No. 19-251

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.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest.

PARTIES TO THE PROCEEDINGS

Petitioner Americans for Prosperity Foundation ("AFPF") was the appellee/cross-appellant in the court of appeals and the plaintiff in the district court.

Respondent Xavier Becerra, in his official capacity as the Attorney General of California, was appellant/cross-appellee in the court of appeals.

Kamala Harris, in her official capacity as the then Attorney General of California, was originally the appellant/cross-appellee in the court of appeals and the defendant in the district court; she was replaced as a party by Respondent Xavier Becerra when he became the Attorney General of California in 2017.

A Rule 29.6 Statement for AFPF appears in the Petition for a Writ of Certiorari at ii.

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INTRODUCTION

"[P]rivacy in group association" has long been recognized as "indispensable to preservation of [the] freedom of association" protected by the First Amendment. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). As such, a State may not compel a private group to disclose the identities of its members and donors unless such compelled disclosure is narrowly tailored to an overriding government interest.

Yet California seeks to shed these established First Amendment strictures. Its Attorney General claims license to demand (on pain of sanction) that all nonprofits, in order to operate in California, first produce the names of their top donors nationwide as listed on the confidential IRS Form 990 Schedule B. So long as this Court's precedents stand, California's disclosure demand cannot.

The record makes clear that California has no need to compel this sensitive donor information to serve any law-enforcement goal. California virtually never uses Schedule B for law-enforcement purposes. And State officials can readily obtain the same information when needed through the far narrower alternative of a targeted audit letter or subpoena.

At the same time, the record amply demonstrates the chilling effect of California's overbroad approach to compiling donor information. Violating purported assurances of confidentiality, California employees posted over 1,800 confidential Schedule B forms listing the names and addresses of charitable donors on a public website. Such misuse is the predictable result of such indiscriminate collection, and it subjects

all charitable donors to potential intimidation, retaliation, and harassment. Indeed, the specter of harmful publicity chills charitable donors from contributing to private charities in the first place, potentially drying up charities' most important sources of support and further inhibiting the freedom of association.

The Ninth Circuit misread this Court's precedents as permitting compulsion of donor identities without the need for narrow tailoring. But fit matters in the First Amendment context. The "exacting scrutiny" this Court has long applied to forced disclosure requirements requires a State to show that the means narrowly fit the ends. By excising the tailoring requirement from the standard of scrutiny it applied, the Ninth Circuit rendered that scrutiny toothless—reducing it to rational-basis review in all but name.

That holding was incorrect and warrants reversal. On any standard of heightened scrutiny, California's Schedule B requirement is unconstitutional on its face.

A holding of facial unconstitutionality here would not jeopardize existing campaign-finance or federal tax laws. It would simply bring California into line with the 47 States that protect their citizens from charitable fraud without compelling sweeping disclosure of Schedule Bs.

While the Ninth Circuit relied almost exclusively on precedents from the election context, those precedents have no application here, and invalidation of California's disclosure demand would have no effect on them. Campaign-finance disclosure laws have survived First Amendment challenges because they

serve the traditional goal of promoting public transparency and informed decision-making in the electoral context. But no such electoral-transparency interest exists or is even asserted here, for Schedule B is supposed to be kept confidential from the public, as California agrees. Nor need reversal undermine the federal statutory requirement that charities submit Schedule B to the IRS. Schedule B derives from a statutory scheme governing tax collection nationwide, and it is subject to confidentiality protections backed by criminal and civil penalties at the federal level.

On the other hand, upholding California's disclosure requirement would effectively abandon this Court's seminal precedents and let law enforcement prevail virtually every time in demanding donor information. That result would break faith with our best constitutional traditions. The Federalist Papers, published pseudonymously, helped persuade a new nation to endorse the Constitution. This Court protected the NAACP's members from intimidation by State officials in the Jim Crow South. For decades since, large donors to LGBTQ causes remained anonymous because they feared the consequences. Historic strides have often been achieved by private groups espousing ideas that others may (at a particular time and place) violently oppose. Our country would be far less just—and the public square less diverse—if Americans could not support causes anonymously.

This is not the time or the climate to weaken First Amendment rights to anonymity. Social and political discord have reached a nationwide fever. Perceived ideological opponents are hunted, vilified, and targeted in ways that were unthinkable before the

dawn of the Internet. As partisan pendulums swing back and forth in governmental offices, and as online campaigns rage against perceived ideological foes, donors to causes spanning the spectrum predictably fear that exposure of their identities will trigger harassment and retaliation far surpassing anything reasonable people would choose to bear. Vindicating freedom of association in this context will therefore mean the difference between preserving a robust culture and practice of private association and charitable giving, versus opening the door to chilling governmental intrusion.

The Court should reverse the Ninth Circuit and hold that California's indiscriminate demand for donor information is unconstitutional on its face or, at a minimum, as applied to AFPF.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-40a) is reported at 903 F.3d 1000. Its order denying rehearing *en banc*, along with the opinions dissenting from the denial and responding to the dissent (Pet. App. 74a-112a), are reported at 919 F.3d 1177. The district court's opinion (Pet. App. 41a-56a) is reported at 182 F. Supp. 3d 1049.

The Ninth Circuit's prior opinion at the preliminary-injunction stage (Pet. App. 57a-69a) is reported at 809 F.3d 536. The district court's preliminary-injunction opinion (Pet. App. 70a-73a) is unreported but available at 2015 WL 769778.

JURISDICTION

The Ninth Circuit issued its opinion on September 11, 2018, and denied rehearing *en banc* on March 29, 2019. Justice Kagan extended the time to file a

petition for a writ of certiorari to August 26, 2019. AFPF filed its petition that day, and this Court granted review on January 8, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

A. California's Disclosure Requirement

The California Attorney General regulates charities in California, Cal. Gov't Code §§12581, 12598(a), and maintains a Registry of Charitable Trusts ("Registry"), *id.* §12584. All charities that operate or fundraise in California—including nonprofit organizations that are tax-exempt under 26 U.S.C. §501(c)(3)—must register with the Registry and annually renew that registration. Cal. Gov't Code §§12585, 12586; Attorney General's Guide for Charities (Apr. 2020) at 1-2, 44-46, 100-102.[1] Around 118,000 charities are registered in California. JA361. Over 60,000 renew their registration each year. JA341.

To register annually, charities must file various forms, including their federal tax return, IRS Form 990. Cal. Code Regs. tit. 11, §301. Schedule B to IRS

[1] https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf.

Form 990—entitled "Schedule of Contributors" and intended to inform the IRS's administration of federal taxes—requires 501(c)(3) organizations to list the names and addresses of their major donors. JA59-64. An organization must list the name and address of each individual who contributed $5,000 or more in a tax year, unless the organization satisfies certain conditions, in which case it may instead list the name and address of each individual who donated more than 2% of all contributions that year. 26 C.F.R. §1.6033-2(a)(2)(ii)(F), (a)(2)(iii)(A).

For years, most tax-exempt organizations completed Schedule B. In 2020, however, the IRS amended its regulations to eliminate its discretionary rule that tax-exempt organizations—other than 501(c)(3) and 527 organizations—report donor names and addresses to the IRS. *See* Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959, 31962-66 (May 28, 2020).

