protect First Amendment rights of free speech and association of educational charities and other advocacy organizations.

Because *Amici* have written extensively on the issues involved in this case, because this Court's decision may be looked to as authority, and because any decision will significantly impact taxpayers, tax administration, free speech, and privacy, *Amici* have institutional interests in this Court's ruling.

SUMMARY OF ARGUMENT

These cases involve the First Amendment, but this is not just a First Amendment case. These cases are also, at heart, about taxpayer confidence, and its effect on government and society.

Respondent Attorney General of California, according to a letter dated December 9, 2019 and also signed by 19 other attorneys general, seeks to use charities' donor information against "corporations, wealthy individuals, and special interests [who] seek to influence politics without leaving fingerprints." The use of donor lists and other taxpayer information for non-tax purposes is the reason Congress enacted extensive tax privacy provisions after President Nixon's misuse of the IRS. Ignoring the lessons taught by the federal experience could cause the revival of "enemies lists," undercut the taxpayer confidence that underlies the world's highest voluntary tax compliance rate, and reverse long-standing donor privacy rights.

Schedule B to IRS Form 990, the obscure tax form sought here, was never intended to be used to uncover wrongdoing; it was created in 2000 to protect donor information against leaks. It immediately failed, as it leaked again and "opposition researchers" discovered it as a rich source of donor information.

Nor is Schedule B useful for the purposes sought by the Attorney General, compared to the rich data available from Form 990. For twenty years, the IRS has tested Schedule B's general questions against the more detailed and targeted information obtained on the publicly-available Form 990. The result is that the IRS no longer uses Schedule B. Nor do 47 states.

Schedule B simply can't be used, where Form 990 offers precisely what the IRS and the Attorney General seek. The IRS has been trying to get rid of Schedule B since 2016.

The same is true of any similar use of donor lists in the absence of the type of particularized evidence of wrongdoing the Form 990 was designed to uncover. To find wrongdoing, there are efficient and effective ways of identifying problem areas; Schedule B and other donor lists generally are neither efficient nor effective, especially compared to their propensity to leak. Advance mass collection of donor lists undermines taxpayer confidence that is essential to support government, especially if it is merely politicians tilting ineffectually at campaign finance windmills.

The contention in the *amicus* brief for the United States that "the disclosure of a group's donors, when imposed as a condition of administering a voluntary governmental benefit program or similar administrative scheme, is not a compelled disclosure subject to exacting scrutiny or the narrow-tailoring requirement" is an overstatement and a misreading of this Court's decisions. This Court has held that the condition may not be on the recipient as a whole, but only on a statutorily-defined program. The condition may not prohibit the recipient from conducting its activities using "private" money, and it may not be so burdensome that the organization cannot function. Language that suggests otherwise, such as in *Regan v. Taxation With Representation*, 461 U.S. 540 (1983), should be clarified. Among other things, this characterization ignores the special role of donor lists, the varied interests underpinning the tax system, and taxpayer confidence.

Finally, the lower court misunderstood how federal tax privacy protections operate and their effect. While the court below believed that the "risk of inadvertent disclosure of any Schedule B information in the future is small," the Attorney General's failure to provide basic protections such as tracking and logging those who accessed the donor information means that the Attorney General wouldn't even know when the protected information leaked.

This Court long ago established that the First Amendment bars the Attorney General here. The Court should reverse the decision below.

ARGUMENT

I. THE ATTORNEY GENERAL'S PLAN TO USE CHARITIES' DONOR LISTS TO TILT AT "DARK MONEY" WINDMILLS RISKS SLAYING THE VOLUNTARY TAX COMPLIANCE GOOSE THAT LAYS THE GOLDEN EGGS.

Is charitable donor information so explosive if leaked or misused that it should only be collected individually and after identifying some particularized reasonable suspicion of serious wrongdoing? These cases involve the First Amendment, but this is not just a First Amendment case. These cases involve tax-exempt organizations, which dwell at the intense, clamorous intersection of the First and Sixteenth Amendments, where sweeping grants of government taxing power clash with broad limits on government power. Thus viewed, these cases are also, at heart, about taxpayer confidence and its effect on government and society.

A. Taxpayer Confidence in Privacy of Their Information Protects Taxpayers, Organizations, and Governments.

In 1992, then-Chief Judge Stephen Breyer described the interests involved in these cases:

> "Congress has decided that, with respect to tax returns, confidentiality, not sunlight, is the proper aim. Tax returns contain highly personal information that many taxpayers might wish not to have broadcast. Moreover, without clear taxpayer understanding that the government takes the strongest precautions to keep tax information confidential, taxpayers' confidence in the federal tax system might erode, with harmful consequences for a tax system that depends heavily on voluntary compliance."

Aronson v. IRS, 973 F.2d 962, 966 (1st Cir. 1992).

The interests of the federal tax system are usually aligned with the "citizen's right to privacy." That is the necessary result of the reliance on voluntary compliance to close the persistent "tax gap" between the tax properly due and the amount the IRS receives. *See, e.g.*, J.T. Manhire, *What Does Voluntary Compliance Mean? A Government Perspective*, 164 U. PENN. L. REV. ONLINE 11, 15 n. 24 (2015) (estimating the United States's voluntary compliance rate as the highest in the world).

