Nos. 19-251 & 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
—v.—
XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
—v.—
XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, INC., AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, HUMAN RIGHTS CAMPAIGN, AND PEN AMERICAN CENTER, INC., IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The **American Civil Liberties Union, Inc. (ACLU)** is a nationwide, nonpartisan, organization with nearly 2 million members dedicated to defending the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. It is also a D.C. nonprofit corporation, and an organization described under Section 501(c)(4) of the Internal Revenue Code. **The American Civil Liberties Union Foundation, Inc. (ACLU Foundation)** is an affiliate of the ACLU, a New York not-for-profit corporation, and an organization described in Section 501(c)(3) of the Internal Revenue Code.

Both the ACLU and the ACLU Foundation are subject to the disclosure demand at issue in this case. Additionally, the First Amendment freedom to associate, and the concomitant right to associational privacy, are issues of great concern to the ACLU, its members, and the ACLU Foundation. The ACLU and the ACLU Foundation have participated in cases concerning associational privacy. *See, e.g.*, *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 55–57, 75–76 (1974) (ACLU challenged, on behalf of itself and its members, certain recordkeeping and disclosure provisions of the Bank Secrecy Act of 1970). More recently, the ACLU and ACLU Foundation, together with their state affiliates, have participated as plaintiffs in lawsuits challenging laws requiring nonprofit organizations to publicly disclose certain

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part and that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Respondent has consented to this *amici curiae* brief, and Petitioners have filed blanket consent letters on the docket.

donor information. *See Citizens Union v. Att'y Gen.*, 408 F. Supp. 3d 478 (S.D.N.Y. 2019); *ACLU of N.J. v. Grewal*, No. 3:19-CV-17807 (D.N.J. Mar. 11, 2020).

The **NAACP Legal Defense and Educational Fund, Inc. (LDF)** is a non-profit, non-partisan legal organization founded in 1940 to achieve racial justice and to ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color. As an organization that has engaged in litigation and advocacy that some have considered controversial, LDF has long had an institutional interest in ensuring the First Amendment associational rights and security interests of its donors and members. To that end, LDF has litigated many of the cornerstone legal authorities at the heart of this case, including *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (litigated and argued by Thurgood Marshall, with the assistance of Robert L. Carter and other LDF attorneys), and *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) (argued by Robert L. Carter and litigated by LDF attorneys).

The **Knight First Amendment Institute at Columbia University (Knight Institute)** is a non-partisan, not-for-profit organization that works to defend the freedoms of speech and the press in the digital age through strategic litigation, research, and public education. The Institute's aim is to promote a system of free expression that is open and inclusive, that broadens and elevates public discourse, and that fosters creativity, accountability, and effective self-government. The Knight Institute is particularly committed to protecting against the compelled disclosure of personal expressive or associational information that would chill core political activity. For

instance, the Institute is currently representing two U.S.-based documentary film organizations in a challenge to a State Department requirement that individuals applying for visas from abroad—including many of the plaintiffs' members and partners—register their social media handles with the government. *See Doc Society v. Blinken*, No. 1:19-cv-03632 (D.D.C.). As the Petitioners argue here, the lawsuit claims that the disclosure requirement significantly burdens protected expression and association and is not sufficiently tailored to the government's asserted interests.

The **Human Rights Campaign (HRC)**, the largest national lesbian, gay, bisexual, and transgender political organization, works to build an America where lesbian, gay, bisexual, and transgender (LGBTQ) people are ensured of their basic equal rights, and can be open, honest and safe at home, at work, and in the community. HRC has an interest in this case due to its status as a 501(c)(3) organization, the associational privacy interests of its members and donors, and its historical vantage. HRC has over three million members and supporters in all fifty states; some of those members and donors are public about their LGBTQ status, advocacy, or interests—and some are not. HRC engages in fundraising in various states and periodically receives contributions from donors who wish to remain anonymous, pseudonymous, or discreet. HRC members, supporters, and staff have faced threats and harassment and reasonably expect to encounter them in the future. Moreover, having been founded in 1980—a time when it was still deemed a criminal offense to be LGBTQ in many parts of America—HRC is keenly aware of the pressure and persecution that

early LGBTQ charities and organizations faced over the years, including in the hands of state officials.