Federal statutes protect the confidentiality of Schedule B donor information. 501(c)(3) public charities must make their federal tax returns publicly available, *see* 26 U.S.C. §6104(d)(1), but they are "not required to publicly disclose their donors," *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014) (plurality opinion); *see* 26 U.S.C. §6104(d)(3)(A). Federal statutes likewise bar the IRS from disclosing the names and addresses of 501(c)(3) donors to the public, *see id.* §6104(b), or to federal agencies for non-tax investigations except in narrowly prescribed circumstances, *see id.* §6103; 85 Fed. Reg. at 31965, or to State officials except in specified circumstances when there is a particular reason to investigate a

particular organization, *see* 26 U.S.C. §6104(c).[2] Federal employees who violate these strictures face criminal and civil penalties. *See id.* §§7213, 7431. And the IRS has instructed that, "[i]f an organization files a copy of Form 990 … and attachments, with any state, it should not include its Schedule B … in the attachments for the state, unless a schedule of contributors is specifically required by the state." JA63. In short, a 501(c)(3) public charity's Form 990 is public, but its donor names and addresses listed in Schedule B are not.

Historically, California did not require charities to file a schedule of contributors. For years, many charities annually registered without filing Schedule B. *See* JA314-16.

Starting in 2010, however, the Registry began issuing deficiency letters demanding that charities submit Schedule B. Pet. App. 10a. Between August 2010 and the second quarter of 2015, the Registry sent 8,000 Schedule B deficiency letters to different charities on an ad hoc basis, creating a de facto requirement that all charities must annually submit Schedule B. JA277-79. In 2019 (more than four years into this litigation), California codified this requirement by amending its regulations to provide for the first time that a registering charity must file IRS Form 990 "together with all attachments and schedules as applicable, in the same form as filed with

[2] The IRS may share a 501(c)(3) public charity's tax returns with State officials only in two specified circumstances, after the IRS has already made a "determination" regarding that organization's tax status or a deficiency of tax. *See* §6104(c)(1).

the Internal Revenue Service." Cal. Code Regs. tit. 11, §301; *see* Office of Attorney General, Notice of Amendments to Regulations, https://oag.ca.gov/charities/notice-prop-amend-regs.[3]

Despite imposing this sweeping donor disclosure requirement, the California Attorney General "virtually never uses [Schedule Bs] to investigate wrongdoing." Pet. App. 55a. After searching 10 years of records, the Attorney General's Office identified only 5 out of 540 investigations (*i.e.*, 0.93%, or one every two years) in which it used a Schedule B. Pet. App. 45a; JA399-401. In each of those instances, moreover, the Attorney General's employees could not testify whether the relevant Schedule B had been collected up front through the Registry's blanket demand or instead through an individualized channel, such as a targeted audit letter or subpoena. Pet. App. 45a; JA72, 204.

California has repeatedly violated its stated commitment to keep confidential every Schedule B it collects. When charities responded to the Registry's deficiency letters by voicing concern about exposure of their donors, the Registry replied that it "maintained Schedule B for public charities as a confidential document" and was "not aware of an inadvertent disclosure in the [last] 21 years." SER201-06.[4] In actuality, however, California law long required

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[3] Before that, the regulation had required filing "IRS Form 990," but had not specifically required Schedule B or other schedules. *See* Cal. Code Regs. tit. 11, §301 (2018).

[4] "SER" citations are to the supplemental excerpts of record filed with the Ninth Circuit at Dkt. 23-1 (Jan. 20, 2017).

public disclosure of any Schedule B a registering charity filed with the State. *See* Pet. App. 67a (citing Cal. Gov't Code §12590). It was not until 2016 (more than a year into this litigation) that California codified a regulation to keep donor information confidential. *See* Cal. Code Regs. tit. 11, §310 (2016).

The Attorney General also repeatedly represented to courts that "there is no evidence to suggest that any 'inadvertent disclosure' has occurred." Appellee's Answering Brief, *Ctr. for Competitive Politics v. Harris*, No. 14-15978, Dkt. 17-1 (9th Cir. July 8, 2014) at 32-33; *see also* Appellant's Opening Brief, *Ams. for Prosperity Found. v. Harris*, No. 15-55446, Dkt. 12-1 (9th Cir. May 7, 2015) at 9-10. But it emerged at trial that those representations were "inaccurate" when they were submitted. JA327, 429.

The Registry had known (but failed to disclose) for years that it had posted at least 25-30 Schedule B forms online. JA350. During this litigation, AFPF discovered that the Registry had posted 1,778 additional Schedule B forms on its public website. Pet. App. 52a. Among those were Schedule Bs for many charities associated with controversial causes. "For instance, in 2012 Planned Parenthood became aware that a complete Schedule B for Planned Parenthood Affiliates of California, Inc., for the 2009 fiscal year was publicly posted; the document included the names and addresses of hundreds of donors." Pet. App. 92a; *see* JA40-41. Lists of hundreds of charities whose "confidential" donor lists California publicly exposed are reproduced at JA78-171, 176-99, 273-75.

Moreover, a website vulnerability had exposed all 350,000 "confidential" documents collected by the Attorney General—including Schedule B forms—to

anyone who scrolled sequentially through URL addresses on the Registry's website, "merely by changing a single digit at the end of the website's URL." Pet. App. 92a. Before this litigation, the Attorney General had not reported these confidentiality breaches to anyone.

B. Americans For Prosperity Foundation

Petitioner Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) public charity devoted to education and training about the principles of a free and open society, including free markets, civil liberties, immigration reform, and constitutionally limited government. Pet. App. 41a, 87a; *see* https://americansforprosperityfoundation.org.

Charles Koch and David Koch helped establish AFPF, and David Koch served as chair of AFPF's board. JA227. AFPF has a sister organization named Americans for Prosperity, a 501(c)(4) organization that focuses on engaging at the grassroots level and building coalitions to promote policy and legislative change in order to advance a free and open society. Pet. App. 10a; *see* https://americansforprosperity.org. Americans for Prosperity has drawn criticism from both sides of the political aisle.[5]

Since at least 2001, AFPF has renewed its registration annually with the Registry without

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[5] *E.g.*, Jeremy W. Peters, *Charles Koch Takes On Trump. Trump Takes On Charles Koch.*, N.Y. Times (July 31, 2018), https://www.nytimes.com/2018/07/31/us/politics/trump-koch-brothers.html; John D. McKinnon and Martin Vaughan, *Democrats Criticize Group Over Attack Ads, Tax Violations*, Wall St. J. (Aug. 28, 2010), https://www.wsj.com/articles/SB10001424052748704147804575456083141366918.

disclosing donor names on Schedule B; for over a decade, the Registry accepted each renewal. Pet. App. 89a-90a. Starting in 2013, however, the Registry began sending Schedule B deficiency letters to AFPF. Pet. App. 10a-11a. The final such letter threatened to suspend AFPF's registration, disallow its charitable tax exemption, and impose fines on AFPF's officers if it did not submit its Schedule B, thereby triggering this litigation. JA54-57.

AFPF's donors are the organization's lifeblood. JA210. Schedule B donors are especially vital because they are AFPF's largest contributors—each accounts for at least 2% of AFPF's annual revenue. Pet. App. 8a-9a. The donors listed on AFPF's Schedule B are limited in number but they are critical, by definition, to the organization's funding as their financial contributions are outsized. *See* JA441. Losing even one could require AFPF to shut down parts of its operation. JA214-15, 260-61.

