Nos. 19-251 and 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION, PETITIONER

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA

THOMAS MORE LAW CENTER, PETITIONER

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING VACATUR AND REMAND

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QUESTION PRESENTED

Whether California's requirement that charitable organizations that fundraise in the State disclose to the state Attorney General's office the identities of their substantial contributors violates the constitutional freedom of association.

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INTEREST OF THE UNITED STATES

These cases concern a constitutional challenge to California's requirement that certain charitable organizations that fundraise in the State disclose to the state Attorney General's office the identities of their substantial contributors. Federal law generally requires disclosure of the same information to the Internal Revenue Service by organizations exempt from federal taxation as described in Section 501(c)(3) of the Internal Revenue

Code, 26 U.S.C. 501(c)(3). Although that federal reporting provision has not been challenged here, the United States has a substantial interest in the proper interpretation of the constitutional standards that apply to the disclosure of that same information to state officials. At the Court's invitation, the United States filed an amicus brief at the petition stage of these cases.

STATEMENT

Petitioners, two charitable organizations that fundraise in California, filed suits alleging that a state law requiring them to disclose a list of their substantial contributors to respondent, the state Attorney General, impermissibly burdens their constitutional freedom of association. Following bench trials, the district court enjoined respondent from requiring petitioners to disclose their substantial contributors to him. 19-251 Pet. App. 41a-56a; 19-255 Pet. App. 51a-67a. The court of appeals reversed. 19-251 Pet. App. 1a-40a.

1. California law requires respondent to "establish and maintain a register" of charitable organizations that operate or solicit contributions within the State, and authorizes him to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Gov't Code § 12584 (West 2018); see *id.* § 12581. After an initial registration, such organizations generally must continue to "file with the Attorney General periodic written reports * * * in accordance with rules and regulations of the Attorney General." *Id.* § 12586(a); see *id.* §§ 12584, 12586(b).

California regulations require those charitable organizations to submit copies of their Internal Revenue Service (IRS) Form 990 as part of their annual periodic reports to respondent. See Cal. Code Regs. tit. 11, § 301

(2005). IRS Form 990 is a return that Section 501(c)(3) charitable organizations exempt from federal taxation generally must file with the IRS each year. On Schedule B of the form, such organizations must disclose "the names and addresses of all substantial contributors." 26 U.S.C. 6033(b)(5). A substantial contributor is one who gives $5000 or more to the organization during the year, though in some cases only if the amount also exceeds 2% of the total donations the organization received that year. See 26 C.F.R. 1.6033-2(a)(2)(ii)(*f*) and (iii)(*a*); cf. 26 U.S.C. 507(d)(2)(A). Although the IRS must allow public inspection of a public charity's Form 990, the names and addresses of any contributors identified on Schedule B generally must be kept confidential, under pain of civil and criminal penalties. See 26 U.S.C. 6103, 6104(b) and (d)(3)(A), 7213, 7213A, 7431.

Under California law, charitable organizations' annual periodic reports, including IRS Form 990, generally must be made available for public inspection. See Cal. Gov't Code § 12590 (West 2018); Cal. Code Regs. tit. 11, § 310(a) (2016). For decades, however, the State has had a policy of "maintain[ing] Schedule B for public charities as a confidential document." 16-55727 C.A. Supp. E.R. 202. In 2016, after this litigation commenced, the State adopted a regulation codifying that policy. See Cal. Code Regs. tit. 11, § 310(b) (2016).

2. a. Petitioners are tax-exempt charitable organizations under Section 501(c)(3) that solicit contributions in California and are subject to the State's registration requirement. See 19-251 Pet. App. 6a, 10a-11a. Since 2001, each petitioner has "annually filed a complete Schedule B with the IRS," but has "either filed redacted versions of the Schedule B or not filed it with the Attorney General at all." *Id.* at 10a-11a.

In 2012 and 2013, respondent sent deficiency letters asserting that petitioners' periodic reports had improperly omitted unredacted copies of Schedule B containing the names and addresses of petitioners' significant contributors. 19-251 Pet. App. 11a. Respondent informed petitioners that if they did not submit complete Schedule B forms, they would face various consequences under state law, including disallowance of their state tax exemption, late fees for "each month or partial month for which the report(s) are delinquent," and suspension of their registration as charitable organizations that may operate or solicit contributions in California. 19-251 J.A. 55-57; 19-255 Pet. App. 181a-183a.

After receiving the deficiency letters, petitioners filed separate suits alleging that the requirement to disclose the names and addresses of their significant contributors impermissibly burdens the constitutional freedom of association. See 14-cv-9448 Compl. ¶¶ 1-6; 15-cv-3048 Am. Compl. ¶¶ 1-10. Petitioners alleged that their contributors had in the past suffered harassment, reprisals, and similar harms because of their association with petitioners. See, *e.g.*, 14-cv-9448 Compl. ¶¶ 16-17. Petitioners also alleged that respondent would make their Schedule B forms publicly available. See, *e.g.*, *id.* ¶ 25. And petitioners alleged that the possibility of public disclosure and harassment would deter current donors and others from making future contributions. See, *e.g.*, *id.* ¶¶ 13-19, 47; 15-cv-3048 Am. Compl. ¶ 36.

b. The district court preliminarily enjoined respondent from requiring petitioners to submit their Schedule B forms. 19-251 Pet. App. 70a-73a; 19-255 Pet. App. 90a-96a. The court of appeals vacated those injunctions and directed the district court "to enter new orders preliminarily enjoining the Attorney General from publicly

disclosing, but not from collecting, [petitioners'] Schedule B forms." 19-251 Pet. App. 58a. The court of appeals found that petitioners had not shown "that *confidential* disclosure to the Attorney General will chill participation or result in harassment of [their] donors by the state or the public." *Id.* at 62a. The court thus concluded that petitioners had "failed to demonstrate any actual burden on First Amendment rights," so long as respondent kept their contributors' information "nonpublic." *Id.* at 65a. And while the court acknowledged petitioners' concerns about "the risk of public disclosure," it determined that a "properly tailored" preliminary injunction would address that risk by "enjoining the Attorney General only from making Schedule B information public." *Id.* at 68a.

c. Following bench trials, the district court entered permanent injunctions prohibiting respondent from requiring petitioners to include Schedule B forms in their periodic reports. 19-251 Pet. App. 41a-56a; 19-255 Pet. App. 51a-67a.