PEN American Center, Inc. (PEN America or PEN) is a nonprofit organization that represents and advocates for the freedom to write and freedom of expression, both in the United States and abroad. PEN America is affiliated with more than 100 centers worldwide that comprise the PEN International network. Its Membership includes more than 7,500 journalists, novelists, poets, essayists, and other professionals. PEN America stands at the intersection of journalism, literature, and human rights to protect free expression and individuals facing threats for their speech. PEN America has a particular interest in opposing censorship schemes in all forms that inhibit creative and free expression. PEN champions the freedom of people everywhere to write, create literature, convey information and ideas, and express their views, recognizing the power of the word to transform the world. PEN America supports the First Amendment and freedom of association in the United States.

SUMMARY OF ARGUMENT

I. The disclosure law at issue here, at least as it has been implemented by California, risks undermining the freedom to associate for expressive purposes. That freedom, in turn, is fundamental to our democracy, and has long been protected by the First and Fourteenth Amendments. A critical corollary of the freedom to associate is the right to maintain the confidentiality of one's associations, absent a strong governmental interest in disclosure. If the State could categorically demand disclosure of associational information, the ability of citizens to organize to

defend values out of favor with the majority would be seriously diminished. As this Court recognized in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the compelled disclosure of an expressive association's members or supporters threatens to chill free association, because people may refrain from exercising those freedoms rather than expose themselves to government reprisal or private retaliation.

Disclosure requirements that threaten to chill the exercise of First Amendment rights are subject to exacting scrutiny: the government must establish that the disclosure requirement is substantially related to a sufficiently important governmental interest to justify the attendant chilling effect. This is a sliding-scale test that imposes a more stringent burden of justification on the government in direct proportion to the disclosure requirement's chilling effect.

II. In general, the compelled disclosure of associational information to the public dramatically increases the risk of private retaliation against the members and supporters of potentially controversial groups, is more likely to chill the exercise of associational freedoms, and is therefore subject to a more stringent form of exacting scrutiny than the compelled disclosure of information to the government on a confidential basis.

Exacting scrutiny is not fatal in fact, however. The compelled public-disclosure of associational information is often permissible when the interests served by the disclosure are especially significant. In the campaign finance context, for example, public disclosure can be substantially related to the government's interests in deterring public corruption,

identifying violations of substantive campaign finance restrictions, and informing the electorate. This Court has accordingly upheld public-disclosure requirements for electioneering communications in the run-up to an election and express advocacy for the election or defeat of particular candidates for elective office.

In other contexts, where public disclosure is not substantially related to especially important governmental interests, this Court has often struck down laws compelling the public disclosure of expressive or associational information. Applying these precedents, lower federal courts have properly held that laws broadly compelling nonprofit organizations to publicly disclose their donors fail exacting scrutiny and violate the First Amendment.

III. California's blanket demand for nonprofit organizations' IRS Form 990 Schedule B documents, which include the names and addresses of major donors, is not designed to facilitate public disclosure; indeed, California is ostensibly committed by law to maintaining the confidentiality of nonprofits' Schedule B forms. But in light of California's record of inadvertently publicizing these sensitive documents, its demand should be treated as a *de facto* public-disclosure requirement, triggering a more stringent form of exacting scrutiny. The record in this case discloses a disturbing pattern of failures to keep the forms confidential. California's assurances that previous mistakes will not be repeated is unlikely to persuade donors that their information, once handed over to the State, will remain confidential. The resulting chill to First Amendment interests harms donors, nonprofit organizations, and civil society writ large.

California has not carried its burden of justification under the exacting scrutiny applicable to compelled public-disclosures of associational information. In the absence of a substantial risk of public disclosure, California's asserted interests in investigative efficiency and fraud prevention may well sustain its disclosure demand; however, these interests are insufficient to justify the substantial chill threatened by the State's *de facto* public-disclosure requirement. California cannot force nonprofit organizations and their supporters to bear the risk of the State's demonstrated inability to maintain the confidentiality of sensitive associational information.

The Court should therefore uphold Petitioners' as-applied challenge to California's donor-disclosure demand. As-applied, rather than facial, relief is appropriate in this case because Petitioners' First Amendment claim depends heavily on fact-specific circumstances contributing to the disclosure requirement's chilling effect. The Court need not decide at this juncture whether California could apply the disclosure requirement to Petitioners and similarly situated groups if it eventually demonstrates that it is capable of maintaining the confidentiality of Schedule B forms.