AFPF treats all donor-identifying information as strictly confidential. JA209-10. It does so to honor its solemn commitments to donors and to protect them from threats, harassment, and violence.

Security threats arise against AFPF on a "fairly regular basis." JA255. Those seeking to intimidate and silence AFPF have infiltrated AFPF events to surreptitiously record and then publicize suspected donors. JA239-40. Names and addresses of perceived AFPF supporters—even the school addresses of supporters' children—have been posted online. Pet. App. 79a; JA211-12, 215.

When AFPF supporters' identities become public, they face economic reprisals and boycotts. Pet. App.

88a. They also are threatened with death and violence. Pet. App. 49a-50a. For example, a contractor who worked at AFPF's headquarters wrote online about infiltrating the "belly of the beast" and threatening to "slit" the "throat" of AFPF's CEO. Pet. App. 49a; JA224-25.

The animosity has boiled over into physical violence. At a Michigan event, for example, knife-wielding protestors cut down a heavy tent, which collapsed on elderly supporters who could not escape on their own. Pet. App. 49a-50a. At one of AFPF's annual summits in Washington, D.C., for example, protestors physically blocked exits, "tried to push and shove and keep people in the building," and knocked an attendee down the stairs. JA292-93.

Government officials have also singled out actual, potential, and even perceived AFPF donors for audits and investigations. JA266-68. California officials have targeted AFPF's donor network to try to limit anonymous giving, which they denigrate as "dark money." JA229-37; *see also* JA46-50. The California Attorney General even accused "the Koch brothers" of engaging in a "brazen attempt to launder money through out-of-state shell organizations." JA45. Despite later acknowledging that no money laundering had occurred, JA51-53, California never issued a formal retraction, JA239.

Given the risks of violence and harassment they face, AFPF's donors would have good reason to fear disclosure of their affiliation with AFPF to the California Attorney General or the public. JA250-53. That fear is exacerbated by the fact that "the Attorney General's current approach to confidentiality obviously and profoundly risks disclosure of any

Schedule B the Registry may obtain from [AFPF]." Pet. App. 53a. Submitting AFPF's Schedule B to the Attorney General would thus have "a chilling effect" on actual and potential AFPF donors, JA300-02, and "would be devastating to [AFPF's] fundraising efforts," JA260-61.

C. District Court Proceedings

In December 2014, AFPF challenged the Attorney General's Schedule B demand as unconstitutional on its face and as applied to AFPF. The District Court for the Central District of California (Real, J.) issued a preliminary injunction barring the Attorney General from demanding AFPF's Schedule B. Pet. App. 70a-73a. But a panel of the Ninth Circuit (Reinhardt, Fisher, and Nguyen, JJ.) vacated the preliminary injunction. Pet. App. 57a-69a. The panel instructed the district court to enter a new, more limited preliminary injunction that would allow the Attorney General to collect AFPF's Schedule B but not publicize it. Pet. App. 66a-69a. The parties then reached a standstill agreement that allowed AFPF to continue withholding its Schedule B until the district court entered final judgment.

The district court held a six-day bench trial at which it heard live testimony from 14 witnesses and considered hundreds of exhibits. Thereafter, the court permanently enjoined the Attorney General's disclosure demand as applied to AFPF. Pet. App. 41a-56a.

The district court first concluded that California failed to establish that its blanket demand for Schedule B forms from every registered charity was substantially related to its asserted law-enforcement

interest. Pet. App. 43a-45a. The district court explained that it "was left unconvinced that the Attorney General actually needs Schedule B forms to effectively conduct its investigations." Pet. App. 44a. The court noted that, "out of the approximately 540 investigations conducted over the past ten years …, only five instances involved the use of a Schedule B." Pet. App. 45a. Even in those five investigations, the court found, the donor information "could have been obtained from other sources." Pet. App. 45a.

The district court next ruled that a blanket annual demand for Schedule B forms from all charities was not "narrowly tailored" to California's asserted law-enforcement interest. Pet. App. 45a-48a. The court found that, as a rule, the Attorney General successfully completes investigations without using any Schedule Bs collected through the annual re-registration process. Pet. App. 47a. "The record before the Court lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." Pet. App. 47a.

The district court also found that "ample evidence" established that "[AFPF], its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." Pet. App. 49a. And the court found that California has "systematically failed to maintain the confidentiality of Schedule B forms." Pet. App. 51a. Because of the Registry's "careless mistakes"—the "amount of" which was "shocking"—the Registry had published over "1,778 confidential Schedule Bs" on its

website, "including 38 which were discovered the day before this trial." Pet. App. 51a-52a. The court concluded that such a "pervasive, recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the Attorney General's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry." Pet. App. 52a. "Given the extensive disclosures of Schedule Bs, even after explicit promises to keep them confidential, the Attorney General's current approach to confidentiality obviously and profoundly risks disclosure of any Schedule B the Registry may obtain from [AFPF]." Pet. App. 53a.

Emphasizing that it was "not prepared to wait until an [AFPF] opponent carries out one of the numerous death threats made against its members," Pet. App. 50a, the district court permanently enjoined the Attorney General from compelling AFPF to disclose its Schedule B, Pet. App. 56a.

Despite its conclusions that California's blanket disclosure demand was neither substantially related nor narrowly tailored to the State's asserted law-enforcement interest, the district court denied AFPF's "facial challenge to the Schedule B requirement" because it believed such a challenge was "foreclosed" by the Ninth Circuit's earlier decision in *Center For Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015). Pet. App. 47a-48a.

D. Ninth Circuit Proceedings

California appealed the district court's order, and AFPF cross-appealed the rejection of its facial challenge. JA38. A panel of the Ninth Circuit (Fisher,

J., joined by Nguyen and Paez, JJ.) vacated the permanent injunction and directed judgment for California. Pet. App. 1a-40a. The court of appeals held that the district court had "appl[ied] an erroneous legal standard" by requiring "narrow tailoring." Pet. App. 22a.

Relying on this Court's decisions analyzing public-disclosure requirements in the election context, the court of appeals held that the First Amendment permits the government to compel the disclosure of a private organization's donors so long as there is "'a substantial relation between the disclosure requirement and a sufficiently important government interest.'" Pet. App. 15a (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). The court rejected any requirement that disclosure demands be "narrowly drawn to prevent the supposed evil," *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961). Pet. App. 15a-16a.

The court of appeals also overturned key factual findings by the district court. Re-examining the "evidence at trial," the court credited testimony favorable to California while discounting testimony favorable to AFPF. Pet. App. 20a-23a, 25a-28a, 30a-36a. The court thus reversed the district court's findings that the collection of Schedule Bs fails to advance California's interest in policing charitable fraud; that California's systematic confidentiality lapses spawn a significant risk of public disclosure of donor information; and that compelling AFPF to provide its Schedule B would chill contributions to AFPF. Pet. App. 22a-23a, 28a-30a, 38a-39a.

Finally, the court of appeals affirmed the district court's rejection of AFPF's facial challenge, agreeing

that it was precluded by Ninth Circuit precedent and finding facial invalidation unwarranted even if the question were considered anew. Pet. App. 39a-40a.

