Nos. 19-251 & 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA,
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

XAVIER BECERRA,
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF OF SENATOR MITCH MCCONNELL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Senator Mitch McConnell is the senior United States Senator from the Commonwealth of Kentucky. He is the Republican Leader in the United States Senate and the former Chairman of the National Republican Senatorial Committee, a national political party committee comprising the Republican members of the United States Senate.

Senator McConnell is a respected senior statesman and is one of the Senate's strongest defenders of the First Amendment's guarantees. For many years, Senator McConnell has participated in litigation defending First Amendment freedoms. For example, he was the lead plaintiff challenging the Bipartisan Campaign Reform Act in *McConnell v. FEC*, 540 U.S. 93 (2003), and he participated as amicus both by brief and oral argument in *Citizens United v. FEC*, 558 U.S. 310 (2010), which overruled *McConnell v. FEC* in part.

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[1] In accordance with Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. As required by Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than *amicus* and his counsel made any monetary contribution intended to fund this brief.

SUMMARY OF ARGUMENT

California's Attorney General has imposed a prior restraint on *any* charity that wishes to solicit funds in California. Whether based in California or not, a charity must disclose its donors (whether *they* are based in California or not) as a precondition on soliciting funds in the state. Despite California's waive of the hand, it is "clearly establish[ed] that charitable appeals for funds . . . are within the protection of the First Amendment." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). And it is just as clear that virtually "[a]ny system of prior restraints of expression" is invalid. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). California's speech-licensing regime is thus plainly invalid: by demanding donor disclosure as a condition on a charity's ability to speak, California has struck at the heart of the First Amendment's prohibition on prior restraints.

The Ninth Circuit nevertheless upheld the disclosure requirement, making spectacular errors in the process. The court misapplied this Court's overly deferential framework of campaign finance law, trampled on the district court's findings without cause, and granted extraordinary deference to the State's speculation regarding its interests and ability to protect donor information.

In reversing the Ninth Circuit's indefensible judgment, the Court should clearly hold that disclosure laws like these, which function as speech-licensing regimes, are prior restraints subject to the strictest scrutiny. They invest extraordinary discretion in political actors to license the speech of

private citizens. And they do so with essentially no justification at all. The district court here, for instance, specifically found that California's disclosure requirements "demonstrably played *no role* in advancing the Attorney General's law enforcement goals for the past ten years." AFPF.Pet.App.47a (emphasis added). If the First Amendment means anything, it means that states cannot impose prior restraints on private speech with only tenuous justification.

Proponents of these laws point to this Court's campaign finance precedents, which generally apply lesser First Amendment protection to anonymity in the electoral context. But as this Court has made clear, campaign finance is a limited exception to the strictest scrutiny that ordinarily applies to burdens on political speech—and this Court should not allow that dubious exception to metastasize into a broad loss of the right to private expression.

Proponents of these laws also try to downplay the threat of disclosure, claiming that disclosure (especially to the state) is really no burden at all. But that is obviously, demonstrably false. Disclosure laws are burdensome is several ways. They threaten the harms of chilled speech and a diminished "marketplace of ideas," *Citizens United v. FEC*, 558 U.S. 310, 335 (2010), as donors and recipients modify (or cease) their expressive activity to avoid reprisals, boycotts, and social ostracizing. Moreover, wholly separate from any fear of reprisal, disclosure *inherently* prohibits anonymous expression, which is itself a distinct method of communication and persuasion. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995). Madison, Hamilton, and Jay

published the Federalist Papers anonymously—but surely not for fear of reprisal. Instead, they wanted to let an argument stand on its own merits, free from possible coloring or bent based on the speaker's identity. Finally, mandatory donor disclosure compels donors to appear to support *everything* an organization does or says—even if they support only a small part of a particular non-profit's work. Thus, disclosure chills expression, prohibits anonymous expression, and compels unwanted expression—it is far from the harmless ministerial requirement that so many defenders flippantly pretend it to be.

As Senator McConnell has previously warned, there is a growing "political movement [that] wants to erase our age-old tradition that citizens should be able to keep their private views, and the causes they privately support, private."[2] "Back in the 1950s, it was the NAACP who took on the state of Alabama over precisely this issue," and the NAACP won an essential "victory for the First Amendment" in this Court.[3] The Court should recognize that holding here and reaffirm the First Amendment's broad protections for anonymity.

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[2] Mitch McConnell, Majority Leader, United States Senate, Remarks on the Senate Floor (July 17, 2018), https://www.republicanleader.senate.gov/newsroom/remarks/irs-announcement-a-victory-for_free-speech.

[3] *Id.*

ARGUMENT

I. DONOR DISCLOSURE REQUIREMENTS ARE PRIOR RESTRAINTS SUBJECT TO THE STRICTEST SCRUTINY.

The California Attorney General demands that, before a charity can solicit in California, it must disclose donor identities and information to the Attorney General's office. The requirement applies to *all* charities (whether from California or not) and *all* donors above a certain threshold (whether from California or not). In other words, to solicit in California, a Kentucky charity has to disclose its Kentucky donors.