ARGUMENT

"Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Disclosure requirements that threaten to chill expression and association are therefore subject to

exacting scrutiny—a sliding-scale test that requires the government to show that its interest in forcing the disclosure is sufficient to justify the disclosure requirement's actual burden on the challenger's First Amendment rights.

Because *public* disclosure of expressive or associational information is particularly likely to chill the exercise of First Amendment freedoms, an especially stringent form of exacting scrutiny applies to public-disclosure requirements. That is the appropriate standard here, even though the challenged law formally requires only disclosure to the government, and not to the public, because California has repeatedly failed to protect the confidentiality of the records sought. In other words, California's disclosure demand is a *de facto* public-disclosure requirement, and should be subject to particularly stringent exacting review. Even public-disclosure requirements have been upheld where the government demonstrates that they are carefully tailored to an especially important interest, such as the interest in public oversight of campaign finance. In this case, however, California has failed to demonstrate that its *de facto* public-disclosure requirement is appropriately tailored to any sufficiently important governmental interest.

I. COMPELLED DISCLOSURES THAT INFRINGE ASSOCIATIONAL PRIVACY ARE SUBJECT TO EXACTING SCRUTINY.

"In democratic countries the science of association is the mother science; the progress of all the others depends on the progress of that one." Alexis de Tocqueville, DEMOCRACY IN AMERICA 492 (Harvey C. Mansfield & Delba Winthrop eds., 2000). As this

Court has recognized, the First and Fourteenth Amendments established constitutional protection for this fundamental democratic practice. "The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981); *see also NAACP v. Alabama*, 357 U.S. at 460 ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."). Some of this Court's most enduring precedents reinforce this fundamental principle. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907–08 (1982); *Hague v. CIO*, 307 U.S. 496, 512–13 (1939); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); *Whitney v. California*, 274 U.S. 357, 372–73 (1927) (Brandeis, J., concurring).

In *NAACP v. Alabama*, the Court established that the "compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective . . . restraint on freedom of association," in violation of the First and Fourteenth Amendments. 357 U.S. at 462. In that case, Alabama sued the NAACP, alleging that the organization failed to comply with certain statutory qualification requirements imposed on out-of-state corporations conducting business in Alabama. 357 U.S. at 451. On the same day the suit was filed, the trial court issued an *ex parte* order prohibiting the NAACP from doing any business in the state or taking steps to satisfy the qualification requirements. *Id.* at 452–53. After the

NAACP demurred and moved to dissolve the *ex parte* order, the state moved for an order compelling the NAACP to produce for the Attorney General's inspection a list of its members and agents in Alabama. *Id.* at 453. The state argued that these records were necessary to establish whether the NAACP was engaged in intrastate business within the meaning of the qualification statute. *Id.* The trial court ordered the NAACP to produce the requested records and, after the NAACP refused to disclose its membership lists, issued a civil contempt judgment against the NAACP. *Id.*

Recognizing that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs," *id.* at 462, this Court reversed the civil contempt judgment. As the Court observed, the NAACP had shown "that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* Alabama argued that the reprisals perpetrated against the NAACP's members were the result of "private community pressures," rather than state action, but this Court rejected the distinction, noting that "it is only after the initial exertion of state power represented by the production order that private action takes hold." *Id.* at 463. In short, the disclosure order infringed the NAACP's freedom to associate because the "fear of exposure of their beliefs shown through their associations and . . . the consequences of this exposure" threatened to "induce members to

withdraw from the Association and dissuade others from joining it." *Id.* at 462–63.

The Court proceeded to analyze whether the state's interest in obtaining the NAACP's membership records was "sufficient to justify" the burden imposed by the disclosure order. *Id.* at 463. It concluded that the compelled disclosure did not have a "substantial bearing" on the state's legitimate investigatory interests, because the NAACP had already admitted that it was operating in the state, had offered to comply in all respects with the qualification statute, and had already turned over all records subject to the disclosure order except its membership lists. *Id.* at 464. The Court accordingly concluded that the state had "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.