The Ninth Circuit denied AFPF's petition for rehearing *en banc*, Pet. App. 77a, over the dissent of five judges, Pet. App. 77a-97a (Ikuta, J., joined by Callahan, Bea, Bennett, and R. Nelson, JJ.). The dissent argued that "a narrow tailoring requirement applie[s] in this context," Pet. App. 91a, and rejected the panel's reliance on this Court's disclosure precedents in "the unique electoral context," Pet. App. 79a. The dissent concluded that "blanket Schedule B disclosure from every registered charity" is not narrowly tailored to law-enforcement goals because "less restrictive and more tailored means" like targeted audit letters and subpoenas "are readily available." Pet. App. 95a.

The dissent also pointed out the panel's "factual errors," explaining that the panel "not only failed to defer to the district court, but also reached factual conclusions that were unsupported by the record." Pet. App. 91a. The dissent noted the extensive evidence that perceived donors faced threats and harassment whenever their identities are publicly disclosed, Pet. App. 88a, and that "the state's promise of confidentiality was illusory," Pet. App. 78a; *see* Pet. App. 91a-94a.

The panel members filed an opinion responding to the dissent. Pet. App. 98a-109a. Separately, the panel granted AFPF's timely application to stay the mandate pending this Court's final disposition. JA21-22.

SUMMARY OF ARGUMENT

California's requirement that charities disclose the identities of their donors to the Attorney General is facially unconstitutional because it is not narrowly tailored to the State's purported law-enforcement interest. At a minimum, the requirement is unconstitutional as applied to AFPF.

I. For over 60 years, this Court has held that any law requiring private groups to disclose their members or donors to the government must satisfy exacting scrutiny. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). This exacting scrutiny safeguards freedom of association by demanding that a disclosure requirement be narrowly tailored to the government's asserted interest. *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296-97 (1961); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *see also McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion).

In holding to the contrary, the Ninth Circuit misread this Court's decisions. Ignoring the great weight of the Court's relevant precedents, the court of appeals relied on precedents specific to *election-related* public disclosures of donors. Those decisions did not conduct a narrow-tailoring analysis because this Court already held in *Buckley v. Valeo*, 424 U.S. 1 (1976), that such disclosure laws *categorically* satisfy narrow tailoring *solely* for reasons unique to elections. That holding has no bearing on a law such as this, which regulates charities outside the election context and is avowedly divorced from any claimed interest in public transparency.

II. California's disclosure requirement is not narrowly tailored to serve its purported asserted law-enforcement interest in policing charitable fraud. The district court's extensive factual findings determined that California almost never uses Schedule B in fraud investigations—only five times in the decade preceding the trial in this case. The court further found that the information is readily available through individualized mechanisms such as targeted audit letters or subpoenas. Forty-seven other States rely exclusively on those case-specific mechanisms to obtain donor information for fraud investigations.

The district court also chronicled how California has "systematically failed to maintain the confidentiality of Schedule B forms." Pet. App. 51a. The State has repeatedly disclosed donor lists to the public, including by displaying over 1,800 confidential Schedule B forms on its website without imposing any penalties or discipline on those responsible for these systemic failures.

Especially given those findings, California's sweeping demand for Schedule B is not narrowly tailored. Indeed, California's compulsory disclosure regime could not meet any conceivable standard of means-end fit because the putative benefit is so meager while the harm to associational rights is so pronounced.

Nor can California's demand be justified by pointing to the IRS. Congress has provided for the IRS to collect Schedule B for different purposes across a different geographic scope, subject to robust confidentiality protections—backed by criminal as well as civil penalties—that keep donor information secure.

III. In the alternative, even if the disclosure demand survives a facial challenge, it is still unconstitutional as applied to AFPF. California has not shown a legitimate need for AFPF's confidential donor information, and the district court found there is a reasonable probability that compelled disclosure would prompt threats, harassment, and reprisals against AFPF's supporters. The First Amendment demands far more before the government so starkly intrudes upon a private association and its donors.

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS COMPELLED DONOR DISCLOSURE UNLESS NARROWLY TAILORED TO AN OVERRIDING GOVERNMENT INTEREST

This Court has long held that government may not compel the disclosure of the membership or donor lists of private associations unless the government satisfies exacting scrutiny. Under any formulation of that standard, the government's demand must be narrowly tailored to achieve its asserted interest. In eliminating the narrow-tailoring requirement, the Ninth Circuit fundamentally misread this Court's precedents.

A. Compelled Disclosure Of A Group's Donors Is Subject To Exacting Scrutiny

The First Amendment guarantees "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances," no less than "the freedom of speech" and "of the press." U.S. Const. amend. I. Those guarantees include the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and

cultural ends," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), and "the right to engage in charitable solicitation," *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611 (2003).

This Court has long recognized "the vital relationship between freedom to associate and privacy in one's associations." *NAACP v. Alabama*, 357 U.S. at 462. The First Amendment protects the right to disseminate ideas and support causes anonymously. *E.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002) (anonymous door-to-door canvassing and handbilling); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42, 347 (1995) (anonymous leafleting); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (anonymous handbilling). The First Amendment likewise protects the right to associate anonymously with others to promote ideas and causes, free from any government demand that one's membership be publicly identified. *Talley*, 362 U.S. at 65 (citing *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. at 462).

It is no surprise that many choose to keep their membership in associations private. Supporting controversial causes can be perilous or bring unwanted attention. "The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42; *accord, e.g.*, *Watchtower Bible*, 536 U.S. at 166. Others elect to remain anonymous out of religious conviction. *See* Brief of The Philanthropy Roundtable, *et al.*, as *Amici Curiae* (Sept. 25, 2019) at 8-10.

To safeguard the right to private association, the First Amendment prohibits the government from compelling a charitable organization to disclose the names of its members or donors unless that compulsion is narrowly tailored to an overriding government interest. The pathmarking decision is *NAACP v. Alabama*. There, the Court unanimously held unconstitutional the Alabama Attorney General's demand for the NAACP's membership list. "Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs," the Court explained, can amount to an "effective … restraint on freedom of association," akin to "[a] requirement that adherents of particular religious faiths or political parties wear identifying arm-bands." 357 U.S. at 462 (citation omitted). Such disclosure is therefore "subject to the closest scrutiny," *id.* at 460-61, and is invalid unless the government can show a "compelling" interest "in obtaining the disclosures" that is "sufficient to justify the deterrent effect" on the "constitutionally protected right of association," *id.* at 463 (citation omitted). Alabama had failed to make that showing. *Id.* at 466.

Two years later, the Court confirmed that the holding of *NAACP v. Alabama* applies not only to an organization's members, but also to its donors. In *Bates v. Little Rock*, NAACP officials had refused to comply with city ordinances that required them to disclose the names of local NAACP members and donors. The Court found the disclosure requirements unconstitutional, holding that, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." 361 U.S. at 524. *Bates* thus confirmed that an organization's "contributors

and members" are treated "interchangeably" under the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). That makes sense because private associations need both members and resources to flourish, and because donors and members face similar risks of retaliation for exercising their associational rights.

Three Terms after *Bates*, this Court synthesized *NAACP v. Alabama*, *Bates*, and other cases to hold that a State's demand for an organization's "membership information" violates the First Amendment unless "the State convincingly show[s] a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 546 (1963). By 1968, the constitutional protection of donor identities from forced disclosure was so well established that this Court summarily affirmed the decision of a three-judge panel (including then-Judge Blackmun) enjoining Arkansas from forcing disclosure of the names of Republican donors. *Roberts v. Pollard*, 393 U.S. 14 (1968), *summarily affirming* 283 F. Supp. 248 (E.D. Ark. 1968) (three-judge court).