California barely even tries to hide that this regime is a sweeping prior restraint on expressive activity. This Court has already "clearly establish[ed] that charitable appeals for funds . . . are within the protection of the First Amendment." *Vill. of Schaumburg*, 444 U.S. at 632. That rule makes sense because fundraising "necessarily combine[s] the solicitation of financial support with the functions of information dissemination, discussion, and advocacy of public issues." *Id.* at 635 (citation omitted). Indeed, solicitation is "vital to the maintenance of democratic institutions," with any "law[] restricting" solicitation valid only if "narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442–43 (2015).

California has not merely "restrict[ed]" this activity, it *bans it outright*, unless charities *first* disclose their donors to the state. Charities cannot, for instance, pass out leaflets or send out emails seeking donations to help support or oppose a particular cause.

They cannot personally advocate for a cause and include with that advocacy a plea for funds. They cannot even engage in informational or educational speech intertwined with solicitation. They cannot, in short, engage in entire *categories* of First Amendment expression, unless and until they pony up their list of donors for California's inspection.

California's regime thus should be subject not merely to strict scrutiny, but to the overbearing presumption of invalidity that attaches to "[a]ny system of prior restraints of expression." *Bantam Books*, 372 U.S. at 70. The lesser scrutiny applied by the Ninth Circuit was wrongly appropriated from this Court's cases on campaign finance disclosure laws, and this Court should not allow California to blow a hole in the First Amendment by expanding that limited exception into a broad rule.

A. California's Disclosure Rule Is a Prior Restraint on Speech, Antithetical to the First Amendment.

Following our English forebears, this Court has long understood that "[p]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Tory v. Cochran*, 544 U.S. 734, 738 (2005) (citation omitted). As early as 1644, John Milton assailed an act of Parliament that permitted censoring the press prior to publication. John Milton, *Appeal for the Liberty of Unlicensed Printing* (1644). Milton "vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept the office of censor and at the same

time good enough to be allowed to perform its duties." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–46 (1936).

As Blackstone would later put it: "The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published." 4 William Blackstone, Commentaries *151. To subject Englishmen "to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." *Id.* at *152. Such restraints are therefore "presumptively unconstitutional." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 558 (1976).

Perhaps the most famous case involving a prior restraint in this country is the *Pentagon Papers Case*. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam). In that case, the government sought to enjoin the publication of classified documents related to the Vietnam conflict. The Court held that such an injunction was an unconstitutional prior restraint and explained that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Id.* at 723 (Douglas, J., concurring). It was therefore the government's "heavy burden" to show "justification for the imposition of such a restraint." *Id.* at 714.

Even though the governmental interest at stake in the *Pentagon Papers Case* was national security, an interest of surpassing importance, the Court was not

willing to permit a prior restraint to stand. *Id.* Justice Black's lead opinion explained that "[t]he guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic." *Id.* at 719 (Black, J., concurring). Justice Brennan echoed that sentiment as well, saying that "only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." *Id.* at 726–27 (Brennan, J., concurring). In other words, absent a truly compelling interest of the highest order, a prior restraint is immediately presumed to be unconstitutional.

And the need for judicial skepticism is especially potent given the inherent bias in these laws, which leak into viewpoint discrimination. A disclosure law "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992). That is because, by requiring donor disclosure, the state is necessarily taking the side of *non-controversial* expression. Although anyone can potentially benefit from anonymity, it is especially important for the unpopular, dissenting view—disclosure laws are essentially status-quo-protection laws. To paraphrase Justice Scalia, promoters of popular views can fight "freestyle," while promoters of unpopular views must "follow Marquis of Queensberry rules." *Id.* at 392.

Yet despite their danger and this Court's warnings, California imposed a prior restraint here, with nothing approaching an interest comparable to

the "safety of a transport already at sea." *Pentagon Papers Case*, 403 U.S. at 726–27 (Brennan, J., concurring). Indeed, the best the Ninth Circuit panel could come up with was the notion that the Attorney General's office would be slightly more "efficient" if it could impose its dragnet disclosure requirements as desired. AFPF.Pet.App.23a. The panel's unquestioning deference to a marginal governmental interest highlights the need for withering scrutiny and clear standards in this area.

And that is true regardless of whether disclosure requirements constitute "a prior restraint on speech in the *strict* sense of that term." *Citizens United*, 558 U.S. at 335 (emphasis added). "As a practical matter," these "onerous restrictions . . . function as the equivalent of a prior restraint by giving the [California Attorney General] power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit." *Id.*

To be sure, California's disclosure requirements fit comfortably within this Court's understanding of prior restraints. *See, e.g.*, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (invalidating city's refusal to rent a municipal theater for a production of "Hair," because it was an unconstitutional prior restraint); *Grosjean*, 297 U.S. at 245–51 (invalidating a gross receipts tax on newspapers as a prior restraint). Here, California requires even out-of-state charities to reveal their out-of-state donors merely for the "privilege" of speaking in California. If that is not a prior restraint on speech, it is hard to know what would be.

But either way, these disclosure laws have precisely the same effect as prior restraints, in that they impose unjustified, antecedent burdens on the exercise of First Amendment rights. And they are precisely as constitutionally dubious.