In the wake of *NAACP v. Alabama*, this Court repeatedly blocked government attempts to compel the NAACP to disclose its members and donors. *See Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 551 (1963) (reversing a contempt judgment against the president of the NAACP's Miami branch for refusing to comply with a subpoena requiring him to bring the NAACP's membership list to legislative committee hearings for the purpose of verifying the organization's membership); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961) (upholding a temporary injunction that prohibited Louisiana from compelling the NAACP to comply with a statute requiring nonprofit organizations to file annually with the Secretary of State a list disclosing the names and addresses of their members and officers in the state); *Bates v. City of Little Rock*, 361

U.S. 516, 527 (1960) (reversing convictions against NAACP officers under municipal ordinances requiring all local organizations to disclose identifying information for their members and contributors, which information would then be made available for public inspection by law). The Court has similarly invalidated state laws requiring individuals to disclose their organizational memberships to the government. *See Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (striking down an Arkansas statute requiring public school teachers to file annual affidavits with the relevant hiring authority listing every organization to which they belonged or regularly contributed over the preceding five years).[2]

Over time, the Court elaborated the exacting scrutiny standard to assess the constitutionality of disclosure requirements that threaten to chill associational freedoms. *See Buckley v. Valeo*, 424 U.S. 1, 64 & n.73 (1976) (per curiam) ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." (collecting cases)). Exacting scrutiny "requires a substantial relation between the

[2] The Court has noted that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (alteration in original) (quoting *Cal. Bankers Ass'n v. Schultz*, 416 U.S. 21, 78–79 (1974) (Powell, J., concurring)).

disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (citations and internal quotation marks omitted). In other words, exacting scrutiny is a sliding-scale test, where the government's burden of justification is proportional to the chill threatened by the disclosure requirement. Disclosure requirements that are more likely to chill associational freedoms must be more narrowly tailored to stronger governmental interests to survive review.

Courts apply a different test when the government compels the disclosure of sensitive associational information as a prerequisite for a tax exemption or a similar benefit. *See Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361 (11th Cir. 2003) (holding that Section 527(j) of the Internal Revenue Code, which requires political organizations to disclose the name, address, and occupation of certain contributors in order to qualify for tax-exempt status, "enacted no barrier to the exercise of the appellees' constitutional rights" (citing *Regan v. Tax'n with Representation of Wash.*, 461 U.S. 540, 544, 549 (1983))); *cf. Bates*, 361 U.S. at 527 (rejecting the cities' argument that the compelled disclosures were necessary to administer occupational license taxes, where there was no indication the NAACP was subject to the taxes and the NAACP had not applied for any exemption). Because California's disclosure requirement applies without regard to whether a charitable organization seeks tax-exempt status under California law, these cases are inapposite here. *See* Cal. Gov't Code § 12585; Cal. Code Regs. tit. 11, §

301. Thus, California's disclosure demand must be evaluated under exacting scrutiny.

II. PUBLIC-DISCLOSURE REQUIREMENTS ARE CONSTITUTIONALLY SUSPECT, EXCEPT IN CIRCUMSTANCES WHERE THEY ARE CLOSELY TIED TO AN ESPECIALLY IMPORTANT GOVERNMENTAL INTEREST, SUCH AS THE INTEREST IN PUBLIC OVERSIGHT OF CAMPAIGN FINANCE.

Disclosure requirements that directly or indirectly lead to the release of sensitive associational information to the public are subject to a more stringent form of exacting scrutiny than limited disclosures to the government. "[W]hen information about one's donation to a group is available to the public, it is more plausible that people who are opposed to the mission of that group might make a donor suffer for having given to it." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018) [hereinafter *Citizens United II*]. In general, the compelled disclosure of expressive or associational information to the public is therefore more likely to chill the exercise of First Amendment rights than the compelled disclosure of such information to the government on a reliably confidential basis.

In *NAACP v. Alabama*, for instance, the threatened chilling effect was predicated on the risk that public revelation of the NAACP's Alabama membership would give rise to "private community pressures" against the NAACP's members, 357 U.S. at 463, including "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," *id.* at 462. Similarly, in *Bates*, the

"fear of community hostility and economic reprisals that would follow public disclosure of the [NAACP's] membership lists had discouraged new members from joining the organizations and induced former members to withdraw." 361 U.S. at 524. And in *Shelton*, the Court recognized that the mere possibility that teachers' organizational affiliations might be publicly disclosed contributed substantially to the statute's chilling effect. 364 U.S. at 486 & n.7. In short, the risk that sensitive associational information will be publicly revealed "raise[s] the stakes" of a First Amendment challenge, and requires the government to carry a correspondingly heavier burden of justification. *Citizens United II*, 882 F.3d at 384.