The district court concluded that the State's disclosure requirement is unconstitutional as applied to petitioners. 19-251 Pet. App. 41a; 19-255 Pet. App. 51a. That conclusion rested on what the court viewed as two "independent[]" grounds. 19-251 Pet. App. 48a; 19-255 Pet. App. 58a. First, the court held that the State had not "convincingly show[n] that its demands are substantially related to a compelling interest, including by being narrowly tailored to achieve that interest." 19-251 Pet. App. 47a; see 19-255 Pet. App. 53a-58a. In the court's view, the evidence showed that the State's "auditors and attorneys seldom use Schedule B when auditing or investigating charities," and that "even in instances where a Schedule B was relied on, the relevant information

it contained could have been obtained from other sources." 19-251 Pet. App. 45a; see 19-255 Pet. App. 55a.

Second, the district court held that petitioners had established that "disclosing [their] Schedule B to the Attorney General would create a burden on [their] First Amendment rights." 19-251 Pet. App. 48a; 19-255 Pet. App. 58a. In the court's view, evidence that individuals publicly associated with petitioners had in the past suffered harassment, reprisals, and similar harms sufficed to establish a "reasonable probability" that the contributors listed on their Schedule B forms would face such harms in the future if their identities were made public. 19-255 Pet. App. 61a; see 19-251 Pet. App. 48a-50a. The court acknowledged that respondent "is only seeking disclosure of [petitioners'] Schedule B for *nonpublic* use," 19-251 Pet. App. 51a, and further recognized that the State had recently "codified" its "confidentiality policy" in a "formal regulation" and "implemented a system of automated and personal reviews to identify documents that were incorrectly classified as not confidential," 19-255 Pet. App. 62a. But the court concluded that such measures were insufficient in light of what it viewed as respondent's "substantial history" of "inadvertent[ly] disclos[ing]" Schedule B forms to the public, *ibid.*—which included the publication of "1,778 confidential Schedule Bs" online and constituted what the court characterized as a "pervasive, recurring pattern of uncontained Schedule B disclosures [that] persisted even during [one of] th[e] trial[s]," 19-251 Pet. App. 52a.

While the district court found the Schedule B disclosure requirement invalid as applied to petitioners, it rejected their facial challenges. 19-251 Pet. App. 42a-43a; 19-255 Pet. App. 52a-53a. The court observed that "the 'strong medicine' of facial invalidation need not and

generally should not be administered when the statute under attack is unconstitutional as-applied to the challenger before the court." 19-251 Pet. App. 43a (quoting *United States* v. *Stevens*, 559 U.S. 460, 482-483 (2010) (Alito, J., dissenting)).

3. The court of appeals reversed the district court's conclusion that the disclosure requirement violates the Constitution as applied to petitioners. 19-251 Pet. App. 1a-40a.

a. Relying on this Court's decision in *Doe* v. *Reed*, 561 U.S. 186 (2010), the court of appeals subjected the disclosure requirement to "exacting scrutiny" under the First Amendment. 19-251 Pet. App. 15a (citation omitted). The court explained that, under that standard, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ibid.* (citations omitted). The court declined "to apply the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny," finding such a requirement inconsistent with "the 'substantial relation' standard [this] Court applied in [*Reed*]." *Id.* at 16a.

The court of appeals then held that the State's Schedule B requirement survives exacting scrutiny as applied to petitioners. 19-251 Pet. App. 7a. With respect to the strength of the governmental interest, the court determined that the disclosure requirement "is substantially related to an important state interest in policing charitable fraud," *ibid.*, because "quick access to Schedule B filings 'increases the Attorney General's investigative efficiency' and allows him to 'flag suspicious activity'" without "'the need for expensive and burden-

some audits,'" *id.* at 19a (brackets and citations omitted). The court concluded that the district court had erroneously applied a "least-restrictive-means" test to discount the governmental interest in disclosure. *Id.* at 22a. The court of appeals explained that "nothing in the substantial relation test requires [respondent] to forgo the most efficient and effective means of" pursuing "important regulatory efforts" to prevent fraud and self-dealing by charities—"at least not absent a showing of a significant burden on First Amendment rights." *Id.* at 23a.

Turning to an assessment of the burden on petitioners, the court of appeals concluded that they had not "established a reasonable probability of retaliation from compliance with" the Section B disclosure requirement. 19-251 Pet. App. 34a. The court observed that "the Schedule B requirement is a far cry from the broad and indiscriminate disclosure laws passed in the 1950s to harass and intimidate members of unpopular organizations." *Id.* at 29a. The court declined to resolve whether petitioners had shown a "constitutionally significant level of threats, harassment or reprisals if their Schedule B information were to become public," *id.* at 34a, because "the information is collected solely for nonpublic use" and the court believed "the risk of inadvertent public disclosure is slight," *id.* at 7a. While acknowledging "that, in the past, the Attorney General's office ha[d] not maintained Schedule B information as securely as it should have," *id.* at 35a, the court stated that respondent was not "likely to inadvertently disclose [petitioners'] Schedule B [information] in the future," given "the promulgation of" the regulation codifying the State's policy of treating Schedule B forms as confidential and the "adoption of additional security measures," *id.* at

38a. The court therefore concluded that, "[b]ecause the burden on the First Amendment right to association is modest, and the Attorney General's interest in enforcing its laws is important, 'the strength of the governmental interest . . . reflects the seriousness of the actual burden on First Amendment rights.'" *Id.* at 39a (brackets and citations omitted).