B. The Lesser Scrutiny of Campaign Finance Laws Does Not and Should Not Apply Outside the Electoral Context.

The panel below followed a disquieting, recurring pattern in upholding California's speech-restrictive laws. It tried to import the diminished scrutiny that the Court has applied in the campaign finance context to a *new* context: disclosure requirements *of any kind at all*. AFPF.Pet.App.7a (holding that the Attorney General's policy "survives exacting scrutiny as applied to the plaintiffs because it is substantially related to an important state interest in policing charitable fraud"); *see also Citizens United v. Schneiderman*, 882 F.3d 374, 385 (2d Cir. 2018) (applying a balancing test to decide whether the government's interest in broad disclosure or the burden on speech was more important and holding that the government prevailed).

That was grievous error. This Court's continued, wrong-headed deference to campaign finance disclosure requirements simply has no application here. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court first allowed governments to force disclosure of campaign donor information, but that was because of this Court's view that the campaign finance context provides unique considerations, both in the overriding governmental interests in "deter[ring] actual corruption and avoid[ing] the appearance of

corruption," and the notion that disclosure is, as compared to a ban, the "least restrictive means of curbing the evils of campaign ignorance and corruption." *Id.* at 66–68. Accordingly, the Court in campaign finance disclosure cases has required only "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366–67.

This Court has *never* applied that diminished form of scrutiny to disclosure requirements outside the "electoral context." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010). Indeed, *Buckley* itself precluded the sort of donor disclosure sought here, limiting it only to those instances where it was directly linked to campaign finance; the Court rejected more sweeping disclosure requirements. 424 U.S. at 78–80.

Instead, the Court has consistently applied *strict* scrutiny to disclosure requirements outside of the electoral context, as the *en banc* dissenters below explained. In this Court's series of membership disclosure cases, beginning with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958), it made clear that "compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom" as more direct methods, and it accordingly viewed such restraints with extreme skepticism. In *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960), the Court held that when disclosure requirements impose a "significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." The governmental interest must also be "reasonably related" to the disclosure

requirement, *id.* at 525; and the state must establish that its "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved," i.e., the disclosure requirement must be the *most* narrow or least restrictive means possible, *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961). And those cases did not even involve a prior governmental ban on protected speech.

Indeed, in the electoral context as well, this Court has still protected anonymity via strict scrutiny, as long as it was not literally a question of campaign finance. In *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), for instance, this Court applied strict scrutiny in invalidating a law that required activists to disclose themselves on election-related leaflets. The disclosure requirements in that case were directly related to electoral issue advocacy, but because they were not *campaign finance* disclosure requirements, this Court applied the "strictest standard of review." *Id.* at 348.[4]

Even if there were an open question as to whether or not the misguided *Buckley* exception for campaign contributions should be extended, the Court should emphatically reject doing so (and frankly, ought to revisit its campaign finance disclosure precedents, *see,*

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[4] To be sure, the Court's opinion in *McIntyre* also referenced "exacting" scrutiny; the Court has not always been consistent in the use of the terms "exacting" and "strict." *See, e.g.*, *Williams-Yulee*, 575 U.S. at 442–43 (requiring a speech limitation to be "narrowly tailored to serve a compelling interest" but describing this analysis as both "exacting" scrutiny and "strict" scrutiny). Regardless, *McIntyre* was clear that it applied what today we would call "strict" scrutiny.

e.g., *McCutcheon v. FEC*, 572 U.S. 185, 231–32 (2014) (Thomas, J., concurring in the judgment) (suggesting the Court revisit its campaign finance disclosure precedents because "what remains of *Buckley* is a rule without a rationale")). Again, as noted above, prior restraints are virtually always unconstitutional. Even most campaign finance laws generally require donor disclosure *after* the First Amendment activity has commenced, not *before*. And this Court has already held that solicitation is "vital to the maintenance of democratic institutions," with any "law[] restricting" solicitation valid only if "narrowly tailored to serve a compelling interest." *Williams-Yulee*, 575 U.S. at 442–43. It makes no sense that a particularly vicious *prior* restraint on solicitation would be subject to lesser scrutiny than *ordinary* restraints on solicitation.

Moreover, as numerous lower court judges have noted, the deference to compelled campaign finance disclosure laws is in great tension with this Court's strong protection of the right to anonymity. *See, e.g.*, *Majors v. Abell*, 361 F.3d 349, 358 (7th Cir. 2004) (Easterbrook, J., dubitante) ("I also do not understand how [the] position [that government can force disclosure of election expenditures] can be reconciled with established principles of constitutional law."); *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) ("[T]he Supreme Court's campaign finance jurisprudence subsists, for now, on a fragile arrangement that treats speech, a constitutional right, and transparency, an extra-constitutional value, as equivalents."). The Court should not eviscerate the right to anonymity by extending what should remain, at most, a limited exception for campaign finance disclosure laws.

As a final point, even under the more permissive standards for campaign finance law, California's disclosure requirements *still* would not stand. California must still show "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Citizens United*, 558 U.S. at 366–67. That is a misguided standard, but it is not a rubber stamp. In each case where this Court has approved of disclosure requirements in the campaign finance context, it has done so on the basis of a substantial record supporting narrow and well-defined disclosures. In *McConnell v. FEC*, 540 U.S. 93, 197 (2003), for instance, the Court pointed to evidence that "advertisements . . . hid[] behind dubious and misleading names," and even then, the Court reaffirmed that "as-applied challenges would be available if a group could show a 'reasonable probability' that disclosure . . . '[would] subject [donors] to threats, harassment, or reprisals.'" *Citizens United*, 558 U.S. at 367; *see also Buckley*, 424 U.S. at 66–67 & nn.77–78 (detailing significant evidence, backed by a congressional record, of the purported need for certain campaign finance disclosure requirements).