But what happens to taxpayer confidence when a State uses federal tax information in a way that federal law would not permit? Most taxpayers will likely not distinguish between a State official revealing information on a federal tax form and a

federal official doing so, since the effect on privacy in an Internet era would likely be the same. *See, e.g.*, Former IRS Commissioner Lawrence Gibbs, "INSIGHT: Let's Not Forget There's a Reason for Keeping Tax Returns Private," *Daily Tax Report*, Aug. 14, 2019, https://tinyurl.com/h51zgisf ("Taxpayers are likely to decide that if the IRS cannot protect the privacy and confidentiality of even the president's returns and tax information, no one else's returns and tax information can be protected. In turn, taxpayers predictably are likely to be less willing than they previously have been to provide information requested by the IRS in tax returns."). *See also United States v. Janis*, 428 U.S. 433, 444, 459 (1976) (discussing "silver-platter doctrine" of sharing information between dual sovereigns); *Gamble v. United States*, 139 S. Ct. 1960, 1979 (2019) (same).

Many of the biggest controversies affecting taxpayer confidence involve misuse of the tax system by politicians and elected officials. One of the charges that helped drive President Richard Nixon from office in 1974 was using the Internal Revenue Service ("IRS") against his "enemies list." *See* Impeachment Of Richard M. Nixon, Articles of Impeachment, II(2), H. Rept. 93-1305, at 3 (1974) ("He has, acting personally and through his subordinates and agents, endeavored to obtain from the Internal Revenue Service, in Violation of the constitutional rights of citizens; confidential information contained in income tax returns for purposes not authorized by law, and to cause, in violation of the constitutional rights of citizens, income tax audits or other income tax investigations to be initiated or conducted in a discriminatory manner."). Those abuses sparked,

among other things, tax confidentiality provisions in 26 U.S.C. ("Internal Revenue Code" or "IRC") § 6103 and the limits in IRC § 6104 on releasing donor information.

Similar scandals erupt periodically involving the rules for tax-exempt organizations. For example, the worst recent governmental regulatory scandal involving tax-exempt organizations may have started in 2010, when the IRS's Tax Exempt Division switched from using a defined review system based on Due Process protections for exemption applications (known as "Touch and Go" or "TAG") to an ad hoc system based on perceptions of organizations' intentions and character (known as "Be On the Look Out" or "BOLO"). *See* Public Policy Legal Institute, "New TIGTA Report on 'Inappropriate' Criteria for Evaluating Exemption Applications," *Vox PPLI*, Oct. 6, 2017, https://tinyurl.com/5lpyok72 ("TAG reviews are what we expected the IRS to do if there had really been a problem; BOLOs are not. BOLOs are, for want of a better description, rogue TAGs"); Glenn Kessler, "Explainer: Sorting through charges and countercharges in the IRS probe," *The Washington Post*, Jul. 3, 2013, https://tinyurl.com/1qzhif0w ("While that report focuses on scrutiny of 'tea party' and related groups — which had been placed on 'be on the lookout' (BOLO) lists — Democrats released documents showing that the term 'progressive' had been part of a 'TAG [touch-and-go] Historical' list.").

That scandal still resonates. *See, e.g.*, Kim Barker and Justin Elliott, "IRS Office That Targeted Tea Party Also Disclosed Confidential Docs From Conservative Groups," *ProPublica*, May 13, 2013, https://tinyurl.com/3vvh57sc; *In re United States*, 817

F.3d 953, 957–59 (6th Cir. 2016) (describing inappropriate IRS collection of donor information which was then withheld from the court and the parties under tax privacy statutes); Letter from Sens. Sheldon Whitehouse and Elizabeth Warren to Secretary of the Treasury Janet Yellen, Feb. 3, 2021, at 3-4, https://tinyurl.com/3aomcau3.

If the taxpayer confidence problem was big enough to affect a President in the 1970's, it's much, much bigger now:

> "California's computerized registry of charitable corporations was shown to be an open door for hackers. In preparation for trial, the plaintiff asked its expert to test the security of the registry. He was readily able to access every confidential document in the registry—more than 350,000 confidential documents—merely by changing a single digit at the end of the website's URL. *See* [*Ams. for Prosperity Found. v. Becerra,* 903 F.3d at 1018]. When the plaintiff alerted California to this vulnerability, its experts tried to fix this hole in its system. Yet when the expert used the exact same method the week before trial to test the registry, he was able to find 40 more Schedule Bs that should have been confidential."

Ams. for Prosperity Found. v. Becerra, 919 F.3d 1177, 1185 (9th Cir. 2019) (Ikuta, J., dissenting from denial of rehearing *en banc*) (emphasis added). *See also* Ben Popkin, "How Hackers Stole 200,000+ Citi Accounts Just By Changing Numbers In The URL," *Consumerist*, Jun. 14, 2011, https://tinyurl.com/1mwt8u2z ("[T]his is a dead simple

and common hack and Citi should have seen it and prevented against it. Seriously, this is kindergarten level stuff. Really, really stupid.").