While the Court's compelled-disclosure decisions have used various formulations to describe the constitutional test, that test has always remained in substance a form of either strict or at the very least "exacting scrutiny." *Buckley*, 424 U.S. at 64; *see Doe v. Reed*, 561 U.S. 186, 196 (2010) (collecting cases); *id.* at 232 (Thomas, J., dissenting) ("I read our precedents to require application of strict scrutiny to laws that compel disclosure of protected First Amendment association."). The "strict test established by *NAACP*

v. Alabama is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley*, 424 U.S. at 66.

B. Exacting Scrutiny Requires Narrow Tailoring

Under any formulation, exacting scrutiny invalidates a compelled-disclosure requirement if the government fails to demonstrate the requirement is narrowly tailored to the asserted interest. The Court made this clear shortly after *NAACP v. Alabama* in *Shelton v. Tucker*, 364 U.S. 479 (1960). *Shelton* considered an Arkansas statute that compelled public teachers to file affidavits listing every organization to which they belonged or regularly contributed within the preceding five years. *Id.* at 480. The Court first noted that, unlike in *NAACP v. Alabama* and *Bates*, there was a "substantially relevant correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists involved." *Id.* at 485.

But that did not end the analysis. Rather, the Court proceeded to examine whether the statute was narrowly tailored to the government's interest because "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." *Id.* at 488. The Court added that the "breadth" of "abridgment" of First Amendment rights caused by a State disclosure demand "must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* Applying that tailoring analysis, the Court concluded that the "unlimited and

indiscriminate sweep of the statute" rendered it facially unconstitutional. *Id.* at 490.

The Court reiterated the need for narrow tailoring in *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), which barred Louisiana from enforcing against the NAACP a statute that required associations to file annually a list of the names and addresses of all members. "We are in an area where, as *Shelton v. Tucker* … emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment." *Id.* at 296. The Court explained that it had "frequent[ly] express[ed]" in free speech cases that regulations of First Amendment activities "need to be 'narrowly drawn to prevent the supposed evil.'" *Id.* at 296-97 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)). *Shelton*, the Court stated, was merely the "latest application of this principle." *Id.* at 297.

These narrow-tailoring requirements are part and parcel of this Court's consistent position that the First Amendment requires a close fit between means and ends at any level of heightened scrutiny:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' … that employs not necessarily the least restrictive means but … a means narrowly tailored to achieve the desired objective."

McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (plurality opinion) (citations omitted). The fit matters because speech and association are easily chilled by regulations that sweep too broadly. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963) (citing *Cantwell*, 310 U.S. at 311).

This Court's precedents foreclose any notion that the need for narrow tailoring evaporates outside traditional strict scrutiny. Of course, content-based laws are presumptively unconstitutional unless "the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Yet the requirement that speech restrictions be "narrowly tailored" to the government's asserted interest also holds even under the more relaxed intermediate scrutiny the Court applies to restrictions on commercial speech, *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989), and content-neutral time, place, and manner regulations, *Grayned v. City of Rockford*, 408 U.S. 104, 116-17 (1972).

Nor does the narrow-tailoring requirement disappear when freedom of association rather than speech is at issue. A State may not interfere with associational rights unless it uses means "closely drawn to avoid unnecessary abridgement of associational freedoms." *In re Primus*, 436 U.S. 412, 432 (1978) (citation omitted); *see also, e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2465 (2018); *Roberts*, 468 U.S. at 623; *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973).

Every circuit other than the Ninth Circuit that has considered compelled disclosures of association information has required narrow tailoring. *See, e.g.*, *United States v. Comley*, 890 F.2d 539, 543-44 (1st Cir. 1989); *Local 1814, Int'l Longshoreman's Ass'n v. Waterfront Comm'n of N.Y. Harbor*, 667 F.2d 267, 273-74 (2d Cir. 1981); *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984); *Familias Unidas v. Briscoe*, 619 F.2d 391, 399-402 (5th Cir. 1980); *Humphreys, Hutcheson, & Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984). Especially instructive are the Second Circuit's decision in *Local 1814*, and the Fifth Circuit's decision in *Familias Unidas*. In both cases, the courts of appeals held—just as this Court did in *Shelton*—that a State disclosure demand was substantially related to a compelling governmental interest but nonetheless violated the First Amendment because it was not narrowly tailored.

All of this precedent makes clear that a State may not interfere with associational rights through donor-disclosure requirements absent narrow tailoring to the asserted government interest. *See Louisiana v. NAACP*, 366 U.S. at 296-97; *Shelton*, 364 U.S. at 488.

C. Disclosure Precedents In The Campaign-Finance Context Do Not Control Here

Contrary to the Ninth Circuit's view (Pet. App. 22a), this Court's decisions upholding donor disclosure requirements in the campaign-finance context do not stand for the proposition that "narrow tailoring and least-restrictive-means tests … do not apply here." Those decisions did not eschew a

requirement of narrow tailoring. Indeed, *Buckley* conducted a "least restrictive means" analysis in the course of applying "[t]he strict test established by *NAACP v. Alabama*." 424 U.S. at 66, 68. The Court in *Buckley* found that strict test satisfied by the close relationship between requiring disclosure of who contributes to an election and the electorate's overriding interests in electoral transparency and informed voting. But California "does not assert any state interest in *public* disclosure of Schedule B forms" (Pet. App. 59a), nor could it given that it purports to keep Schedule Bs confidential. Accordingly, the rationale for disclosure in campaign-finance cases is wholly inapplicable here.

As the dissent from the denial of rehearing *en banc* correctly explained, the decisions such as *Doe*, 561 U.S. at 196-97, that hold that certain donor disclosure requirements survive exacting scrutiny in the campaign-finance context do not explicitly "discuss whether disclosure was narrowly tailored to address the government's concern" because the Court "already held" in *Buckley* that campaign-related public-disclosure requirements categorically satisfy narrow tailoring. Pet. App. 83a. Recognizing the unique interests at play in the electoral context, this Court explained in *Buckley* that *public* disclosure of campaign-related donors is generally the "least restrictive means of curbing the evils of campaign ignorance and corruption." 424 U.S. at 68.

In other words, *Buckley* "fashioned a per se rule" that "the narrow tailoring prong of the *NAACP v. Alabama* test is satisfied" when a government invokes its traditional interest in compelling public disclosure of donors giving for unambiguously campaign-related

purposes—a rule confined to election regulation. Pet. App. 82a. Contrary to the Ninth Circuit's reading, this Court has never blessed compelled disclosure of donors as generally permissible. Rather, when invoking *Buckley* and its progeny, this Court has been careful to explain it was applying "precedents considering First Amendment challenges to disclosure requirements *in the election context*." *Doe*, 561 U.S. at 196 (emphasis added).

The government has a distinctive interest in "ensuring our election system is free from corruption or its appearance." Pet. App. 82a. And this Court has repeatedly held that public disclosure is the only mechanism adequate to achieve that objective: "Public disclosure … promotes transparency and accountability in the electoral process *to an extent other measures cannot*." *Doe*, 561 U.S. at 199 (emphasis added). Transparency in the electoral process, in turn, has been thought to buttress trust and faith in public institutions, which is essential for our democracy. The same cannot be said of the government's efforts to acquire confidential lists of donors to private charitable associations that, by definition, are never meant to be shared with the public.