Here, by contrast, California provided virtually no justification for its laws at all. It asserted a general interest in "fraud prevention," but California did not even attempt to explain how that interest was substantially related to a dragnet licensing regime, applicable to *any charity* that solicits funds in California. The Attorney General did not even hint at a reason why, for instance, the identities of *non-California* donors to *non-California* charities are relevant, much less important. And the district court

specifically found that the Attorney General demonstrated "no harm" arising out of donor privacy for the decade prior to the policy change. AFPF.Pet.App.55a. In the end, the only thing California could point to was a generalized interest in "efficiency." AFPF.Pet.App.23a. That the panel somehow *accepted* that minimal assertion as enough to justify a broad ban on solicitation should confirm what the governing law and common sense already establish: diminished scrutiny of speech-restrictive disclosure laws is wholly insufficient.

II. DONOR DISCLOSURE REQUIREMENTS ARE SEVERELY BURDENSOME, BOTH FOR DONORS AND RECIPIENTS.

The primary defense of the states that have imposed these donor disclosure requirements—and the courts that have let them—is the dubious notion that "requiring disclosure is not itself an evil." *Schneiderman*, 882 F.3d at 383 (upholding similar New York donor disclosure rule). The panel below, for instance, held that Petitioners had "not shown a significant First Amendment burden on the theory that complying with the Attorney General's . . . nonpublic disclosure requirement will chill contributions." AFPA.Pet.App.28a–30a.

Although it should go without saying, this inverts the burden, placing the onus on the private speaker to justify opting out of disclosure, while absolving the state of any duty to justify its need for disclosure in the first instance. Multiple federal courts have missed another equally obvious point: donor disclosure requirements are *immensely* burdensome. As this Court and others have "repeatedly" recognized,

"compelled disclosure . . . can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Davis v. FEC*, 554 U.S. 724, 744 (2008) (striking disclosure). Disclosure threatens "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Patterson*, 357 U.S. at 462. Moreover, it annihilates the *donor's* right to anonymous expression, an important First Amendment right in itself. And it compels the donor to express support for speech and conduct that the donor might not support, by implying that he or she supports everything a non-profit does or says. The repeated argument of the states engaged in this regulation—that disclosure to the "state" is "nonpublic"—is no defense at all, as this and other prominent cases show.

A. Donor Disclosure Requirements Inhibit the Free Marketplace of Ideas by Chilling the Expressive Activity of Both Donors and Recipients.

To start, there can be no doubt that donor disclosure requirements threaten great practical harm—harassment, boycotts, violence—to those who espouse controversial or unpopular views. This very case provides extensive evidence to that effect. Americans for Prosperity Foundation established that "supporters whose affiliation had previously been disclosed experienced harassment and abuse." AFPF.Pet.App.79a. Their "names and addresses, and even the addresses of their *children's schools*, were posted online along with threats of violence." *Id.* (emphasis added). Protestors armed with knives and box-cutters tore down the Foundation's tent at an event in Wisconsin—with supporters still inside.

AFPF.Pet.App.49a–50a. Prominent supporters have faced death threats—as have their families. AFPF.Pet.App.50a. Likewise, the Thomas More Law Center established its continual experience with threats and harassment, as well as instances of donors being boycotted—or refusing to identify themselves simply for *fear* of being boycotted. TMLC.Pet.App.59a–60a.

Of course, this sort of harassment sometimes explodes into violence, as it has for other groups with views that evoke strong passions. Just to give one recent example, a gunman, motivated by Family Research Council's views on marriage, entered the organization's Washington, D.C., headquarters and attempted to "kill as many people as [he] could."[5] The only reason the invasion did not become a mass murder is that "the security guard was able to stop [the shooter] in time"[6]—but not before the intruder shot the security guard in the arm.[7] By contrast, most organizations, especially small ones, cannot afford security, much less most *donors*, many of whom are simply private individuals without the resources to hire armed guards to protect their homes and families.

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[5] M. Alex Johnson, *Man gets 25 years for attack on Family Research Council headquarters*, NBC News (Sept. 19, 2013), https://www.nbcnews.com/news/us-news/man-gets-25-years-attack-family-research-council-headquarters-flna4B11205259.

[6] *Id.*

[7] Jason Ryan & Russell Goldman, *Family Research Council Shooting: Injured Guard Tackles Gunman*, ABC News (Aug. 15, 2012), https://abcnews.go.com/US/family-research-council-shooting-injured-guard-tackles-gunman/story?id=17013563.