Here, the Attorney General of California seeks to use donor information against "corporations, wealthy individuals, and special interests [who] seek to influence politics without leaving fingerprints." Attorneys General Gurbir S. Grewal & Letitia James, Letter to Secretary of the Treasury Steven T Mnuchin and IRS Commissioner Charles P. Rettig, RE: Notice of Proposed Rulemaking (RIN: 1545-BN28), Dec. 9, 2019, at 2 n. 2, https://tinyurl.com/attorneys-general-letter ("Attorneys General Letter"). Permitting this use of donor lists would be a revival of the enemies list against tax-exempt organizations, and a reversal of donor privacy rights held firmly for four decades.

B. The Tool for the Attorney General's Asserted Purposes is Form 990, Not Schedule B.

Rooting out fraud and abuse is not a justification for abandoning constitutional rights or endangering public confidence in the tax system. A better solution is to allow only the most precise and effective tools to obtain the information needed in these uncommon situations.

Fortunately, the IRS has created, tested and evolved such a tool. It is not Schedule B, the federal donor list at the heart of these cases, but IRS Form 990, [2] the main tax information return to which

[2] For an example of a completed Form 990 including an attached Schedule B, *see* the 2016 IRS Form 990 Annual Information Return from the Christopher Street West

Schedule B is an attachment, which most tax-exempt organizations must file each year.[3]

Form 990 was designed to capture specific information about management, finances, and operations of tax-exempt organizations. It is a dense and difficult form to complete, and a significant part of many tax-exempt organization lawyers' and accountants' practices is assisting organizations in completing Form 990 each year.

Part of Form 990 is tailored specifically to identify wrongdoing, through initial checklists and detailed additional schedules. Part IV of Form 990 alone is 38 questions triggering a requirement to file more information, each designed to spot particular situations which the IRS has determined may pose issues. For example, Part IV, Line 27 asks: "Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons? If 'Yes,'

Foundation (also known as LA Pride), which is publicly available on the charity's website. https://lapride.org/wp-content/uploads/2018/03/2016-CSW-Tax-Return.pdf. The Schedule B form is available at pages 27–38.

[3] IRC § 6033 requires most tax-exempt organizations to file annual information returns with the IRS. This section applies generally to filing information with the IRS, but also affects information-sharing agreements with state governments. Otherwise, the IRS could, by agreeing with state governments to ignore statutory and regulatory requirements, evade the privacy interests protected by IRC §§ 6103, 6104(b) and other sections – raising complex and troubling constitutional questions about, among other things, a "silver-platter" handoff between dual sovereigns. *See, e.g.*, *Janis*, 428 U.S. at 444, 459.

complete Schedule L, Part III." Internal Revenue Service, "Form 990, Return of Organization Exempt From Income Tax," Part IV, Line 27, at 4, https://www.irs.gov/pub/irs-pdf/f990.pdf. If the box is checked "yes," Part III of the required Schedule L then asks for name of the interested person, the relationship between the person and the organization, the amount of assistance, the type of assistance, and the purpose of the assistance. *See* Internal Revenue Service, "Schedule L (Form 990), Transactions With Interested Persons," https://www.irs.gov/pub/irs-pdf/f990sl.pdf.

Much of the information sought by the Attorney General from Schedule B is not actually available from Schedule B. For example, the Attorney General seeks information to enforce federal prohibitions against "private inurement" and "private benefit."[4] Attorneys General Letter, at 1. Since January 2001, IRC § 4958 has prohibited such "excess benefit transactions" with "substantial influence persons," who include all persons who would be listed on Schedule B. *See, e.g.*, Lawrence M. Brauer, Toussaint T. Tyson, Leonard J. Henzke, and Debra J. Kawecki, Internal Revenue Service, "H. An Introduction To I.R.C. 4958 (Intermediate Sanctions)," *Exempt Organizations Continuing Professional Education*

[4] "Private benefit" is use of tax-exempt assets for the benefit of private individuals, and "private inurement" is private benefit for organizational insiders. *See, e.g.*, Andrew Megosh, Lary Scollick, Mary Jo Salins and Cheryl Chasin, Internal Revenue Service, "H. Private Benefit Under IRC 501(c)(3)," *Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2001*, at 135, https://www.irs.gov/pub/irs-tege/eotopich01.pdf.

Technical Instruction Program for FY2002, at 260, 262, https://www.irs.gov/pub/irs-tege/eotopich01.pdf, (substantial contributor to a charity is a "substantial influence person" subject to excess benefits transaction prohibition and penalties). Penalty taxes of up to 200% of the "excess" can be imposed on the organization and, jointly and severally, on organizational managers. Schedule B, however, likely has no information that would, on its face or in conjunction with other documents, demonstrate either of those violations. More importantly, violations of IRC § 4958 must be reported on Part IV, Line 25 and Schedule L, Part I, with supplemental details (such as whether an excess benefit transaction was "corrected") that would not appear on Schedule B. *See* Internal Revenue Service, "Instructions for Schedule L," at 2, https://www.irs.gov/pub/irs-pdf/i990sl.pdf.