Outside the exceptional context of elections, this Court has consistently applied a narrow-tailoring requirement under the First Amendment and vindicated the "strong associational interest in maintaining the privacy of membership lists." *Gibson*, 372 U.S. at 555-56; *see also* Pet. App. 84a ("[T]he *NAACP v. Alabama* test … remains applicable for cases arising outside of the electoral context ….").

Affording States wide latitude to enforce sweeping demands for donor information simply because a law-enforcement agency speculates (rather than proves) that such collection might improve investigative efficiency would be tantamount to abdicating *NAACP v. Alabama*. Indeed, in any of this Court's compelled-disclosure cases, the government could have argued that ready access to the membership or donor lists of civil-rights organizations could facilitate investigating those groups as and if need arose. But the First Amendment demands a much tighter means-end fit.

Accordingly, "to reaffirm the vitality of *NAACP v. Alabama*'s protective doctrine," and to "clarify that *Buckley*'s watered-down standard has no place outside of the electoral context," Pet. App. 97a, this Court should hold that the Ninth Circuit erred in abandoning the narrow-tailoring requirement.

II. CALIFORNIA'S DISCLOSURE DEMAND IS FACIALLY UNCONSTITUTIONAL FOR LACK OF NARROW TAILORING

Because the California Attorney General's demand for the donor lists of every charity operating within the State is in no way narrowly tailored to the State's purported interest in fighting fraud, the demand does not come close to meeting exacting scrutiny. This Court should strike it down on its face.

A law is facially unconstitutional under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citation omitted); *see also Doe*, 561 U.S. at 194, 197-201.

Here, California's blanket demand for donor names from AFPF and thousands of other charities is unconstitutional in nearly every application. Any instance where California's demand might satisfy exacting scrutiny would, at best, be isolated happenstance—the one charity out of thousands for which there is some reason to suspect fraud. The same defect is fatal to the demand as a whole: It simply is not narrowly tailored to the State's asserted interest in policing charitable fraud.

The Attorney General uses approximately one Schedule B every two years. And on those rare occasions when Schedule B is relevant, the Attorney General can obtain it through a targeted audit letter or subpoena. Requiring every registered charity—of which there are tens of thousands—to file its Schedule B annually when California concedes it uses just one every two years is quintessentially overbroad, especially when California can obtain that single Schedule B through individualized audit letters and subpoenas. This Court should hold California's demand facially invalid due to its "unlimited and indiscriminate sweep" given that "less drastic means" exist "for achieving the same basic purpose." *Shelton*, 364 U.S. at 488, 490.

A. The Attorney General Virtually Never Uses Schedule B For Fraud Investigations

California seeks to compel every registered charity to file its Schedule B each year as part of its annual registration renewal. *See* pages 7-8, *supra*. Over 60,000 charities annually renew their registration. Pet. App. 51a. Each of those charities may in turn list dozens (sometimes even hundreds, JA40) of donors on its Schedule B. California is therefore compelling tens

of thousands of Americans to reveal their private associations.

As the district court concluded, this sweeping demand serves no creditable purpose. Indeed, the court found that the disclosure requirement has "played no role in advancing the Attorney General's law enforcement goals for the past ten years." Pet. App. 47a. "The Attorney General," the district court noted, "does not review Schedule Bs upon collection and virtually never uses them to investigate wrongdoing." Pet. App. 55a.

Even in isolated instances when a Schedule B has some utility, the Attorney General can readily obtain the relevant information from other sources. Pet. App. 45a. California has 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." Pet. App. 47a. And it would take far more than a *single instance* to establish a fit relative to California's annual demand for *tens of thousands* of Schedule Bs.

The extensive trial record amply supports those factual findings. A charity's registration papers, including any Schedule B that it submits, are filed with the Registry of Charitable Trusts. But the Registry does not "put the Schedule B to any use as part of its day-to-day business." JA365; *see also* JA355 ("The registry doesn't use any of the information on the Schedule B."). Nor do investigative and audit staff "check to see if there's [a] Schedule B." JA402. Rather, they first consult Registry documents "only when a complaint comes in" about a particular charity. JA403.

Schedule B has never triggered—or obviated—an investigation by the Attorney General. JA77, 396-97, 417-18, 433. Instead, "the things that have precipitated investigations are media reports and complaints." JA417; *see also* JA329. There are no random audits of charities. JA70.

Even when an investigation begins, Schedule B has negligible utility at best. In the ten years preceding the trial in this case, fewer than 1% (5 out of 540) of the Attorney General's investigations of charities so much as implicated a Schedule B. Pet. App. 45a; JA399-401. So, on average, the Attorney General uses Schedule B in one investigation every two years. Framed another way, the likelihood that any given Schedule B submission might be useful for a fraud investigation at any point over the ensuing decade is less than 0.01%.

Even in the five investigations where a Schedule B was used, the Attorney General's investigators could not recall whether they had consulted unredacted Schedule Bs on file before initiating the investigation. Pet. App. 45a; JA72, 204. And when investigators relied on Schedule B, the same information could have been obtained from other sources. *See* Pet. App. 45a; JA407-08. Simply put, charity "investigations are not Schedule B driven." JA205.

The Ninth Circuit offered no persuasive ground to overturn the district court's well-supported findings or to find on appeal that "the up-front collection of Schedule B information improves" the performance of the Attorney General's office. Pet. App. 23a. Even if that were a reasonable inference from the evidence at trial (and it is not), the panel was bound to defer to the district court's factual findings so long as they

were "plausible in light of the record viewed in its entirety." *Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985); *see also* Fed. R. Civ. P. 52(a)(6); *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017). This Court owes no deference to the panel's impermissible "appellate factfinding," Pet. App. 79a, and should credit the district court's well-supported findings.

B. Targeted Audit Letters And Subpoenas Are More Tailored Tools To Police Fraud

The Attorney General's across-the-board disclosure mandate is particularly objectionable because more tailored investigative tools are readily available. In *Shelton*, this Court held that the "breadth" of a disclosure demand's infringement of First Amendment freedoms must be evaluated "in the light of less drastic means for achieving the same basis purpose." 364 U.S. at 488. Here, targeted audit letters and subpoenas offer an effective way to satisfy California's law-enforcement interests without stifling the associational freedoms of tens of thousands of charities and their legions of donors.

As the evidentiary record shows, whenever California investigates a charity, its invariable practice is to issue an audit letter or subpoena to the charity seeking certain records, including the charity's federal tax returns (which include Schedule B). JA66-68, 172-75, 204, 307-09, 330-31, 411-12, 418. Even when the relevant documents are already on file, investigators *still* request them to ensure that they have the charity's complete and up-to-date paperwork. *See* JA204. No evidence suggests that those mechanisms are insufficient to fulfill California's law-enforcement needs. Accordingly, there is no doubt that "less restrictive and more

tailored means for the Attorney General to obtain the desired information are readily available." Pet. App. 95a.

The experience of other States confirms the point. "All 50 state attorneys general possess a law enforcement interest in preventing non-profits from defrauding their citizens." Brief of States of Arizona, *et al.*, as *Amici Curiae* (Sept. 25, 2019) ("States Brief") at 6. Yet "47 States and the District of Columbia [do] not require annual submission of unredacted Schedule Bs." *Id.* (citing 50-State survey in AFPF's Opening Brief in No. 16-55727 (9th Cir.), Dkt. 22 at ADD-35 to ADD-43); *see* JA419-20. Those States and the District use targeted subpoenas, compliance audits, and other tailored mechanisms to police charitable fraud successfully without resorting to sweeping collection. States Brief at 7-8. If a blanket demand for Schedule B from every charity were important to preventing charitable fraud or illegality, then California would have much better company in demanding it.