The court of appeals also rejected petitioners' facial challenges. 19-251 Pet. App. 39a-40a. The court observed that "the evidence adduced at these trials does not prove the Schedule B requirement fails exacting scrutiny in a substantial number of cases, judged in relation to its plainly legitimate sweep." *Id.* at 40a (brackets, citations, and internal quotation marks omitted).

b. The court of appeals denied rehearing en banc. 19-251 Pet. App. 77a. Judge Ikuta, joined by four other judges, dissented. *Id.* at 77a-97a. In her view, the State's "established history of disclosing confidential information inadvertently" supported the conclusion that Schedule B information could be publicly released, and she concluded that petitioners had "established that [their] members might be exposed to harassment and abuse if their identities were made public." *Id.* at 91a. She further faulted the panel for not applying "a narrow tailoring requirement." *Ibid.* In response, the three judges on the panel expressed their view that these cases involve "the *nonpublic* disclosure of Schedule B information," and thus do not "expos[e] contributors to the threats, harassment or reprisals that might follow *public* disclosure." *Id.* at 98a; see *id.* at 98a-109a.

SUMMARY OF ARGUMENT

A. Compelled-disclosure requirements are subject to exacting scrutiny, a standard this Court has specifi-

cally recognized is less stringent than strict scrutiny. *Doe* v. *Reed*, 561 U.S. 186, 196, 199 n.2 (2010).

1. Laws that implicate the freedom of association take various forms. A requirement that organizations disclose their members' or donors' identities involves "no direct action" restricting association. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). But such laws may "have the practical effect 'of discouraging' the exercise" of that freedom and thus affect associational rights indirectly. *Ibid.* (citation omitted).

This Court has made clear that such disclosure requirements are subject to "exacting scrutiny." *Reed*, 561 U.S. at 196. "That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Ibid.* (citations and internal quotation marks omitted). And while the disclosure requirement need not be the least restrictive means to achieve that interest, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Ibid.* (citation omitted).

The Court's application of exacting, rather than strict, scrutiny to disclosure requirements reflects the different constitutional interests presented by laws that only indirectly affect associational rights. Such laws—unlike those that directly affect associational rights—do not bar anyone from associating or pose the same threat of governmental suppression of dissident views. Yet those challenging a disclosure requirement may be able to demonstrate an impermissible burden on association if they can establish "a reasonable probability that the compelled disclosure of [their] contributors' [or members'] names will subject them to threats, harassment, or reprisals from either Government officials or

private parties." *Buckley* v. *Valeo*, 424 U.S. 1, 74 (1976) (per curiam). Such challengers "must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim." *Ibid.*

2. Petitioners are wrong to contend that disclosure requirements should instead be subject to strict scrutiny or at least its narrow-tailoring requirement. That argument ignores this Court's clear articulation of the less stringent exacting-scrutiny standard, which appropriately reflects the First Amendment interests implicated by disclosure provisions. Petitioners isolate phrases in various decisions considering disclosure requirements, but the Court's analysis in each case was consistent with the application of exacting scrutiny. Nor can petitioners successfully distinguish cases applying exacting scrutiny on the ground that they arose in the electoral context. This Court has subjected all disclosure requirements to the same standard of constitutional scrutiny—and that makes sense. Both inside and outside the electoral context, the relevant principle is the same: because disclosure requirements affect associational rights only indirectly, strict scrutiny and its least-restrictive-means test are unwarranted.

B. The constitutionality of the IRS's collection of Schedule B information does not resolve these cases. The federal reporting provision does not *compel* disclosure, but rather constitutes a condition for receiving a governmental subsidy in the form of tax exemptions and deductibility. Such subsidies are not subject to exacting scrutiny. See *Regan* v. *Taxation With Representation*, 461 U.S. 540, 545-551 (1983). Thus, the fact that the IRS permissibly collects Schedule B information as a condition of providing a governmental subsidy is not dispositive of the constitutionality of respondent's requirement

that charities disclose Schedule B information to operate or fundraise in the State.

C. The court of appeals correctly identified exacting scrutiny as the constitutional standard for evaluating the State's Schedule B disclosure requirement, and it correctly rejected petitioners' facial challenges. The disclosure requirement clearly furthers important governmental interests in policing fraud and abuse; other means of obtaining the same information would be less effective and less efficient; and petitioners have not shown that donors who contribute to charitable organizations in general will be exposed to a reasonable probability of threats and harassment as would be necessary to establish that the disclosure provision is facially invalid.

The court of appeals' analysis of petitioners' as-applied challenges, however, was incomplete based on the facts of these cases. In reversing the district court's finding that petitioners had demonstrated a substantial First Amendment burden, the court of appeals declined to consider how significant the harm would be to petitioners' contributors if their identities became publicly known. But the magnitude of such harm is relevant to properly assessing the possible deterrent effect of the law based on the particular history of respondent's prior public disclosure of Section B information. In addition, some language in the court's analysis erroneously suggested that petitioners must specifically establish that their contributors' information, as distinct from other organizations' contributors' information, would be inadvertently disclosed. To give the court the opportunity to account for those issues in the first instance, the cases should be remanded for the court to reassess the as-applied burden on the associational rights that petitioners assert.

ARGUMENT

California requires charitable organizations that fundraise in the State to disclose to respondent the identities of their substantial contributors. This Court has subjected such disclosure requirements to exacting scrutiny, requiring that they be substantially related to important governmental interests and that the strength of those interests reflect the seriousness of the actual burden on First Amendment rights. That standard—rather than strict scrutiny—should apply here.

In a brief filed in response to the Court's invitation at the petition stage, the United States took the position that California's disclosure requirement is not narrowly tailored to a compelling governmental interest. After this Court's grant of review and the change in Administration, the government reconsidered the issues presented in these cases and has concluded that its prior position misstated the exacting-scrutiny standard and gave insufficient weight to the nonpublic nature of the disclosure that California requires. The flaw in the decision below lies not in its articulation of the governing legal standard, but in its application of established legal principles to the facts of these cases. Thus, without unsettling those principles, this Court should vacate the decision below and remand for further proceedings.