Loans or receipts from substantial contributors or other insiders must similarly be reported on Part IV, Line 26 and Schedule L, Part II, with details not reported on Schedule B. *See id.* at 2–3. Grants or similar payments to substantial contributors or insiders must be reported on Part IV, Line 27 and Schedule L, Part III, but not reported on Schedule B. *See id.* at 3–4. Business relationships or transactions with substantial contributors or insiders must be reported on Part IV, Line 28 and Schedule L, Part IV, but not necessarily on Schedule B. *See id.* at 4–5.

The Attorney General also contends that Schedule B is needed to identify overvalued non-cash contributions: "Knowing the significant donor's identity allows her to determine what the "in kind" donation actually was, as well as its real value." *Ams. for Prosperity Found.*, 903 F.3d at 1010. But Schedule

B has only three general columns, where Form 990, Part IV, Lines 29 and 30, and Schedule M, "Non-cash Contributions," require that information and much more, including breakdowns of categories such as art work (and what type of art and whether the gift is fractional) and instructions and supplemental questions about various common sources of overvaluation. *See* Internal Revenue Service, "Schedule M (Form 990), Non-cash Contributions," https://www.irs.gov/pub/irs-pdf/f990sm.pdf.

Almost all of Form 990 is a public document, available upon demand under two exceptions to the general rule of privacy in IRC § 6103. *See* IRC §§ 6104(b) ("The information required to be furnished … shall be made available to the public"), 6104(d)(1)(A)(i) ("A copy of the annual return … shall be made available by such organization for inspection … by any individual at the principal office of such organization" (emphasis added)).

There are two exceptions corresponding to the two exceptions to the general tax privacy rule, each specifically barring the release of donor information. *See* IRC § 6104(b) ("Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor"); IRC § 6104(d)(3)(A) ("[P]aragraph (1) shall not require the disclosure of the name or address of any contributor to the organization."). Thus, in Form 990, Congress expressly required the publication of the information needed to uncover the wrongdoing that the Attorney General claims to seek, while barring the release of donor information.

C. Schedule B Was Designed to Protect Donor Information, Not Uncover Wrongdoing.

In contrast, Schedule B was never designed to be used to police fraud or any other wrongdoing.[5] Its sole purpose was to assist IRS employees in identifying confidential donor information so donors could be protected from disclosure.

Schedule B is one of the simplest tax forms: a list of names, addresses and other details which could identify those who have given large amounts to charities. Schedule B's content makes it one of the most highly-protected federal tax forms because donor information, "if in the hands of the IRS at all, should be categorically sheltered from disclosure." *Landmark Legal Found. v. IRS,* 267 F.3d 1132, 1135 (D.C. Cir. 2001) ("Under the latter reading, Congress would be understood to have thought that the specifically identified information, if in the hands of the IRS at all, should be categorically sheltered from disclosure."); *Church of Scientology of Cal. v. IRS* ("*Scientology*"), 484 U.S. 9, 15 (1987) ("Subsections 6103 (f)(1), (2), and (4), for example, allow the release of returns and return information to congressional committees, but distinguish between return information that identifies a taxpayer and return information that does not.").

The dilemma for the IRS was how to collect the

[5] An extensive analysis of the history of Schedule B, including a discussion of the federal and state tax privacy provisions, is available at Public Policy Legal Institute, "Reviving the 'Enemies List' Using IRS Form 990, Schedule B," *Vox PPLI*, Feb. 3, 2021, https://tinyurl.com/reviving-enemies-list.

donor information, as the statute required, without exposing it to leaks. Prior to the introduction of Schedule B in 2000, Form 990 filers were required to include a non-disclosable list of substantial donors, but the Instructions did not specify a format. In 2000, the IRS determined that at least some unauthorized disclosures were caused by its employees failing to recognize that these informal schedules of donors' information were protected material. The IRS decided to create a standard format, which was Schedule B.[6] Schedule B immediately failed:

> "We have already been contacted by individuals involved in "opposition research" who are using the Schedule B disclosures to piece together profiles of the major donors to charitable organizations whose ideologies or causes they wish to disrupt and disparage. This growing industry involves the use of expanding Internet databases, pretext telephone calls from investigative reporters, and information matching techniques that surpass the capacity of the IRS itself."
>
> In essence, we suspect that the IRS has unwittingly permitted itself to become an accomplice to a massive invasion of taxpayer

[6] As explained in a 2002 IRS internal training manual: "Schedule B is moving toward a situation where all of the non-disclosable contribution information required by Form 990 can be filed on Schedule B and easily removed before the return is made public. This is still a work in process." Cheryl Chasin, Debra Kawecki and David Jones, Internal Revenue Service, "G. Form 990," *Exempt Organizations Continuing Professional Education Technical Instruction Program for FY2002*, at 232, https://www.irs.gov/pub/irs-tege/eotopicg02.pdf.

> privacy through the release of exempt organization donor information.

Greg Colvin & Marcus Owens, "IRS Form 990 Donor Disclosure: Current Posture, Background, Options," 35 EXEMPT ORGS. TAX REV., No. 3, Mar. 2002, at 408, https://tinyurl.com/2peo7y5r.