Tellingly, California failed to identify a single instance where up-front collection of Schedule B proved more effective or efficient than a targeted audit letter or subpoena. As the district court found, there is no evidence that bulk pre-investigation collection of Schedule Bs yields *any* efficiencies whatsoever. Pet. App. 47a.

There is no appreciable downside to asking for Schedule B through audit letters or subpoenas. Although California asserts that targeted audit letters and subpoenas might tip off targets of investigations, the record belies that assertion. Pet. App. 95a. Ample evidence confirms that requesting

Schedule B through audit letters and subpoenas has *never* tipped anyone off in a way that frustrated or undermined the ensuing audit or investigation. JA67-69, 405-06, 418-19. Indeed, the Attorney General's supervising investigative auditor could not recall a single "instance where [he] asked a charity for their Form 990" or "Schedule B" in an audit letter "and they refused to provide it," JA405-06, or tampered with a document before providing it, JA69. Another employee added that she is not "aware of any scenario" where "a request for a Schedule B [in an audit letter] tipped anyone off" and thereby "frustrated or undermined the ensuing investigation or audit." JA419.

Even if these findings were ignored, any marginal benefit for fraud investigations could not justify burdening the associational rights of hundreds of thousands of Americans. In *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988), this Court considered a North Carolina statute regulating the solicitation of charitable contributions by professional fundraisers. The statute limited the fees that fundraisers could charge, which the State asserted was important to combatting charitable fraud. *Id.* at 786-95. This Court held that requirement violated the First Amendment right to engage in charitable solicitation. *Id.*

The Court explained that North Carolina had narrower means of policing charitable fraud, such as enforcing anti-fraud laws and requiring certain financial disclosures, and it held that, "[i]f this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice

speech for efficiency." *Id.* at 795; *accord, e.g.*, *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 747 (2011); *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) ("The Village's legitimate interest in preventing [charitable] fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly."). Whatever administrative efficiency California attributes to amassing troves of data about donor identities, mere efficiency cannot justify the chill cast on associational rights by such sweeping collection.

Riley is instructive on a second point. A separate provision of North Carolina's statute required professional fundraisers to disclose to potential donors the percentage of charitable contributions turned over to a charity (rather than withheld as a fee), which North Carolina had enacted to reduce alleged donor misperception. 487 U.S. at 795-801. The Court held that such "compelled statements of 'fact'" are "subject to exacting First Amendment scrutiny," and ruled that the statutory provision was facially unconstitutional because it was "not narrowly tailored" to the government's asserted end. *Id.* at 797-98. "In contrast to the prophylactic, imprecise, and unduly burdensome rule the State has adopted to reduce its alleged donor misperception," the Court explained, "more benign and narrowly tailored options are available," such as enforcing anti-fraud laws and requiring certain financial disclosures. *Id.* at 800. "These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent

compelling necessity, and then, only by means precisely tailored." *Id.*

Here, just as in *Riley*, California's Schedule B disclosure requirement is unconstitutional because it is "prophylactic, imprecise, and unduly burdensome" while more "narrowly tailored options are available," such as targeted audit letters and subpoenas. And, just as *Riley* contemplates, California also can (and does) combat charitable fraud by enforcing anti-fraud laws directly, *see* Attorney General's Guide for Charities, *supra* note 1, at 83-86, and by requiring disclosure of extensive information about a charity's *finances*, such as the amount a charity raises and how it spends its funds, *see, e.g.*, Cal. Gov't Code §12586(e); Cal. Code Regs. tit. 11, §301.

These narrower alternatives mitigate the threat to First Amendment freedoms not only by eliminating the unnecessary collection of donor information but also by ensuring that any donor information that is collected is better safeguarded from public exposure. Unlike California's indiscriminate collection of documents from tens of thousands of charities, audit letters and subpoenas target a limited set of materials from just a handful of groups. That yields a vastly smaller universe of documents, which is both easier to manage and more likely to find active use in fraud investigations. Investigators are far likelier to track and treat those documents with care to maintain their confidentiality.

In fact, in California, investigations are kept confidential by default. *See* Attorney General's Guide for Charities, *supra* note 1, at 86. In contrast, the filings that charities submit for their annual registration are, by default, publicly available. *See*

Cal. Gov't Code §12590; Cal. Code Regs. tit. 11, §310. California thus requires confidential Schedule Bs be filed alongside documents that will be made public, and the "very tedious" process of separating out the confidential materials from the public materials in 60,000 annual filings has predictably resulted in the inadvertent public disclosure of many Schedule B forms. Pet. App. 51a; *see also* 85 Fed. Reg. at 31963 ("[R]eporting the names and addresses of substantial contributors on an annual basis poses a risk of inadvertent disclosure of information that is not open to public inspection because information on Schedule B generally must be redacted from an otherwise disclosable information return.").

In sum, limiting the collection of Schedule B to targeted audit letters or subpoenas is a more narrowly tailored alternative that will be much better suited to forestall inadvertent disclosure and the further chilling of First Amendment rights.

C. California Has Systematically Failed To Maintain The Confidentiality Of Schedule B Donor Information

While the legitimate benefit of California's compelled-disclosure requirement is negligible, its threat to associational rights is immense, especially because, as the trial court found, California has "systematically failed to maintain the confidentiality of Schedule B forms." Pet. App. 51a. The deficiencies in California's lax approach to supposed "confidentiality" underscores the lack of narrow tailoring here. And the result of California's porous protections is to chill the exercise of First Amendment freedoms, especially among those who support controversial groups.

The district court made well-supported findings establishing why "the state's promise of confidentiality was illusory," in the words of the dissent from denial of rehearing *en banc*. Pet. App. 78a. The Attorney General posted on the Registry's public website at least *1,800* confidential Schedule B forms: 1,778 that AFPF discovered during litigation, plus another 25-30 that the Registry has previously posted online. Pet. App. 52a; JA349-50. Many affected charities were associated with controversial or highly charged causes, *see* JA78-171, 176-99, 273-75 (lists of affected charities), and many Schedule Bs (revealing countless individual donors) had been publicly available for *years*, *see* JA357-58. For example, in 2012 California "was made aware that the Registry had publically posted Planned Parenthood's confidential Schedule B [from 2008-09], which included all the names and addresses of hundreds of donors." Pet. App. 52a; *see* JA40-41.

As the dissent below further noted, "California's computerized registry of charitable corporations was shown to be an open door for hackers." Pet. App. 92a. AFPF discovered that "every confidential document in the [R]egistry—more than 350,000 confidential documents" (including Schedule B forms)—was "readily" accessible online "merely by changing a single digit at the end of the website's URL." Pet. App. 92a. Many other vulnerabilities may well yet be discovered. "[T]he state's confidential information is so vulnerable to hacks and inadvertent disclosure that Schedule B information is effectively available for the taking." Pet. App. 89a. Thus, as the district court found, "the Attorney General's current approach to confidentiality obviously and profoundly risks

disclosure of any Schedule B the Registry may obtain" from AFPF or any other charity. Pet. App. 53a.