A. Compelled-Disclosure Requirements Are Subject To Exacting Scrutiny

1. The First Amendment protects "the free exercise" of religion; "the freedom of speech" and "of the press"; and "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I. This Court has recognized that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of

grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 622 (1984). Accordingly, the Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Ibid.*

As this Court has recognized, laws that implicate the freedom of association "can take a number of forms." *Roberts*, 468 U.S. at 622. Some laws "directly and immediately affect[] associational rights." *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 659 (2000). For example, a law might impose penalties on individuals because of their "affiliation or nonaffiliation" with a particular group. *Elrod* v. *Burns*, 427 U.S. 347, 349 (1976) (plurality opinion). Or a law might "force[] the group to accept members it does not desire." *Roberts*, 468 U.S. at 623. When a law directly and immediately affects associational rights, this Court typically has applied a form of strict scrutiny. See *Dale*, 530 U.S. at 659 (rejecting application of an "intermediate standard of review" to a law that "directly and immediately affects associational rights"); *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 74 (1990) (requiring that political patronage practices be "narrowly tailored to further vital government interests"); *Roberts*, 468 U.S. at 623, 626 (upholding "a reglation that force[d] [a] group to accept members" as "the least restrictive means of achieving" a "compelling interest").

Other laws, in contrast, have "only an incidental effect on" associational rights. *Dale*, 530 U.S. at 659. For

example, a law might "require disclosure of the fact of membership" in a particular group. *Roberts*, 468 U.S. at 622-623. Or a law might require disclosure of the group's donors or contributors. See *Buckley* v. *Valeo*, 424 U.S. 1, 65 (1976) (per curiam). Although disclosure requirements involve "no direct action" restricting the freedom of association, they may nevertheless "have the practical effect 'of discouraging' the exercise" of that freedom. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (citation omitted).

The Court confronted a membership disclosure requirement in *NAACP* v. *Alabama*. See 357 U.S. at 460. There, Alabama sought to compel the NAACP to disclose "the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association" for the purpose of "determining whether [the NAACP] was conducting intrastate business in violation of the Alabama foreign corporation registration statute." *Id.* at 451, 464. Evaluating the effect on associational rights, the Court was "unable to perceive that the disclosure of the names of [the NAACP's] rank-and-file members ha[d] a substantial bearing" on determining whether the NAACP was subject to the foreign corporation registration statute. *Id.* at 464. The Court further emphasized that the NAACP had made an "uncontroverted showing" that the disclosure of its membership lists would "expose[] its members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. The Court "conclude[d] that Alabama ha[d] fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *Id.* at 466; see *Healy* v. *James*,

408 U.S. 169, 183 (1972) (observing that "[t]he requirement * * * that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members' associational rights").

2. Although *NAACP* v. *Alabama* did not label the level of constitutional scrutiny it applied, the Court has since made clear that disclosure requirements are subject to "exacting scrutiny." *Buckley*, 424 U.S. at 64. "That standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Doe* v. *Reed*, 561 U.S. 186, 196 (2010) (citations and internal quotation marks omitted). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Ibid.* (citation omitted). Thus, under exacting scrutiny, "fit matters." *McCutcheon* v. *FEC*, 572 U.S. 185, 218 (2014) (plurality opinion). But unlike strict scrutiny, exacting scrutiny does not demand that a disclosure requirement be the least restrictive means to achieve the pertinent governmental interests. Instead, a court must "look to the extent of the burden that [the disclosure requirement] place[s] on individual rights," and then "determin[e] whether [the governmental] interests are sufficient to justify the requirement[]." *Buckley*, 424 U.S. at 68.

This Court's application of exacting scrutiny rather than strict scrutiny to disclosure requirements reflects the different constitutional interests presented by laws that have only an indirect effect on associational freedoms. As the Court explained in *Reed*, it is "pertinent to [the] analysis" that a law is "a disclosure requirement" rather than "a prohibition" on the exercise of First Amendment rights because "[d]isclosure require-

ments may burden the ability to speak" but "do not prevent anyone from speaking." 561 U.S. at 196 (citation, emphasis, and internal quotation marks omitted); see *Buckley*, 424 U.S. at 66 (observing that "compelled disclosure has *the potential* for substantially infringing the exercise of First Amendment rights") (emphasis added); *Citizens United* v. *FEC*, 558 U.S. 310, 366, 369 (2010) (characterizing disclosure requirements as "less restrictive" than "more comprehensive regulations of speech"). In addition to presenting a lesser burden on First Amendment rights, disclosure requirements do not present the same threat of governmental "suppression" of "dissident expression," *Roberts*, 468 U.S. at 622, as do laws that seek to control "association and belief *per se*," *Elrod*, 427 U.S. at 363 n.17 (plurality opinion). Thus, the rationale for strict scrutiny does not apply when the "deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure." *Buckley*, 424 U.S. at 65.

In applying exacting scrutiny and assessing the indirect burden on First Amendment rights that may arise from a disclosure requirement, this Court has further made clear that those challenging the law must establish a causal chain between disclosure and the asserted infringement of associational rights. See, *e.g.*, *Buckley*, 424 U.S. at 69-74. The Court has recognized that the causal requirement is satisfied and challengers may be able to demonstrate an impermissible burden on association when they establish "a reasonable probability that the compelled disclosure of a party's contributors' [or members'] names will subject them to threats, harassment, or reprisals from either Government officials or

private parties." *Id.* at 74. But absent the "[r]equisite [f]actual [s]howing," the Court has found that "any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative," rendering *NAACP* v. *Alabama* "inapposite." *Id.* at 69-70.

The Court's decision in *Buckley* illustrates the application of the foregoing principles to a disclosure law. The Court in that case upheld a law requiring minor political parties and independent candidates to disclose their contributors, explaining that none of the challengers had "tendered record evidence of the sort proffered in *NAACP* v. *Alabama*," "where the threat to the exercise of First Amendment rights [wa]s so serious and the state interest furthered by disclosure so insubstantial that the [disclosure] requirement[] [could not] be constitutionally applied." *Buckley*, 424 U.S. at 71. "At best," the Court observed, the challengers had "offer[ed] the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure." *Id.* at 71-72. And "on th[at] record," the Court held, "the substantial public interest in disclosure * * * outweigh[ed] the harm generally alleged." *Id.* at 72.