More ubiquitous are the more prosaic threats of economic reprisals and social ostracism. *See, e.g.*, *Citizens United*, 558 U.S. at 481–82 (Thomas, J., concurring in part and dissenting in part) (describing harassment, threats, and forced resignations after donors' contributions to support California's Proposition 8 were disclosed). The "the advent of the Internet," in particular, "provide[s] political opponents with the information needed to intimidate and retaliate against their foes." *Id.* at 484 (citation omitted). That is especially true in an era where a few providers so dominate the flow of information online. Just to take one of innumerable examples, YouTube is able to significantly restrict the flow of information coming out of *United States Senate hearings*[8]—it takes no imagination to see that powerful media companies could silence, ostracize, or otherwise threaten anyone revealed to contribute to the "wrong" causes. *See Majors*, 361 F.3d at 356 (Easterbrook, J., dubitante) ("Anonymity . . . may be especially valuable when opposing entrenched actors. Disclosure also makes it easier to see who has not done his bit . . . , so that arms may be twisted and pockets tapped.").

Thus, disclosure is not only a direct prior restraint on the charity—a required license before it can engage in speech—but it also chills the free expression and association of both donors and recipients. As Senator

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[8] Ron Johnson, *YouTube Cancels the U.S. Senate*, The Wall Street Journal (Feb. 2, 2021), https://www.wsj.com/articles/youtube-cancels-the-u-s-senate-11612288061?mod=hp_opin_pos_2 (explaining YouTube's removal of video of Senate testimony by leading physician on a possible treatment for COVID-19).

McConnell has explained, "[a]s more activist regulators" seek "nonpublic . . . documents, individuals from across the political spectrum reth[ink] donating, associating or even speaking," resulting in an "undeniabl[e] chill[]" of their "First Amendment rights."[9] Organizations will either have to refrain from fundraising, lose funding as donors decline to risk revealing themselves to the world, or "self-censor" their message and avoid controversial topics. *Ashcroft v. ACLU*, 542 U.S. 656, 670–71 (2004).

At the same time, disclosure also burdens the rights of the *donors*, who lose the right to anonymously support their chosen causes. This Court has recognized that the right to "[a]nonymity" in expression "is a shield from the tyranny of the majority." *McIntyre*, 514 U.S. at 357. And the Court has repeatedly recognized the burdens that anonymity-stripping laws impose. In *McIntyre*, the Court held invalid an ordinance that prohibited anonymous leafletting, noting that "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Id.* at 342 (citation omitted). The Court has likewise held invalid laws that required paid petition circulators to wear nametags and that required door-to-door evangelists to first obtain a "permit" from the mayor—efforts remarkably similar to the California Attorney General's latest efforts. *See Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 199–200 (1999); *Watchtower*

[9] Mitch McConnell, *Stopping the speech police is goal of new IRS rule*, Lexington Herald Leader (July 23, 2018), https://www.kentucky.com/opinion/op-ed/article215370365.html.

Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002).

To be sure, this case is not simply a *McIntyre* redo; it is an easier case. The charities themselves will not maintain anonymity, as they must disclose their identities to solicit funds—otherwise no one would know how to donate. But the harm to would-be-anonymous donors *also* harms the soliciting charity. Charities know that donors will be less inclined to contribute if they have to reveal themselves, especially if the charity takes controversial positions—meaning that charities will modify their own speech (or suffer the loss of donations), because of donors' fear of reprisals.

And threats of reprisal are particularly likely to have a chilling effect because, of course, "you cannot 'unring the bell.'" *In re Search of Elec. Commc'ns in the Acct. of chakafattah@gmail.com at Internet Serv. Provider Google, Inc.*, 802 F.3d 516, 529 (3d Cir. 2015). "[D]isclosure once made may never be completely undone." *Mackey v. United States*, 401 U.S. 667, 713 (1971) (Brennan, J., concurring in the judgment). Neither donor nor recipient can achieve any meaningful remedy once the information is disclosed.

Indeed, the IRS, which collects donor information for tax treatment purposes, explicitly warns filers *not* to share this information with states, as they "might inadvertently make the schedule available for public inspection."[10] Many states similarly instruct charities *not* to include donor identification information in their

[10] IRS Schedule B, Schedule of Contributors Form at 5 (2020), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf.

filings with state authorities. *E.g.*, Illinois Charitable Organization Form AG990-IL Filing Instructions ¶3 (2019) (directing charities to file "IRS form 990 (excluding Schedule B)," the form that includes identifying donor information); Michigan Renewal Solicitation Form at 2 (2020) (instructing charities that "if you file Form 990 . . . do not provide a copy of Schedule B"); Oregon Form CT-12F for Foreign Charities at 7 (2020) ("Organizations that file Form 990 . . . are not required to attach the Schedule B," but if they do so, it "may be made available for public inspection.").[11]

Yet even the IRS has suffered high profile failures, as Senator McConnell has warned against. For instance, in "2014, the IRS had to settle a lawsuit" because an "IRS worker broke the law and leaked an unredacted copy of a group's confidential tax forms, which wound up in the hands of a liberal organization on the opposite side of the issue."[12] This "private information about Americans' political speech was quickly weaponized for political purposes. In one case, the CEO of a technology organization was hounded from his job by liberal activists for daring to see this subject differently than they did."[13] And that is despite the *criminal penalties* imposed on anyone who even accesses such information without authorization,

[11] These forms are available at https://illinoisattorneygeneral.gov/charities/ag990-instructions.pdf (Illinois), https://www.michigan.gov/documents/ag/Fillable_renewal_app_Final_2-9-09_266595_7.pdf (Michigan), and https://www.doj.state.or.us/wp-content/uploads/2021/01/2020_web_ct-12f.pdf (Oregon).