Even the more stringent form of exacting scrutiny, however, is far from fatal in fact. The government may compel public disclosure of expressive or associational information where it is substantially related to important governmental interests. The Court should be careful to avoid overbroad pronouncements that might call into question the viability of disclosure requirements in appropriate contexts. For instance, public-disclosure requirements serve especially compelling interests in the context of electoral campaigns, where transparency furthers the interest in "curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68; *see also Doe*, 561 U.S. at 199 ("Public disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot.").

In *Buckley*, this Court held that the disclosure provisions of the Federal Election Campaign Act did not violate the First Amendment. Those provisions

required any "individual or group, other than a political committee or candidate, who makes contributions or expenditures of over $100 in a calendar year other than by contribution to a political committee or candidate" to file quarterly reports with the Federal Election Commission, which then made the reports available for public inspection and copying. *Buckley*, 424 U.S. at 63–64 (citation and internal quotation marks omitted).

While acknowledging that exacting scrutiny was warranted "because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," the *Buckley* Court held that disclosure requirements in the campaign finance context advance three governmental interests related to the "free functioning of our national institutions," *id.* at 66 (citation omitted): (1) providing information to voters, so that they can evaluate candidates for office; (2) deterring public corruption and the appearance of corruption through public transparency; and (3) facilitating the detection of violations of FECA's contribution limitations. *Id.* at 66–68. In particular, *Buckley* noted that FECA's disclosure requirements were "part of Congress' effort to achieve 'total disclosure,'" in response to "the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act." *Id.* at 76.

The plaintiffs conceded that FECA's disclosure requirements "certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption," *id.* at 68, but they challenged the application of the disclosure

requirements to minor parties and independent candidates. Observing that it was "highly speculative" whether the disclosure requirement would impose "any serious infringement on [the] First Amendment rights" of minor parties and independent candidates, the Court refused to exempt them categorically. *Id.* at 70–73. The Court, however, acknowledged that a party may be entitled to as-applied relief under *NAACP v. Alabama* where it demonstrates "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74; *see also Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982).

The plaintiffs also challenged the application of the disclosure requirements to independent expenditures. *Buckley*, 424 U.S. at 75. The Court held that FECA's disclosure requirement for independent expenditures, narrowly construed to encompass only express advocacy for or against a candidate while excluding other forms of partisan discussion, was sufficiently related to the government's interest in informing the electorate to survive exacting scrutiny. *Id.* at 80–81. *See also Citizens United v. FEC*, 558 U.S. 310, 368–69 (2010) [hereinafter *Citizens United I*] (upholding the Bipartisan Campaign Reform Act's public disclaimer and disclosure requirements for electioneering communications, on the ground that these requirements were substantially related to the government's compelling interest in informing the electorate regarding the source of speech about candidates shortly before an election).

Outside the candidate electoral context, this Court has often struck down laws compelling public

disclosure of expressive or associational information, after concluding that they were not substantially related to an important governmental interest. *See, e.g.*, *Talley v. California*, 362 U.S. 60 (1960) (invalidating a Los Angeles ordinance prohibiting the distribution of handbills that did not identify the names and addresses of persons who prepared, distributed or sponsored them).

The Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), is instructive. In that case, a woman was prosecuted under an Ohio statute prohibiting the distribution of anonymous campaign literature expressing her opposition to a proposed school tax levy. *Id.* at 337–38 & n.3. The state asserted that the statute was substantially related to "its interest in preventing fraudulent and libelous statements and its interest in providing the electorate with relevant information." *Id.* at 348.

This Court rejected both justifications. It held that the statute was not substantially related to the government's interest in preventing fraudulent and libelous statements, because it "encompasse[d] documents that are not even arguably false or misleading," and because Ohio had failed to demonstrate that the restriction was either necessary or sufficient to prevent such statements. *Id.* at 351–53. The Court also held that "[t]he simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit," at least with respect to pure issue advocacy. *Id.* at 348.