The Court in *Buckley* further emphasized, however, that challengers who seek to establish a reasonable probability that disclosure will result in threats, harassments, or reprisals "must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim." 424 U.S. at 74. That proof may take a variety of forms, including "specific evidence of past or present harassment of members due to their associational ties," "harassment directed against the organiza-

tion itself," or a "pattern of threats or specific manifestations of public hostility." *Ibid.* The Court recognized that "[a] strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought" could constitute an "unduly strict requirement[] of proof." *Ibid.* Nevertheless, the Court did not find it necessary to recognize "a blanket exemption" from disclosure for minor parties, emphasizing that it would not "assume that courts will be insensitive to" the requisite showing of harm when it is established on an individual basis. *Ibid.*; see *Reed*, 561 U.S. at 203 (Alito, J., concurring) (observing that the recognition of an as-applied exemption in compelled-disclosure cases "plays a critical role in safeguarding First Amendment rights"). "Where it exists," the Court observed, "the type of chill and harassment identified in *NAACP* v. *Alabama* can be shown." *Buckley*, 424 U.S. at 74.

3. Petitioners contend that strict scrutiny—or at least narrow tailoring, by which they appear to mean a least-restrictive-means test—should apply to the disclosure requirement at issue here. AFPF Br. 24-27; TMLC Br. 19-32. But as explained above, the rationale for strict scrutiny does not apply where, as here, a law does not "directly and immediately affect[] associational rights." *Dale*, 530 U.S. at 659. Petitioners identify no sound basis for this Court to depart from precedent recognizing that disclosure requirements are instead subject to exacting scrutiny, which appropriately balances the First Amendment interests implicated in this context.

a. To support their request that the Court apply strict scrutiny or a least-restrictive-means test to respondent's Schedule B disclosure requirement, peti-

tioners focus on isolated phrases from this Court's precedents. AFPF Br. 20-27; TMLC Br. 26-29. For example, they highlight *NAACP* v. *Alabama*, in which the Court found that the State had not shown a "compelling" interest in a disclosure requirement that was "sufficient to justify the deterrent effect" on associational freedom. AFPF Br. 22 (quoting *NAACP* v. *Alabama*, 357 U.S. at 463); TMLC Br. 27 (same). They observe that *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960), likewise described the State's need to show a "compelling" interest. AFPF Br. 22 (quoting *Bates*, 361 U.S. at 524); TMLC Br. 27 (same). And they cite language from *Shelton* v. *Tucker*, 364 U.S. 479 (1960), stating that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." AFPF Br. 24 (quoting *Shelton*, 364 U.S. at 488); TMLC Br. 28 (same); see also AFPF Br. 25 (quoting language from *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 297 (1961), stating that time, place, and manner regulations "need to be 'narrowly drawn to prevent the supposed evil' ") (citation omitted).

But those isolated phrases do not override this Court's clear articulation of the "exacting scrutiny" standard: "[t]o withstand this scrutiny," there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," such that "the strength of the governmental interest * * * reflect[s] the seriousness of the actual burden on First Amendment rights." *Reed*, 561 U.S. at 196 (citations and internal quotation marks omitted); see also, *e.g.*, *Citizens United*, 558 U.S. at 366-367 ("The Court has subjected [disclosure] requirements to 'exacting

scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.") (citation omitted). Indeed, the Court in *Reed* explained that exacting scrutiny is a lower "standard of review" than "strict scrutiny." 561 U.S. at 199 n.2. And the Court upheld the disclosure requirement in that case without subjecting it to the least-restrictive-means test that the Court has adopted to implement strict scrutiny's narrow-tailoring element. *Id.* at 197-202.

Against the backdrop of this Court's clear distillation of the exacting-scrutiny standard, the disclosure cases that petitioners cite cannot be read as requiring strict scrutiny or its stringent form of narrow tailoring. The Court has previously recognized that phrases like "'narrowly drawn'" can describe a standard of review that is "more flexible" than a "'least-restrictive-means' approach." *Board of Trs. of the State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 476-477 (1989) (citation omitted); see also, *e.g.*, *McCutcheon*, 572 U.S. at 218 (plurality opinion) (describing the requirement of "a fit that is not necessarily perfect, but reasonable," because it "employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective") (citations omitted). That language reinforces that "fit matters" under exacting scrutiny, *McCutcheon*, 572 U.S. at 218 (plurality opinion)—but provides no basis to avoid exacting scrutiny altogether in favor of a more stringent standard of review. Instead, the phrases petitioners quote merely reflect the "imprecision" that the Court has previously acknowledged in the "variety of descriptive terms" it historically used when describing standards of constitutional scrutiny. *United States* v. *O'Brien*, 391 U.S. 367, 376-377 (1968).

Moreover, the disclosure cases petitioners cite are consistent with this Court's articulation of exacting scrutiny in both reasoning and result. In *NAACP* v. *Alabama*, the Court considered the "substantiality of Alabama's interest in obtaining the membership lists" and the "substantial restraint" on associational freedom arising from disclosure, ultimately finding that the State had "fallen short of showing a controlling justification" for the burden imposed. 357 U.S. at 462, 464, 466. Similarly, in *Bates*, the Court evaluated whether the law had "a reasonable relationship to the achievement of the governmental purpose asserted as its justification," emphasized that the disclosure requirement constituted a "substantial abridgement of associational freedom," and ultimately found "no relevant correlation" between the claimed state interest and the compelled disclosure. 361 U.S. at 524-525. And in *Shelton*, the Court determined that a disclosure law's "comprehensive interference with associational freedom [went] far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." 364 U.S. at 490. In each case, the Court weighed the strength of the State's interest in disclosure against the extent of the burden on First Amendment rights—just as exacting scrutiny demands. See *Reed*, 561 U.S. at 196 ("To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'") (citation omitted).

b. Petitioners contend that reliance on *Reed* or any other election-related decision is misplaced because the electoral context is unique. AFPF Br. 27-30; TMLC Br. 29-31. But the relevant principle is that because disclo-

sure requirements affect associational rights only indirectly, strict scrutiny and the least-restrictive-means test are unwarranted. That principle is the same, both inside and outside the electoral context.