[12] McConnell, Remarks on the Senate Floor, *supra* note 2.

[13] *Id.*

in addition to additional penalties for disclosure. 26 U.S.C. §§ 7213(a)(1), 7213A. California has no similar protections.

These harms are no less immediate because they relate to donations. As this Court (and common sense) makes clear, there is little meaningful difference between restricting expression and restricting *funding* of expression. Just as "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns" as compelling them to speak, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2464 (2018) (emphasis omitted), demanding that a donor reveal her identity is the same as demanding that a speaker reveal hers. It has the same chilling effect, and "[*w*]*henever* the Federal Government or a State prevents individuals from saying what they think on important matters," it undermines "our democratic form of government." *Id.* (emphasis added).

B. Disclosure Laws Destroy the Right to Anonymous Expression, Which Is a Distinct, Protected Method of Communicating Ideas.

More than simply acting as a shield against reprisal, the Court has recognized that prohibiting anonymity undermines a valid *method* of persuasion. "[Q]uite apart from any threat of persecution, an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity." *McIntyre*, 514 U.S. at 342. For instance, "a writer who may be personally unpopular" can remain anonymous and thus "ensure that readers will not prejudge her

message simply because they do not like its proponent." *Id.*

Indeed, "the early political climate of the United States was replete with anonymous writings," from "Cato's Letters, a series of essays about free speech and liberty that first appeared in 1720," to Thomas Paine's Common Sense. Jennifer B. Wieland, *Note: Death of Publius: Toward A World Without Anonymous Speech*, 17 J.L. & Pol. 589, 591 (2001). And although fear of reprisal might have been a motivating factor for some writers, clearly for many it was simply a matter of improving their persuasiveness. Presumably, "this is a reason why Madison, Hamilton, and Jay chose to publish *The Federalist* anonymously. Instead of having to persuade New Yorkers that his roots in Virginia should be overlooked, Madison could present the arguments and let the reader evaluate them on merit." *Majors*, 361 F.3d at 357 (Easterbrook, J., dubitante). It seems unlikely that Madison, Hamilton, and Jay were *afraid* to support the cause—at least no more afraid than were the Anti-Federalists, who also wrote anonymously to support their cause.

To take just one practical example, in this case the district court found extensive evidence that speakers and supporters at AFPF events were threatened, harassed, and spat upon. AFPF.Pet.App.49a. But there is also an inverse problem: if any well-known or controversial figures fund a cause, the mission and advocacy is likely to be received differently by the public if they know of and maintain opinions (positive or negative) regarding those figures. Anonymity can help focus the debate on the *issues*, rather than the figures themselves. "[E]ven in the field of political

rhetoric, where the identity of the speaker is an important component of many attempts to persuade, the most effective advocates have sometimes opted for anonymity." *McIntyre*, 514 U.S. at 342–43 (citation omitted). Forced disclosure removes this arrow from the quiver of anyone wanting to engage in public debate.

Anonymity also provides other benefits. For example, it allows the anonymous person to move up (or down) class and professional ladders, by stripping one's rank, doctoral letters, and income from one's expression. *See, e.g.*, Chesa Boudin, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 Yale L.J. 2140, 2155 n.66 (2011) (suggesting that some colonial era authors preferred anonymity for "class-based reasons," as "'[a] gentleman lost caste if he wrote professionally in competition with mere scribblers; and conversely, a lower-class professional writer concealed behind a nom de plume could gain authority by writing as if he were a gentleman.'" (citing Douglass Adair, Fame and the Founding Fathers 386 n.1 (Trevor Colbourn ed., Liberty Fund 1998) (1974))). And it allows donors to avoid drawing attention to their deeds, a virtue lauded by many religious (and non-religious) traditions for millennia. *See, e.g.*, *Matthew* 6:3–4 (New Revised Standard Version) ("But when you give alms, do not let your left hand know what your right hand is doing, so that your alms may be done in secret."). But these options fall by the wayside if the government can force charitable donors to identify themselves.

C. Disclosure Laws Compel Donors to Engage In Speech.

Beyond the fear of reprisal and loss of anonymity, disclosure laws also impermissibly compel donors to engage in unwanted expression. That is because, by requiring charities to divulge their donors and donors to divulge their identities, California necessarily "alte[rs] the content of [their] speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018). A donor might give money to an organization for many reasons, but once the donation is disclosed, the implied message is that the donor supports *all* of the organization's speech. Yet that will not often be the case. A donor to the ACLU might support its litigation efforts on behalf of the First Amendment, but not its views on transgenderism; a donor to Catholic Charities might support its work on behalf of the poor but not its views on all other issues. That nuance is lost if charities are compelled to reveal their donors.

And "[w]hen speech is compelled," donors "are coerced into betraying their convictions." *Janus*, 138 S. Ct. at 2464. It is no different than if an individual signed onto a petition supporting one issue, only to learn later that her signature would be affixed to multiple petitions supporting multiple different issues, many of which the signer may not support. "Compelling individuals to mouth support for views they find objectionable violates" a "cardinal constitutional command." *Id.* at 2463. In "most contexts," such compulsion would be "universally condemned," *id.*, as it should be here.