The *McIntyre* Court distinguished *Buckley* by pointing out that, whereas FECA's disclosure

requirements were limited to expenditures in candidate elections, Ohio's statute applied directly to pure speech regarding public referenda or other issue-based ballot measures, such as McIntyre's anonymous leaflets about the proposed school tax levy. Thus, Ohio's statute was "more intrusive" than FECA, because "[d]isclosure of an expenditure and its use, without more, reveals far less information" than disclosure of an author's identity, *id.* at 355; and Ohio's statute "rest[ed] on different and less powerful state interests" than FECA, because candidate-related speech carries a greater risk "that individuals will spend money to support a candidate as a quid pro quo for special treatment after the candidate is in office" than pure issue advocacy, *id.* at 356.

Applying these precedents, lower federal courts have properly held that laws compelling nonprofit organizations to publicly disclose the identities of their donors, without a substantial nexus to a sufficiently important governmental interest, violated the First Amendment. In *Citizens Union of N.Y. v. Att'y Gen.*, 408 F. Supp. 3d 478 (S.D.N.Y. 2019), a district court invalidated a New York donor-disclosure law. The law required Section 501(c)(3) organizations to publicly disclose all donors who contributed more than $2,500, "if the 501(c)(3) itself makes an in-kind donation to a 501(c)(4) that engages in lobbying in New York, either on its own behalf or through a retained lobbyist." *Id.* at 489. It required Section 501(c)(4) organizations to publicly "disclose donors who contributed $1,000 or more," if "the 501(c)(4) expends more than ten thousand dollars in a calendar year on communications made to at least 500 members of the public concerning the position of any elected official relating to any 'potential' or pending

legislation, unless the donors made contributions only into a segregated account not used to support such communications." *Id.* at 491–92.

First, the court held that the donor-disclosure requirement imposed on 501(c)(3) organizations was not substantially related to any sufficiently important governmental interest to justify the public-disclosure requirement's chilling effect. *Id.* at 504. The court observed that the laws upheld by this Court in cases like *Buckley*, and *Citizens United I* compelled the public disclosure "of those contributing to candidates" or to "campaigns supporting identified candidates." *Id.* None of those laws "approached the tangential and indirect support of political advocacy" conducted by 501(c)(3) organizations. *Id.*

Along the same lines, the court held that the donor-disclosure requirement imposed on Section 501(c)(4) organizations—which was not confined to those circumstances "where the entity engages in express advocacy for a candidate or electioneering," but rather applied to a "broad[] swath" of "pure issue advocacy before the public"—infringed "[t]he First Amendment rights to publicly discuss and advocate on issues of public interest, and to do so anonymously." *Id.* at 506–07. New York asserted an interest in informing the public about the identities of those funding pure issue advocacy, but the court responded that "[t]he cases upholding donor disclosure requirements have never recognized an informational interest of such breadth." *Id.* at 507. To the contrary, this Court's precedents "strongly suggest that compelled [public] identity disclosure is impermissible for issue-advocacy communications" untethered to electioneering. *Id.* As noted elsewhere in *Citizens Union*, however, the application of exacting scrutiny

is quite different with respect to confidential disclosures to the government that are not at substantial risk of becoming public. *See id.* at 501–02 (citing *Citizens United II*, 882 F.3d at 384).

The distinction between disclosure requirements closely tied to electoral expenditures and those, like the one at issue here, that apply broadly to nonprofits also informed a recent decision invalidating a New Jersey disclosure law. *Ams. for Prosperity v. Grewal*, No. 319-CV-14228, 2019 WL 4855853 (D.N.J. Oct. 2, 2019). The statute at issue required "independent expenditure committees"—defined as Internal Revenue Code Section 527 and Section 501(c)(4) organizations that spent more than $3,000 on political communications annually—to disclose the identities of donors who contributed more than $10,000 annually to the state's Election Law Enforcement Commission, *id.* at *1, which would then make the disclosures available for public inspection, N.J. Admin. Code § 19:25-2.4(a). On the plaintiff's motion for preliminary injunction, the court held that it was likely to succeed in demonstrating that the Act's donor-disclosure requirement facially violated the First Amendment. *Ams. For Prosperity*, 2019 WL 4855853, at *19.

While acknowledging that "[c]ourts have found a substantial relation for what have come to be called electioneering communications, as well as for direct lobbying," *id.* at *16 (collecting cases), the court concluded that New Jersey's statute swept far more broadly. The New Jersey statute applied to "practically any media spending," during almost any time of the year, that includes "any fact or opinion about a candidate or public question." *Id.* at *17–*19. The court's preliminary injunction was subsequently

converted into a permanent injunction with New Jersey's consent. Consent Order Converting Prelim. Inj. into Final J. Permanently Enjoining Enforcement of P.L. 2019, c. 124, *Ams. for Prosperity*, No. 3:19-CV-14228.