D. Schedule B Is Not Useful for the Attorney General's Intended Purposes.

Is the information on Schedule B worth its resource cost and propensity to leak? Over the last twenty years, the IRS has been running a real-world, nationwide "A/B test" on Schedule B vs. Form 990.[7] The same organizations fill out and file both forms, using the same information, at the same time. Which is more effective to gather information on wrong-doing: general lists of donors (Schedule B) or specific questions eliciting more detailed information in narrow categories which have indicated possible wrongdoing in the past (Form 990)?

The outcome of this 20-year-long test is that the IRS uses the Form 990 particularized questions, not Schedule B: "IRS does not systematically use Schedule B; the lack of a Taxpayer Identification Number makes the data unsuitable for electronic matching." Internal Revenue Service, Tax-Exempt and Government Entities Division, *Disclosure Risk on Form 990, Schedule B and Rev. Proc. 2018-38,* Aug. 2018, ("IRS Disclosure Risk Briefing"), Slide 7,

[7] "A/B testing, at its most basic, is a way to compare two versions of something to figure out which performs better." Amy Gallo, "A Refresher on A/B Testing," *Harvard Business Review*, Jun. 2017, https://hbr.org/2017/06/a-refresher-on-ab-testing.

reprinted in Attorneys General Letter, at 26, https://tinyurl.com/attorneys-general-letter. Neither does the IRS Small Business/Self-Employed Division, nor do 47 States and the District of Columbia. *See id.*; 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, in No. 19-251, at 4.

Neither does the Attorney General here. According to trial testimony, the Attorney General did not even collect Schedule B until 2010, and hasn't used it regularly or rigorously since then. *See Ams. for Prosperity Found.*, 903 F.3d at 1006–07. "As the district court found, 'out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section [of the Attorney General's office], only five instances involved the use of a Schedule B.' 19-251 Pet. App. 45a." Amicus Brief of United States, at 20. "The court also found that '[e]ven in the few instances in which a Schedule B was relied on, the relevant information it contained could have been obtained from other sources.' 19-255 Pet. App. 55a." *Id.*

On May 28, 2020, as part of its amendments to the Schedule B regulations reducing[8] the requirements to

[8] The proposed regulatory changes did not cover IRC § 501(c)(3) charities because IRC § 6033(b)(5) specifically requires reporting of contributor information from IRC § 501(c)(3) charities. Prior to May 28, 2020, the IRS, by regulation, had extended that statutory requirement to other tax-exempt organizations and so could remove it by regulation; the IRS could not remove the reporting requirement from charities without

put donor information on Schedule B, the IRS refuted assertions that using Schedule B was more efficient:

> "For the specific purpose of evaluating possible private benefit or inurement or other potential issues relating to qualification for exemption, the IRS can obtain sufficient information from other elements of the Form 990 or Form 990–EZ and can obtain the names and addresses of substantial contributors, along with other information, upon examination, as needed. In light of the inefficiencies involved in collecting, maintaining, and redacting this information if it were reported annually, the Treasury Department and the IRS do not agree with comments suggesting that requiring affected tax-exempt organizations to provide name and address information of substantial contributors upon examination is less efficient for the IRS and affected tax-exempt organizations."

Internal Revenue Service, Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959, 31963 (May 28, 2020), https://tinyurl.com/bwecpwkt.

The IRS has been trying to get rid of Schedule B since at least 2016: "The proposed regulations will eliminate for most tax-exempt organizations … the current reporting requirements regarding contributions received and their contributors." Dep't of Treasury, *Unified Agenda,* "Guidance Under Section 6033 Regarding the Reporting of Contributors Names and Addresses," RIN 1545-BN28, Spring 2016,

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additional legislation.

https://tinyurl.com/5d37juds. It wanted to propose legislation to do so, but the Obama Administration decided not to request a legislative fix. *See* IRS Disclosure Risk Briefing, Slide 6, *reprinted in* Attorneys General Letter, at 25.

E. Charities' Donor Lists Should Not Be Collected For Campaign Finance Enforcement Without Particularized Reasonable Cause.

If Schedule B both failed its original purpose to protect donor information and is not a helpful resource for legitimate tax administration, then why does the Attorney General want the Schedule B form? In the December 9, 2019, Attorneys General Letter, the Attorney General told the IRS he wanted to use Schedule B for non-tax purposes, most importantly, to fight against "corporations, wealthy individuals, and special interests [who] seek to influence politics without leaving fingerprints. … The revised donor reporting requirements that the IRS now proposes are certain to make federal and state review of this spending far more difficult if not impossible." Attorneys General Letter at 2 n. 2. *See also Bullock v. IRS*, 401 F. Supp.3d 1144, 1159 (D. Mont. 2019) (setting aside Schedule B changes in IRS Rev. Proc. 2018-38, agreeing with Montana Governor's assertion that "information concerning the identity of exempt organizations' contributors remains critical for enforcing limits on political activity.").