It is therefore not surprising that in evaluating disclosure requirements in election-related cases, this Court has observed that the exacting-scrutiny standard is drawn from *NAACP* v. *Alabama* and the other non-election cases that followed it, with no suggestion that the standard of review differs based on context. See, *e.g.*, *Buckley*, 424 U.S. at 64-65 & n.73 (describing "exacting scrutiny" as a standard derived from, *inter alia*, *NAACP* v. *Alabama*, *Shelton*, and *Bates*); *Reed*, 561 U.S. at 196 ("Since *NAACP* v. *Alabama* * * * we have required that the subordinating interests of the State [offered to justify compelled disclosure] survive exacting scrutiny.") (quoting *Buckley*, 424 U.S. at 64) (brackets in original). That the standard of review does not differ follows from *NAACP* v. *Alabama* itself, which pronounced it "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." 357 U.S. at 460.

Petitioners are further wrong to assert that this Court's decisions in the electoral context "did not conduct a narrow-tailoring analysis because this Court already held in *Buckley* * * * that such laws *categorically* satisfy narrow tailoring *solely* for reasons unique to elections." AFPF Br. 18; see TMLC Br. 30. Petitioners do not point to any post-*Buckley* decision of this Court that has recognized that "categorical[]" holding of *Buckley*. AFPF Br. 18 (emphasis omitted). And if that holding existed, much of the analysis in *Reed* would have been unnecessary. See 561 U.S. at 197-199. Petitioners accordingly provide no sound basis to modify or

depart from the exacting-scrutiny standard that this Court has long applied to disclosure requirements, both inside and outside the election context.

B. Disclosure Requirements Imposed As Conditions On The Receipt Of Governmental Subsidies Are Not Subject To Exacting Scrutiny

In seeking to defend California's Schedule B disclosure requirement, respondent has emphasized that charitable organizations exempt from federal taxation are required by federal law to submit the same information about their major donors to the IRS. Resp. Supp. Br. 1, 5-6. But petitioners have not challenged that federal law, see AFPF Br. 45-47; TMLC Br. 53-55—and for good reason. The federal reporting provision is not a compelled-disclosure requirement. Rather, it is a condition on receiving a governmental subsidy in the form of tax exemptions and deductibility. See 26 U.S.C. 170, 501(a). Such conditions on governmental subsidies are not subject to exacting scrutiny. See, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 545-551 (1983). Respondent has not sought to characterize California's Schedule B requirement as such a condition, however—presumably because charitable organizations that fail to comply are not merely denied a subsidy but also barred from operating and fundraising in the State. Thus, the constitutionality of the IRS's collection of Schedule B information does not resolve these cases.

1. When a disclosure requirement is imposed as a condition on a governmental subsidy, exacting scrutiny does not apply. An organization seeking a subsidy is not *compelled* to disclose its contributors because it can simply forgo the governmental benefit, to which it has no entitlement. Accordingly, a disclosure requirement imposed as a condition on a governmental subsidy does

not raise the same First Amendment concerns as a requirement that compels disclosure as a regulatory measure. See *Regan*, 461 U.S. at 550 (contrasting "governmental provision of subsidies" with a situation in which "the State attempts to impose its will by force of law," where "constitutional concerns are greatest") (brackets, citation, and internal quotation marks omitted).

This Court's decision in *Regan* is instructive. There, the Court upheld a requirement that Section 501(c)(3) organizations that enjoy tax-exempt status refrain from lobbying activities. See 461 U.S. at 545. The Court determined that, although lobbying is protected by the First Amendment, the government does "not infringe[] any First Amendment rights or regulate[] any First Amendment activity" when it denies tax-exempt status to organizations engaged in lobbying because "Congress is not required by the First Amendment to subsidize lobbying." *Id.* at 546. The Court explained that "[b]oth tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system," *id.* at 544, and that Congress's "decision not to subsidize the exercise of a fundamental right does not infringe the right," *id.* at 549. Accordingly, Congress's decision to impose a viewpoint-neutral condition on the receipt of a governmental subsidy "is not subject to strict scrutiny," *ibid.*, even if, by choosing to accept the subsidy, the recipient "cannot exercise its freedom of speech as much as it would like," *id.* at 550.

2. Here, the requirement that charitable organizations file Schedule B with the IRS each year is a condition on the receipt of a subsidy under the Internal Revenue Code. See 26 U.S.C. 6033(b)(5). As in *Regan*, that subsidy takes the form of tax exemptions and deductibility, see 26 U.S.C. 170, 501(a), and any organization can

avoid the disclosure condition by choosing to forgo the subsidy. Heightened scrutiny therefore does not apply. See *Regan*, 461 U.S. at 545-551. Rather, such a condition may be upheld so long as it is reasonable, see *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353, 359-360 (2009); *Rust* v. *Sullivan*, 500 U.S. 173, 197 (1991); *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984); *Regan*, 461 U.S. at 550-551, and does not "reach outside" the federal tax-subsidy program, *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 217 (2013).

The federal disclosure requirement satisfies those requirements. Disclosure of a charitable organization's significant contributors is reasonably related to the IRS's administration of tax-subsidy laws that apply to Section 501(c)(3) charities. Indeed, Congress specifically added the disclosure requirement in the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, in order to "facilitate meaningful enforcement" of "new self-dealing rules and other provisions" regulating organizations that choose to claim tax-exempt status under Section 501(c)(3). H.R. Rep. No. 413, 91st Cong., 1st Sess. 36 (1969). The IRS thus properly collects Schedule B information as part of its administration of the federal tax-subsidy program, and the federal reporting provision is constitutional. See *Grove City Coll.*, 465 U.S. at 575 (rejecting a First Amendment challenge to a condition on financial assistance because the petitioner could "terminate its participation in the [federal] program and thus avoid [its] requirements"); *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959) (rejecting a First Amendment challenge to a regulation denying a tax deduction for lobbying expenses because "[p]etitioners are not being denied a tax deduction be-

cause they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets"); *Lewis Publ'g Co.* v. *Morgan*, 229 U.S. 288, 306-307 & n.3, 314-315 (1913) (rejecting a First Amendment challenge to a discounted postal rate conditioned on the recipient's making certain disclosures).