D. None of the Harms Caused by Mandatory Disclosure Are Mitigated by States' Promises to Keep Information Private.

These harms are not mitigated by California's (or any state's) argument that they will keep the disclosures confidential. Not only the Ninth Circuit, but the Second Circuit as well, has accepted this argument as a reason to downplay the "burden" associated with disclosure requirements. AFPF.Pet.App.7a ("[T]he risk of inadvertent public disclosure is slight."); *Schneiderman*, 882 F.3d at 384–85 (dismissing the possibility of New York having disclosed donor information because, *prior to discovery*, plaintiffs had not yet identified any such disclosures). This Court should not fall prey to the same legal feint.

a. As Senator McConnell has noted, in "2012, California—which had promised nonprofits that donor lists would only be seen by the State's Registry of Charitable Trusts—'accidentally' published the donor lists of hundreds of nonprofits from across the political spectrum. And more states, like New York, have sought to copy California, allowing more activist regulators to access this information."[14]

Indeed, as the district court found in this very case, the risk of even *inadvertent* disclosure is anything but "slight." AFPF.Pet.App.7a. One Petitioner here found over *1,700* publically available donor schedules, including 38 that were discovered the day before trial. AFPF.Pet.App.52a. One expert was able to hack into "California's computerized registry" and access "*every confidential document* in the registry

[14] McConnell, Remarks on the Senate Floor, *supra* note 2.

. . . merely by changing a single digit at the end of the website's URL." AFPF.Pet.App.92a (emphasis added). Even after the Attorney General's office tried to "fix" the problem, the same expert used the same method to obtain 40 more donor information schedules. *Id.*

Of course, the Attorney General's office "continuously maintained" that it was "underfunded, understaffed, and underequipped when it comes to the policy surrounding" donor information schedules. AFPF.Pet.App.52a. That aligns California's Attorney General with nearly every government office in the history of the world, and it is one of the primary reasons that disclosure to state governments is so damaging. Even in cases where no one has *yet* shown all the flaws in the state's security measures—likely "underfunded, understaffed, and underequipped"—each additional disclosure multiplies the risk to the donors and recipients.

Most importantly, part of the First Amendment injury here involves *chilled* expressive and associative activity, which means that even the reasonable *fear* of disclosure is unacceptable. Indeed, in this litigation, the district court found that "[i]t is highly likely that . . . donors felt [this] fear . . . and equally likely that at least some of those donors withheld contributions because of that fear." TMLC.Pet.App.60a. Allowing this fear to hold sway harms not only the donors, who "will choose simply to abstain" from donations, but "society as a whole, which is deprived of an uninhibited marketplace of ideas." *Citizens United*, 558 U.S. at 335 (citation omitted).

b. These concerns are raised to a fever pitch by the virtually unbounded discretion that state attorneys

general enjoy under these laws. For instance, California's Attorney General retains discretion to require (or not require) donor disclosure. Cal. Gov't Code §§ 12586–87; *see also* N.Y. Exec. Law § 172(1) (providing discretion to New York Attorney General with respect to regulating charities). And even after promulgating regulations requiring disclosure, the Attorney General retains discretion to enforce (or not enforce) the requirements with respect to any specific entity.

This Court has noted the risks in granting "unbridled discretion" to a state actor to determine when to apply speech restrictions, even where a state *may*, as a general matter, regulate speech (as in the case of, e.g., permit requirements for various types of speech on public property). *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 757, 759 (1988) (noting the "difficulty of effectively detecting, reviewing, and correcting content-based censorship 'as applied'" where the state authority retains extensive discretion). That discretion becomes all the more problematic where the state is not permissibly regulating speech in a public forum but imposing prior restraints on *private speech*.

Even without further evidence of potential political bias, this would be an untenable situation, but it is especially concerning given the demonstrated pattern of bias in some of the very offices responsible for these disclosure laws. California's Attorney General, for instance, aggressively prosecuted pro-life actors for using secret recordings to expose operations of abortion providers, while *defending* the rights of animal-rights activists to perform virtually identical

sting operations.[15] This was the first prosecution *ever* under these laws, and the Attorney General strategized with private, pro-abortion entities to coordinate a response and target the pro-life activists.[16] The Los Angeles Times, hardly a conservative editorial page, was troubled by this brazen political bias.[17] Elsewhere, the New York Attorney General's office (New York being one of the few other states that requires charities to disclose their donors), has demonstrated hostility to anonymity and *Citizens United*, giving potential donors no comfort at all that their identities will not be, in the New York Attorney General's words, brought "[i]nto [t]he [l]ight."[18] Instead, he trumpeted the public disclosure of such information!

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[15] Madeline Osburn, *Four Years Later, Planned Parenthood Whistleblower Still Trapped In Kamala Harris's Persecution*, The Federalist (Aug. 20, 2020), https://thefederalist.com/2020/08/20/four-years-later-planned-parenthood-whistleblower-still-trapped-in-kamala-harriss-persecution/.