Charities such as the Petitioners are prohibited from engaging in electioneering. *See* IRC § 501(c)(3) ("which does not participate in, or intervene in (including the publishing or distributing of

statements), any political campaign on behalf of (or in opposition to) any candidate for public office"). IRC § 4955 imposes a penalty tax of up to 100% on any charity which makes a federal, state or local political expenditure and, jointly and severally, 50% on the organization's managers. Managers tend to be careful about avoiding IRC § 4955 taxes, which are rare.[9]

More to the point, Form 990 includes both specific questions about charities' political activities and Schedule C with more details about those activities. *See* Internal Revenue Service, "Schedule C (Form 990), Political Campaign and Lobbying Activities," https://www.irs.gov/pub/irs-pdf/f990sc.pdf. Schedule B, on the other hand, can't be computer-matched and often includes listings that aren't readily matched to specific campaign contributors, such as office addresses, trusts or LLCs used for charitable giving. This claim fails as above: charities' donor lists are neither useful nor efficient for campaign finance enforcement.

This case is, as the Petitioners accurately note, about protecting donors against injury, using long-standing First Amendment doctrines balancing privacy against government power. It is also about protecting governments, particularly government tax revenues, against injury from a decrease in voluntary compliance by taxpayers dismayed by government

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[9] IRS data indicates that taxes paid in Fiscal Years 2003-2005 for IRC §§ 4955 (political expenditures), 4912 (disqualifying lobbying expenditures), and premiums on personal benefit contracts combined were less than $5,500 per year. *See* Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing The Ban On Political Activity By Charities*, 6 FIRST AMEND. L. REV. 1, 12 n. 37 (2018).

leaks and misuse of personal tax information. And it is about protecting the law enforcement and judicial systems of the federal and State governments against claims that they are being used as political weapons.

Each of those interests is at risk in this case. Each distills to a reliance on public confidence in government, a well-worn path in analyzing tax privacy. The decisions below ignore this chain of precedent, not even mentioning seminal tax privacy cases such as *Scientology*. *See Scientology*, 484 U.S. at 9 (tax privacy protections to be interpreted strictly). In fact, none of the four published appellate opinions in these cases mention *Scientology*. Yet the decisions below will likely harm public confidence in government, and thus implicate the same interests.

Donor lists are not essential or efficient in regulating charities. Their compelled disclosure raises unnecessary constitutional questions. More efficient and targeted information to detect and document possible violations is publicly available. Advance mass collection of donor lists undermines taxpayer confidence that is essential to support government, especially if it is merely tilting ineffectually at campaign finance windmills. The Court should apply traditional First Amendment precedent and reverse the decision below.

II. THE ATTORNEY GENERAL SHOULD NOT BE ABLE TO LEVERAGE AN ARGUABLY LEGITIMATE USE OF SCHEDULE B INTO A CONDITION ON AN ENDLESS ARRAY OF CONSTITUTIONAL RIGHTS.

Tax-exempt organizations strike a bargain, of

sorts, with the government as the price for being exempt from the income tax: they agree to release to the public most of their tax returns under IRC § 6104. That is not a complete waiver of their privacy because they do not agree to release their donor lists, under IRC §§ 6104(b) and 6104(d)(3)(A). In other words, a charity agrees, in effect, to tell the world details about its inner workings, but *not* about its donors. That helps protect charities, as well as the voluntary compliance discussed above.

In its *amicus curiae* brief, however, the United States asserted a much broader contract theory to analyze this case: "the disclosure of a group's donors, when imposed as a condition of administering a voluntary governmental benefit program or similar administrative scheme, is not a compelled disclosure subject to exacting scrutiny or the narrow-tailoring requirement." Brief of the United States at 12. The Attorney General claims: "the same is true in California." Supp. Brief for Respondent at 5. This is an overstatement of the applicable laws and a misreading of the decisions of this Court.

The terms of that bargain are set by Congress. *See, e.g.*, *In Re Hampers*, 651 F.2d 19, 23 (1st Cir. 1981) ("The deliberate judgment of the legislature on the balancing of the societal interests in detecting, preventing, and punishing criminal activity, in safeguarding individuals' interests in privacy, and in fostering voluntary compliance with revenue reporting requirements, seems to us a legitimate if not compelling datum in the formation of federal common law in this area."). The terms of that bargain cannot be overly burdensome, and can generally stretch no further than the terms in the applicable statutes. *See*

Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 47, 59 (2006) ("the First Amendment supplies 'a limit on Congress' ability to place conditions on the receipt of funds'"); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,* 570 U.S. 205, 2014–15 (2013) ("*AOSI I*") ("[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself"); *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.,* 140 S. Ct. 2082, 2086 (2020) ("*AOSI II*") (same).

In other words, even Congress cannot insist on a funding condition that goes beyond the limits of the government spending program it wants to subsidize or "conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *AOSI I*, 570 U.S. at 214–15, *citing FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 399–401 (1984) (condition struck because the effect of ban on editorials went beyond limits of congressional program). "By demanding that funding recipients adopt—as their own—the Government's view on an issue of public concern, the condition by its very nature affects 'protected conduct outside the scope of the federally funded program'." *AOSI I*, 570 U.S. at 219, *quoting Rust v. Sullivan*, 500 U.S. 173, 197 (1991).