3. In contrast, respondent has not sought to defend California's Schedule B disclosure requirement as a condition on governmental subsidies. When petitioners did not comply with the requirement, respondent informed them not only that they might lose their state tax exemptions but also that they could be barred from operating or soliciting contributions in California. See 19-251 J.A. 55-57; 19-255 Pet. App. 181a-183a; *Bates*, 361 U.S. at 517, 524 (applying exacting scrutiny to a disclosure requirement imposed as a condition on "operating within [a] municipality"). Respondent therefore has acknowledged that exacting scrutiny applies here, Br. in Opp. 12-16, and the constitutionality of the IRS reporting provision does not resolve these cases.

C. The Cases Should Be Remanded For The Court Of Appeals To Reassess The As-Applied Burden On Associational Rights

For the most part, the court of appeals correctly applied the foregoing principles. The court was right to assess California's Schedule B disclosure requirement under exacting scrutiny and correctly rejected petitioners' facial challenges. But in addressing petitioners' as-applied challenges, the court's analysis was incomplete on the facts presented here. A remand is therefore warranted.

1. The court of appeals correctly identified exacting scrutiny as the applicable constitutional standard for

assessing California's disclosure requirement. 19-251 Pet. App. 15a. The court further correctly articulated the elements of exacting scrutiny, stating that it "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest," such that "the strength of the governmental interest * * * reflect[s] the seriousness of the actual burden on First Amendment rights." *Ibid.* (quoting *Reed*, 561 U.S. at 196). And the court rightly rejected petitioners' suggestion that it should instead "apply the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny" or "require the state to choose the least restrictive means of accomplishing its purposes." *Id.* at 16a.

2. Applying exacting scrutiny, the court of appeals correctly rejected petitioners' facial challenges to the Section B disclosure requirement. 19-251 Pet. App. 39-40a. Petitioners cannot demonstrate error in the court's conclusion that "the evidence adduced at these trials d[id] not prove the Schedule B requirement 'fails exacting scrutiny in a "substantial" number of cases, "judged in relation to its plainly legitimate sweep."'" *Id.* at 40a (quoting *Center for Competitive Politics* v. *Harris*, 784 F.3d 1307, 1315 (9th Cir.), cert. denied, 577 U.S. 975 (2015), in turn quoting *United States* v. *Stevens*, 559 U.S. 460, 473 (2010)).

In seeking to invalidate the requirement on its face, petitioners principally challenge the strength of the State's interest in requiring disclosure. AFPF Br. 30-34; TMLC Br. 33-43. But as the court of appeals explained, the disclosure requirement "'clearly furthers'" "'important government interests' in 'preventing fraud and self-dealing in charities by making it easier to police

for such fraud.'" 19-251 Pet. App. 22a (brackets, citation, and ellipsis omitted). Schedule B information can help state investigators "determine whether a charity is actually engaged in a charitable purpose, or is instead violating [state] law by engaging in self-dealing, improper loans, or other unfair business practices." *Id.* at 17a (citation omitted). For example, Schedule B information can allow state investigators "to determine when an organization has inflated its revenue by overestimating the value of 'in kind' donations." *Id.* at 19a (citation omitted); see *Citizens United* v. *Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) (explaining that Schedule B information "permits detection of schemes such as the 'intentional overstatement of the value of noncash donations in order to justify excessive salaries'") (brackets and citation omitted). Schedule B information can also help state investigators "trace money used for improper purposes," determine whether a charity is being used "as an improper vessel for gain," and identify other suspicious activity. 19-251 Pet. App. 21a.

Petitioners assert that respondent's effort to police fraud should be confined to issuing targeted audit letters and subpoenas. AFPF Br. 34-39; TMLC Br. 38, 42-43. But attempts to obtain Schedule B information through those alternatives would be less effective and less efficient. 19-251 Pet. App. 19a-21a. As the evidence showed, issuing a subpoena or audit letter would alert a charity to the State's investigation, which could allow it to hide assets, destroy documents, and fabricate records. *Id.* at 20a. Issuing a subpoena or audit letter would also be more expensive and burdensome, substantially delaying the State's ability to take action. See *id.* at 19a-21a. The Schedule B disclosure requirement

thus "increases the Attorney General's investigative efficiency" while avoiding the risk of revealing ongoing investigations. *Id.* at 19a (brackets and citation omitted).

Because the disclosure requirement "clearly furthers" "'important government interests,'" 19-251 Pet. App. 22a (brackets and citation omitted), a facial challenge cannot succeed unless "the strength" of those interests, in general, fails to "reflect the seriousness of the actual burden on First Amendment rights," *Reed*, 561 U.S. at 199 (citation omitted). As in *Reed*, however, petitioners' evidence of such a burden focuses "almost entirely on the specific harm they say would attend disclosure of [their own] information," *id.* at 200, with no evidence that similar harms would "attend the disclosure of a typical" charitable organization's donors, *id.* at 201.

Petitioners have not shown that donors who contribute to charitable organizations in general will face a reasonable probability of threats or harassment if their identities become known. While petitioners point to evidence that some of their contributors have previously been harassed on account of their association with petitioners, see AFPF Br. 50-51; TMLC Br. 44-50, many charitable organizations could not plausibly advance similar claims. Indeed, although some philanthropy is anonymous, it is common for charitable organizations to publicly acknowledge donations by publishing contributors' names. And many charitable organizations sell the names and contact information of their donors with no apparent concern that this conduct will subject their contributors to threats or harassment. See Ely R. Levy & Norman I. Silber, *Nonprofit Fundraising and Consumer Protection: A Donor's Right to Privacy*, 15 Stan. L. & Pol'y Rev. 519, 529-530 (2004). Because "there is

no reason to assume that any burdens imposed by disclosure of typical" charitable donations "would be remotely like the burdens [petitioners] fear in this case," their facial challenge to the Section B disclosure provision cannot succeed. *Reed*, 561 U.S. at 201.