These cases reflect a critical distinction. Where public-disclosure requirements are closely tailored to especially important governmental interests, as in the carefully defined campaign finance context, they may satisfy exacting scrutiny. Beyond these narrow circumstances, however, public-disclosure requirements generally fail exacting scrutiny.

III. CALIFORNIA'S *DE FACTO* PUBLIC-DISCLOSURE REQUIREMENT IS NOT SUBSTANTIALLY RELATED TO ANY SUFFICIENTLY IMPORTANT GOVERNMENTAL INTEREST.

Unlike the laws discussed above, California does not ostensibly seek to compel *public* disclosure of nonprofit organizations' donors listed on their IRS Form 990 Schedule B documents.[3] California law expressly requires state officials to keep nonprofit organizations' Schedule B forms confidential under almost all circumstances. *See* Cal. Code Regs. tit. 11,

[3] Schedule B requires nonprofit organizations to list the names and addresses of individuals who contributed $5,000 or more in a given tax year. 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). Certain nonprofit organizations, such as Petitioners, need only list the names and addresses of individuals who contributed more than $5,000 if their donations accounted for more than 2% of the organization's charitable receipts that year. *Id.* § 1.6033-2(a)(2)(iii)(a). The IRS does not include Schedule B forms among the documents it makes available for public inspection. *See* 26 U.S.C. § 6104.

§ 310(b). However, California has repeatedly failed to maintain the confidentiality of this information. As such, the disclosure demand as applied should be treated as requiring *de facto* public disclosure and, for that reason, subjected to a more stringent form of exacting scrutiny. As explained below, California's disclosure demand fails that scrutiny.

The breaches of confidentiality here were massive. While this case was pending before the district court, Petitioner Americans for Prosperity Foundation identified 1,778 confidential Schedule Bs that the Attorney General had inadvertently posted on the State Registry of Charitable Trusts' website, "including 38 which were discovered the day before . . . trial." Pet. App. 52a.[4] Among these were the Schedule B form for Planned Parenthood Affiliates of California, which contained the names and address of hundreds of donors. *Id.* Some Schedule B forms had remained on the website since 2012. Pet. App. 36a. Additionally, "[b]y altering the single digit at the end of the URL" corresponding to each file on the Registry website, Petitioner's expert witness "was able to access, one at a time, all 350,000 of the Registry's confidential documents." Pet. App. 36a.

To be sure, "the sheer possibility that a government agent will fail to live up to her duties" is not a sufficient basis "to assume those duties are not binding." *Citizens United II*, 882 F.3d at 384. In this case, however, California's "systematic incompetence in keeping donor lists confidential [is] of such a

[4] All references to the Appendix to the Petition for Certiorari in this *amici curiae* brief refer to the Appendix to the Petition for Certiorari in *Americans for Prosperity Foundation v. Becerra*, No. 19-251.

magnitude as to effectively amount to publication." *Id.* (parenthetically summarizing the district court's findings in this case). California has pledged to address the identified security vulnerabilities, implementing procedural quality checks and adopting other safeguards. Pet. App. 36a–37a. But these mid-litigation assurances are cold comfort to donors concerned that they may be exposed to harassment if their identities are publicly revealed, given the long history of inadvertent disclosure in this case and the irreparable nature of privacy violations.

Petitioners have also demonstrated that their donors are likely to be chilled by their legitimate fear that public disclosure of their identities could lead to reprisals. Indeed, Petitioners have shown that people publicly associated with their organizations have been subjected to threats, harassment or economic reprisals in the past. Pet. App. 31a–33a. *Cf. Cmty-Serv. Broad. of Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1118 (D.C. Cir. 1978) (en banc) ("To be sure, where actual instances of harassment are established . . . the case is a stronger one . . . The absence of such concrete evidence [of threats, harassment, or reprisals], however, does not mandate dismissal of the claim out of hand; rather, it is the task of the court to evaluate the likelihood of any chilling effect, and to determine whether the risk involved is justified in light of the purposes served by the statute."). Given the apparently significant possibility that California will once again inadvertently disclose nonprofits' Schedule B forms, Petitioners' donors—and many donors to nonprofit organizations across the political spectrum—will understandably choose to limit their associations rather than expose themselves to an increased risk of harassment or reprisals.