Tax exemption is not a "voluntary governmental benefit program," in the sense the Attorney General would like to use it. This type of theory has variously been termed a "public benefit" or "public subsidy"

bargain. Neither "benefit" nor "subsidy" is a particularly apt term here. After all, almost every taxpayer is entitled to at least a standard deduction, with additional deductions for those who are over 65 years old, blind, or have dependents. Internal Revenue Service, "Topic 551, Standard Deduction," https://www.irs.gov/taxtopics/tc551. Others receive public benefits of various sorts. This Court would likely not countenance denying taxpayers their constitutional rights because of that "subsidy" or "benefit."

Thus, it is an overstatement of this Court's teachings to promote these theories as a catch-all denial of all tax exemption if charities and other actions do not agree to waive all constitutional rights. "Simply because a rights holder should generally be able to bargain away that right does not mean, however, that they should be permitted to do so when the other party is the government." Lloyd Hitoshi Mayer, "Nonprofits, Speech, and Unconstitutional Conditions", 46 CONN. L. REV. 1045, 1052 (2014), https://opencommons.uconn.edu/law_review/236.

Though not so succinctly stated, this Court agrees. In *Regan v. Taxation With Representation,* 461 U.S. 540 (1983) ("*TWR*"), for example, this Court rejected a claim that restricting charities' lobbying was unconstitutional:

> Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to

> cash grants of the amount of a portion of the individual's contributions. … In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that nonprofit organizations undertake to promote the public welfare.

TWR, 461 U.S. at 544. But the Court was careful to limit the subsidy argument to specific circumstances where Congress has determined that a public subsidy was or was not appropriate. The Court pointed out that "Congress – not TWR or this Court – has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying, and other disadvantages that might accompany that lobbying." *Id.* at 550. Congress had already exercised that power by denying a deduction to for-profit entities for lobbying. *See Cammarano v. United States*, 358 U. S. 498, 513 (1959) ("Congress is not required by the First Amendment to subsidize lobbying.").

The situation also would have been different if the lobbying restriction had burdened TWR significantly "unrelated to the congressional purpose of ensuring that no tax-deductible contributions are used to pay for substantial lobbying, and effectively make it impossible for a § 501(c)(3) organization to establish a § 501(c)(4) lobbying affiliate." *TWR*, 461 U.S. at 544 n. 6. Here, the condition could entirely stop the charity from operating in California without reference to whether or not wrongdoing occurred, and without reference to the purpose of the compelled speech.

Justice Blackmun, joined by two other Justices,

found Footnote 6 in *TWR* particularly important: "I write separately to make clear that, in my view, the result under the First Amendment depends entirely upon the Court's necessary assumption – which I share – about the manner in which the Internal Revenue Service administers § 501." *Id.* at 552 (Blackmun, J., concurring). He continued:

> "Any significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4). It must be remembered that § 501(c)(3) organizations retain their constitutional right to speak and to petition the Government. Should the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates, the First Amendment problems would be insurmountable. It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him. Similarly, an attempt to prevent § 501(c)(4) organizations from lobbying explicitly on behalf of their § 501(c)(3) affiliates would perpetuate § 501(c)(3) organizations' inability to make known their views on legislation without incurring the unconstitutional penalty. Such restrictions would extend far beyond Congress' mere refusal to subsidize lobbying."

Id. at 553 (Blackmun, J., concurring). As Justice Blackmun framed it, the "public subsidy" argument is limited to express Congressional actions defining the limits of a subsidy and where the implementation of the government project is not burdensome.

Notwithstanding the wide sweep of the language in *TWR*, Justice Blackmun's narrower framing of the decision has won the day. *See AOSI I*, 570 U.S. at 215; *AOSI II*, 140 S. Ct. at 2088 ("[*Regan*] simply explained that a speech restriction on a corporate entity did not prevent a separate affiliate from speaking…."); *AOSI II*, 140 S. Ct. at 2096 (Breyer, J., dissenting) ("Take *Regan*. To refresh, in that case we upheld a ban on engaging in certain protected speech (lobbying) that the federal tax code imposed on a nonprofit's § 501(c)(3) organization because the nonprofit could still speak through a separate § 501(c)(4) organization."); Brian Galle, *Charities in Politics: A Reappraisal*, 54 WILLIAM & MARY L. REV. 1561, 1569–70 (2013) ("Later cases adopted Blackmun's concurrence as the more persuasive approach."); Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations after Citizens United*, 10 ELECTION L. J. 363, 369–72 (2011) (discussing lower court adoption of Blackmun approach); Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 STANFORD L. REV. 1919, 1942 (2006) ("The government may demand that tax-exempt groups not engage in lobbying or electioneering, but only because those groups may set up non-tax-exempt affiliates that can then use purely tax-paid funds for that speech."). To the extent *Regan v. Taxation With Representation* is considered to stand for something broader than Justice Blackmun's framing, this Court should clarify the decision.