3. The proper resolution of petitioners' as-applied challenges to the disclosure requirement presents a closer question. To determine the "actual burden on [petitioners'] First Amendment rights," the court of appeals recognized that it must consider the extent to which the disclosure requirement would have a "'deterrent effect'" on contributors' willingness to associate with petitioners. 19-251 Pet. App. 23a (citation omitted). That issue, in turn, required an assessment of whether petitioners could show "a reasonable probability that the compelled disclosure [of their Schedule B information] will subject [their significant contributors] to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 24a (citations omitted).

In evaluating the probability of such harm, all judges who have considered the evidence in these cases—from the district court judge to the court of appeals panel to the circuit judges who dissented from the denial of rehearing en banc—correctly emphasized the important distinction between public and nonpublic disclosure of Schedule B information. See 19-251 Pet. App. 25a-39a, 51a-53a, 91a-93a, 106a-109a. Many of this Court's cases involve the risk of threats, harassment, or reprisals by private parties following the disclosure of information to the public. See, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. at 462-463. But when, as here, a law involves only nonpublic disclosure—that is, disclosure of information to govern-

mental officials, who are required to keep the information confidential—such harms will presumably not occur, absent a showing that the officials themselves will misuse the information or will publicly release the information notwithstanding confidentiality requirements.

Here, petitioners did not show a reasonable probability that nonpublic disclosure of their Schedule B information to respondent will lead to threats, harassment, or reprisals from governmental officials themselves. See 19-251 Pet. App. 27a-28a, 48a-50a; 19-255 Pet. App. 58a-61a. Nor did petitioners establish that governmental officials would deliberately violate the State's current prohibition on the disclosure of Schedule B information to the public. See Cal. Code Regs. tit. 11, § 310(b) (2016); see also *United States Postal Serv.* v. *Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."). Thus, an assessment of the actual burden on the First Amendment rights that petitioners assert turns on (1) the risk that governmental officials will *inadvertently* disclose Schedule B information to the public, and (2) the risk that private parties will subject petitioners' contributors to threats, harassment, and reprisals if the information is publicly disclosed. See 19-251 Pet. App. 30a-39a.

In holding that petitioners had shown only a "modest" burden on their First Amendment rights, 19-251 Pet. App. 39a, the court of appeals reached a conclusion on only the first of those two issues and focused on the likelihood that *petitioners*' contributors' information, in particular, would be inadvertently disclosed. In light of measures respondent had taken to address previous breaches of confidentiality, the court determined that "[t]he risk of inadvertent disclosure of *any* Schedule B

information in the future is small, and the risk of inadvertent disclosure of *the plaintiffs'* Schedule B information in particular is smaller still." *Id.* at 38a. Having found no "reasonable probability that [petitioners'] Schedule B information will become public as a result of disclosure to [respondent]," the court declined to "decide whether [petitioners] have demonstrated a reasonable probability that the compelled disclosure of Schedule B information would subject their contributors to a constitutionally significant level of threats, harassment or reprisals if their Schedule B information were to become public." *Id.* at 34a.

Given the competing evidence in these cases and the district court's contrary finding that "there is a high risk of public disclosure," 19-251 Pet. App. 38a, the court of appeals erred in stopping its analysis without assessing how significant the harm would be to petitioners' contributors if their identities became publicly known. In deciding whether to make a donation, potential contributors will naturally consider not just the likelihood of inadvertent public disclosure, but also the probability and magnitude of the harms they could suffer if public disclosure occurred. The greater the probability and magnitude of those harms, the greater the chilling effect of the disclosure requirement, even if the threshold risk of inadvertent disclosure remains relatively small. On these unique facts, where respondent's "history" of not "maintain[ing] Schedule B information as securely as it should have * * * raises a serious concern," *id.* at 35a, the overall deterrent effect on the exercise of First Amendment rights should be assessed as a function of *both* variables: the probability of public disclosure and the severity of the harms such disclosure could produce.

Nor should petitioners be required to specifically establish that their contributors' information, as distinct from other organizations' contributors' information, would be inadvertently disclosed. In response to the dissent from the denial of rehearing en banc, the panel stated that it found the risk of public disclosure to be "exceedingly small" because "[t]he key question * * * was not whether there was a 'risk of inadvertent disclosure of *any* Schedule B information in the future,' but rather whether there was a significant 'risk of inadvertent disclosure of *the plaintiffs*' Schedule B information in particular.'" 19-251 Pet. App. 108a-109a. Of course, the bare claim that "[n]othing is perfectly secure on the internet" cannot "establish a significant risk of public disclosure." *Id.* at 37a. But to the extent the court of appeals required petitioners to offer proof of how respondent handles their specific information, that approach contradicts this Court's recognition that organizations seeking an as-applied exemption from a compelled-disclosure requirement should not be subject to "unduly strict requirements" and instead "must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim." *Buckley*, 424 U.S. at 74.

Because the court of appeals' analysis was incomplete, a remand is appropriate to allow the court to reassess the burden that California's disclosure requirement places on the associational rights petitioners assert. The court could then determine whether the disclosure requirement satisfies exacting scrutiny as applied to petitioners, in light of the principles set forth above.

If the court of appeals determines that the disclosure requirement does not withstand such scrutiny as applied to either petitioner, it should further consider whether a remedy that addresses the actual burden on First Amendment rights by further reducing the risk of inadvertent public disclosure—rather than by prohibiting the collection of petitioners' Schedule B information altogether—would be appropriate. See 19-251 Pet. App. 68a-69a (granting such a remedy at the preliminary injunction stage to "address the risk of public disclosure" without "preclud[ing] [respondent] from obtaining and using Schedule B forms for enforcement purposes").

CONCLUSION

The judgment of the court of appeals should be vacated, and the cases should be remanded for further proceedings.

Respectfully submitted.

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