[16] *Id.*

[17] The Times Editorial Board, *Felony charges are a disturbing overreach for the duo behind the Planned Parenthood sting videos*, Los Angeles Times (Mar. 30, 2017), https://www.latimes.com/opinion/editorials/la-ed-planned-parenthood-charges-20170330-story.html.

[18] Press Release, Eric T. Schneiderman, Attorney General, New York State Office of the Attorney General, A.G. Schneiderman Adopts New Disclosure Requirements For Nonprofits That Engage In Electioneering (June 5, 2013), https://ag.ny.gov/press-release/2013/ag-schneiderman-adopts-new-disclosure-requirements-nonprofits-engage.

Indeed, the New York Attorney General claims the power to require disclosure of 501(c)(4) organizations—not just 501(c)(3)

Even the IRS has suffered high-profile credibility issues in recent years. Though not, ostensibly, a partisan agency, the IRS applied aggressive scrutiny, demanded unnecessary information, and inordinately delayed applications for tax-exempt status from groups with perceived conservative views.[19] Senator McConnell "heard from Kentuckians who . . . were targeted based on their ideology," and he "called for a government-wide review of these abuses to hold the bad actors accountable."[20] The IRS ultimately issued apologies—and settlements—to many of the affected groups.[21]

In this hyper-partisan political environment, it should be patently clear that "mere 'official curiosity,'"

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charities—despite the fact that New York statutory law does not so provide. *Compare id.* (purporting to require disclosure from 501(c)(4) organizations) *with* N.Y. Exec. Law § 171-a(1) (providing New York Attorney General authority to regulate only "[c]haritable organizations," defined as "benevolent, philanthropic, patriotic, or eleemosynary person[s]"). *But see Schneiderman*, 882 F.3d at 389–90 (deferring to New York Attorney General's own view of his authority). Of course, it is the legislature's role to promulgate law, and judiciary's role to determine "what the law requires." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019) (Gorsuch, J., concurring in the judgment). But in many instances, bureaucrats with unbounded discretion and partisan motivations can chill speech well before a court gets involved.

[19] Peter Overby, *IRS Apologizes For Aggressive Scrutiny Of Conservative Groups*, NPR (Oct. 27, 2017), https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups.

[20] McConnell, *Stopping the speech police is goal of new IRS rule*, *supra* note 9.

[21] *Id.*

on the part of state actors with nearly unlimited discretion is not a "basis" for imposing such extreme burdens on First Amendment rights. *FEC v. Machinists Non-Partisan Pol. League*, 655 F.2d 380, 387–88 (D.C. Cir. 1981).

c. As a last gasp, some proponents of disclosure laws have defended them on the basis that the IRS *also* requires disclosure of donors. *E.g.*, *Schneiderman*, 882 F.3d at 384 ("Appellants offer nothing to suggest that their donors should more reasonably fear having their identities known to New York's Attorney General than known to the IRS."). But even assuming that the IRS can generally demand donor information for tax purposes (which is quite the assumption), that does not mean the California Attorney General can.

The justification for the IRS's demand of donor disclosure would likely be that it supports the federal government's tax subsidy for certain non-profits—i.e., their tax exemptions. *See* U.S.Cert.Br.12 ("An organization seeking the subsidy is not . . . compelled to disclose its donors, because it always can forgo the governmental benefit."). And that donors can, in lieu of giving tax deductible funds, still exercise their First Amendment rights by donating to similar groups. In some circumstances, government can attach certain conditions to its own funding programs, because "[a]s a general matter, if a party objects to a condition on the receipt of federal funding, its recourse is to decline the funds," even where such "a condition may affect the recipient's exercise of its First Amendment rights." *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013). That says nothing about a precondition on the ability to *privately speak*.

And even the IRS has moved in recent years to *limit* its disclosure requirements. As Senator McConnell has repeatedly noted (and praised), the IRS recently withdrew disclosure requirements for certain "education and advocacy groups, including veterans' organizations, business leagues and local chambers of commerce." [22] Senator McConnell has elsewhere explained that "[c]ontributions to these organizations are not tax deductible" and "these organizations [were] not required to release that information under the public inspection and availability requirements," so the IRS's move ended a "pointless[] demand [for] private contributor lists."[23]

In any event, whether a particular IRS disclosure requirement would comply with this Court's unconstitutional conditions doctrine is unsettled, but no such justification could apply to California's (or similar) disclosure requirements. The California Attorney General's policy is not a condition on a public subsidy, it is a prior restraint on *private expressive activity*. The appropriate federal analogy would be if the United States Attorney General asserted the authority to demand mass disclosures as a condition on charities fundraising anywhere in the United States. It should go without saying that this would attract the strictest constitutional scrutiny.

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Courts and states have repeatedly avoided applying the First Amendment to disclosure laws

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[22] McConnell, *Stopping the speech police is goal of new IRS rule*, *supra* note 9.

[23] McConnell, Remarks on the Senate Floor, *supra* note 2.

based on the notion that disclosure is not "really" harmful. These courts and states apparently believe that unless a challenger can prove reprisals involving bloody noses, broken bones, or worse, they have no interest in privacy and anonymity. That cannot possibly be right. The harms of disclosure are (or should be) obvious to all, and challengers should not have to reestablish, every single time, that disclosure requirements inflict serious burdens on expressive activity.

CONCLUSION

For all these reasons, the Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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