The chilling effect created by California's disclosure demand under these circumstances will not just affect donors, however. Nonprofit organizations must decide whether to comply with California's disclosure demands, thereby jeopardizing their relationships with donors who do not want their information to be at substantial risk of public disclosure, or forfeit their right to solicit donations in the country's largest state. *See Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (holding that the First Amendment protects charitable appeals for funds). Thus, both individuals and organizations must pay the price for California's inadvertent disclosures. Ultimately, the public as a whole will suffer from a diminished civil society if people do not feel free to associate without risk of reprisals.

Thus, in the context of Petitioners' as-applied challenges, California's donor-disclosure requirement must be evaluated under the exacting scrutiny applied to the compelled public-disclosure of associational information for potentially controversial groups. On this record, the requirement cannot satisfy that demanding standard.

California has not argued that public disclosure of nonprofit organizations' Schedule B forms is substantially related to any important governmental interest; nor could it, since the disclosures at issue here were contrary to California law. Instead, California argues that it needs blanket, pre-investigation access to nonprofit organizations' Schedule B forms in order to "polic[e] charitable fraud and self-dealing." Br. in Opp. 22–24. The District Court did not find this interest especially compelling. Noting that California had not identified "even a

single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts," it found that California's disclosure requirement "demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years." Pet. App. 47a. The Court of Appeals rejected this finding, however, crediting testimony that Schedule B information facilitates investigative efficiency and allows the Attorney General's office to flag suspicious activity without tipping off the organization under investigation. Pet. App. 17a–22a (citing *Citizens United II*, 882 F.3d at 382).

These law enforcement interests may justify disclosure to the government where reliable assurances of confidentiality are in place. Thus, in *Citizens United II*, the Second Circuit deemed similar interests sufficient to justify New York's law compelling the disclosure to the government of nonprofit organizations' Schedule B forms at the lower end of exacting scrutiny, *where there were no well-pleaded allegations that the forms had ever been inadvertently revealed to the public*. *See* 882 F.3d at 384. But California's extensive history of inadvertently disclosing nonprofit organizations' confidential Schedule B forms calls for more exacting scrutiny. Moreover, targeted disclosure demands—such as individualized audit letters and subpoenas—remain at the State's disposal to investigate groups that are suspected of engaging in unlawful activity.

Under these circumstances, California's *categorical* disclosure requirement for any nonprofit that seeks to solicit donations in the state cannot be sustained. Pet. App. 45a–48a. Where, as here, the

disclosure demands are not even ostensibly tied to public transparency regarding campaign finance, or any other especially sensitive subject of regulation, "[t]here is no substantial relation between the requirement that the identity of donors to [nonprofit organizations] be *publicly* disclosed and any important government interest." *Citizens Union*, 408 F. Supp. 3d at 504 (emphasis added).

This Court should therefore reverse the court of appeals' decision and hold that California's donor-disclosure requirement—on this record of recent, extensive public disclosures without justification—violates the First and Fourteenth Amendments as applied to Petitioners. As-applied, rather than facial, relief is appropriate here, for two reasons. First, as-applied challenges are often, though not always, "the more proper way to call into question disclosure regulations," because the chill that accompanies disclosure is the touchstone for the constitutional analysis; groups that are not likely to be chilled by the compelled disclosure are less likely to have a valid First Amendment claim. *Citizens United II*, 882 F.3d at 384 n.3; *see also, e.g.*, *Citizens United I*, 558 U.S. at 370 (citing *McConnell v. FEC*, 540 U.S. 93, 198 (2003)).

Second, as-applied relief is appropriate because Petitioners' chill depends largely on California's recent failures to maintain the confidentiality of Schedule B forms in its possession. If California demonstrates a reliable commitment to maintaining the confidentiality of Schedule B forms, then the threatened chill to Petitioners' donors may decrease, and the donor-disclosure requirement may survive under a more lenient form of exacting scrutiny. Under those circumstances, California may once again

attempt to defend the constitutionality of its disclosure requirement. But this Court need not reach those questions at this juncture. On this record, California's disclosure requirement violates Petitioners' rights under the First and Fourteenth Amendments.

CONCLUSION

The Court should reverse the judgment below.

Respectfully Submitted,

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