The cases here represent a far end of this spectrum, because the condition – compelled disclosure of association – is purchased at the cost of being able to operate in California, which is beyond

any limit created by the legislature by merely creating a tax exemption. There is no way for a donor to associate with "private" funds, because California won't allow donors' contributions to be "private." "Unlike the situation in [*TWR*], the law provided no way for a station to limit its use of federal funds to non-editorializing activities, while using private funds 'to make known its views on matters of public importance.'" *AOSI I*, 570 U.S. at 215–16. Here, the condition is on the charity, not the program. *Id.* at 219 ("[O]ur 'unconstitutional conditions' cases involve situations in which the Government has placed a condition on the recipient of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.") (emphasis added).

Nor would charities be able to avail themselves of the option for an affiliate (likely an IRC § 501(c)(4) social welfare organization, as in *TWR*) and avoid the disclosure of their donors. As noted above, the Attorney General, many of his colleagues, and two prominent Senators have already indicated that they want to disclose the donors to IRC § 501(c)(4) organizations.

Nor does the Attorney General fulfill his side of the "bargain" with charities: he doesn't protect the donor information he wants to collect. The lower court made fundamental errors in determining the Attorney General's compliance with minimal privacy protections. For example, the lower court said: "the differences between federal and California privacy law are therefore immaterial to risk of inadvertent disclosure at issue here." *Ams. for Prosperity Found.*,

903 F.3d at 1017 n. 10. The actual differences in those two sets of laws are immense. The Attorney General, by regulation, says the information is confidential, and then leaves it at that.[10] The IRS is more rigorous.[11]

For example, the Ninth Circuit said: "[Petitioners] have not shown [the Attorney General's] cybersecurity protocols are deficient or substandard as compared to either the industry or the IRS, which maintains the same confidential information." *Ams. for Prosperity Found.*, 903 F.3d at 1019. The lower court gave examples of what it wanted to see as metrics:

> "Although the plaintiffs contend that the Charitable Trusts Section's protective measures are inadequate because they impose no physical or technical impediments to prevent employees from emailing Schedule Bs externally or printing them in the office, the record does not show that the IRS maintains a more secure internal protocol for its handling of Schedule B information or that the Charitable Trusts Section is failing to meet any particular security standard."

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[10] *See* Cal. Code Regs. tit. 11, § 310(b). *But see* CAL. CONST. art. I, §3(b) (guaranteeing right to access public information); Cal. Gov. Code § 12590 ("Subject to reasonable rules and regulations adopted by the Attorney General,…reports filed with the Attorney General shall be open to public inspection.").

[11] IRS Publication 4639, *Disclosure and Privacy Reference Guide,* Oct. 2012, ("Chief Counsel's Guide"), https://www.irs.gov/pub/irs-pdf/p4639.pdf, is 340 pages long. Internal Revenue Service, Pub. 1075, *Tax Information Security Guidelines For Federal, State and Local Agencies*, Sept. 2016, https://www.irs.gov/pub/irs-pdf/p1075.pdf, is 180 pages long.

Id. at 1019 n. 11.

The IRS's Schedule B email handling requirements are significantly more secure. For example, among the nine specific requirements listed in Subsection 9.4.3 of the Chief Counsel's Guide for the use of email to send Federal Tax Information is "FTI must not be transmitted outside of the agency either in the body of the email or as an attachment." Chief Counsel's Guide, at 108. The Attorney General has no such limitation.

The rules for printing documents in the office are more complex but equally specific; printing is permitted but all documents are to be tracked and logged, including listing all access and who accessed the information. *See id.* at 15 ("The agency must establish a tracking system to identify and track the location of electronic and non-electronic FTI from receipt until it is destroyed."). If the information was disclosed, the "log must reflect to whom the disclosure was made, what was disclosed, and why and when it was disclosed." *Id.* at 16. And both printing and scanning are expressly covered by the tracking and logging requirement. *See id.*

The Attorney General has no such tracking or logging mechanism. According to the court below, the Attorney General "samples" the records for "keywords," and weekly checks, by "script," to see if identifying information is made available to the public. *See Ams. for Prosperity Found.*, 903 F.3d at 1018.

The irony of the situation is that the Attorney General has tried to implement the IRS's privacy protections but found them too restrictive. *See* Joint

App. in No. 19–251, p. 335 ("And I did all those things, but in the end it was impossible to use what we were receiving even though it was valuable.").

On the basis of its failure to distinguish between the Attorney General's and the IRS's systems, the lower court said: "The risk of inadvertent disclosure of any Schedule B information in the future is small." *Ams. for Prosperity Found.*, 903 F.3d at 1019. Without tracking and logs, the Attorney General is unlikely even to be able to determine when such violations actually occur.

It appears the lower court is satisfied with a monitoring system which responds only after someone complains that their data has been accessed illegally: "There is also no dispute that the Registry Unit immediately removes any information that an organization identifies as having been misclassified for public access." *Id*. But by then, the information is likely on the Internet and forever public.

This unconstitutional condition would be compelled association. Any contrary interpretation would eviscerate this Court's long-standing "burden" analysis, and empower governments to impose similar conditions on a variety of constitutional rights.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the decisions below be reversed.

Respectfully submitted,

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