The compelled disclosure to law enforcement of information about a person's private associations alone can chill speech and association—especially where a private group espouses views that may differ from those of the State government. But a demonstrated, ever-present risk of *public* disclosure exacerbates that chill by exposing donors to threats, intimidation, harassment, and violence by all those who oppose their points of view or the organization's activities.

This Court's decision in *Shelton* is instructive. There, the Court held that the Arkansas statute compelling teachers to disclose their affiliations to the State was unconstitutional "[e]ven if there were no disclosure to the general public" because of the "pressure" it puts on supporters to "avoid any ties which might displease" the State. *Shelton*, 364 U.S. at 486; *see also id.* at 491 (Frankfurter, J., dissenting) ("The Court's holding that the Arkansas statute is unconstitutional does not, apparently, rest upon the threat that the information which it requires of teachers will be revealed to the public."). "Public exposure," the Court explained in *Shelton*, "simply operate[s] to widen and aggravate the impairment of constitutional liberty." *Id.* at 486-87 (majority opinion). Moreover, in this case, as in *Shelton*, the "fear of public disclosure is neither theoretical nor groundless," and that fear further chills the exercise of First Amendment rights by supporters who wish to remain anonymous. *Id.* at 486.

Whenever the government collects broad swaths of information like charitable donor identities that it

promises to keep confidential, there is an inherent risk that the confidential information will be stolen, leaked, or otherwise publicized. *See Whalen v. Roe*, 429 U.S. 589, 605 (1977) (noting "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files"). That specter is magnified when, as here, the State collects *a lot* of private information that it promises to keep confidential. Collecting and retaining hundreds of thousands of lists of donor identities inevitably creates numerous opportunities for leaks that would otherwise not exist. The more porous a State's confidentiality protections, the greater the risk the information will be disclosed and thus the greater the chilling effect of the State's disclosure requirement.

By collecting such a vast trove of sensitive donor information that it does not use, California has gratuitously risked publicly exposing the names and addresses of thousands upon thousands of donors—a risk that was evidenced in this very case. In the current age of all-too-common hacks of government databases, it is more critical than ever that governmental collection of data implicating First Amendment interests, such as donor names, be narrowly tailored to what the government truly needs, so that any exposures of such sensitive data are limited. *See* Pet. App. 96a-97a. And California's conspicuous failures to protect this data or to report or acknowledge known leaks should deprive the State of any benefit of the doubt it might otherwise claim. In light of this record, no reasonable donor would credit California's latest assurances of confidentiality.

D. California's Disclosure Demand Fails Narrow Tailoring And Any Other Applicable Standard Of "Fit"

California's Schedule B disclosure requirement is not narrowly tailored to California's asserted interest in policing charitable fraud. Forcing all charities that operate or fundraise in California—totaling *tens of thousands*—to submit confidential donor information *each year* just to facilitate a mere *five* investigations over *ten years* does not come close to meeting that standard. 99.99% of these Schedule Bs go unused. The absence of narrow tailoring is especially glaring given the ready availability of more tailored options, such as targeted audits and subpoenas, and the demonstrated risk of public exposure of confidential information resulting from California's indiscriminate approach.

If "exacting scrutiny" is to mean anything, such a policy cannot stand. California's indiscriminate demand for Schedule B from thousands of charities is patently unconstitutional—incapable of satisfying exacting scrutiny in any of its applications—and therefore facially invalid. *Stevens*, 559 U.S. at 473.

It was the "unlimited and indiscriminate sweep of the statute" in *Shelton*, 364 U.S. at 490, and the "prophylactic, imprecise, and unduly burdensome" nature of the disclosure requirement in *Riley*, 487 U.S. at 800, coupled with the existence of less drastic alternatives, that led the Court to hold those disclosure requirements facially unconstitutional for lack of tailoring. The same holds here. California's demand that tens of thousands of charities disclose their major donors each year is facially unconstitutional because narrower alternatives are

available. The "comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry" into charitable compliance within its borders. *Shelton*, 364 U.S. at 490.

Moreover, even if the Court credits the Attorney General's current promises that the donor information will be used only for legitimate purposes and will otherwise be kept confidential, the threat to private associational rights would still loom. As the NAACP Legal Defense and Education Fund explained in an *amicus* brief to the Ninth Circuit in support of AFPF: "even if a given administration insists that the information it collects will only be used for socially beneficial purposes, once a database exists, it can be exploited by a future government with less benign motives." Brief for the NAACP Legal Defense and Education Fund, Inc. as *Amicus Curiae*, No. 16-55727, Dkt. 45 (9th Cir. Jan. 27, 2017) at 6. "By collecting and aggregating confidential information about an organization's donors or members, the government creates a loaded gun that a future administrat[ion] might decide to fire." *Id.* at 28.

In an opinion responding to the dissent from the denial of rehearing *en banc*, the Ninth Circuit panelists conceded that exacting scrutiny *does* require some examination of the "fit" between a disclosure demand and the State's interest, although they maintained that "narrow tailoring" was not required and instead that "a looser fit will suffice." Pet. App. 102a-03a. As explained above, however, exacting scrutiny requires narrow tailoring, not some "looser" test of fit. *See* Section I.B, *supra*.

In any event, California's sweeping demand for Schedule B donor information is unconstitutional under any standard of heightened scrutiny that meaningfully compares means to ends. The record reflects that California demands that tens of thousands of charities annually file Schedule Bs just to facilitate review of, at most, a tiny handful. The remaining 99.99% never serve any useful purpose. At best, they gather dust; at worst, they are publicly disclosed. The number of Schedule Bs California has made publicly accessible is orders of magnitude higher than the number it has used for any legitimate end. Even in the vanishingly rare case where Schedule B may be relevant, the Attorney General can obtain it through targeted audit letters and subpoenas. Simply put, California's Schedule B disclosure requirement is so poorly tailored to serve the State's law-enforcement interests that it cannot satisfy any possible test of "fit."

E. The IRS's Collection of Schedule B Does Not Render the California Attorney General's Collection Constitutional

California has argued that there is no harm in its demanding Schedule B from charities because the IRS does it too. But Schedule B is statutorily required by Congress to serve tax-collection purposes nationwide. *See* 26 U.S.C. §6033(b)(5); *see also* Brief for the United States as *Amicus Curiae* (Nov. 24, 2020) at 12-15. The California Attorney General, in contrast, plays no such role in tax collection, *see* JA335-36; Cal. Gov't Code §15700 (establishing California Franchise Tax Board, which administers California taxes), nor has any other creditable interest in Schedule B beyond the asserted law-enforcement interest in policing

charitable fraud. That interest falls far short of justifying a blanket demand for these nationwide listings. *See* Pet. App. 44a-45a, 93a-95a.

There are other important differences between the IRS's and California's respective treatments of Schedule B. "The IRS takes seriously its duty to protect confidential information" such as Schedule B donor information. 85 Fed. Reg. at 31963. California does not. Pet. App. 51a. Unlike the IRS, California officials published some 1,800 Schedule Bs and exposed tens of thousands more through a gaping website vulnerability, thereby revealing the names and addresses of countless donors. Pet. App. 51a-52a, 91a-92a.

Federal law imposes strict protocols to protect the confidentiality of Schedule B, but California has not followed suit. *See* JA333-38. If confidentiality is ever breached, federal law imposes civil and criminal penalties. *See* 26 U.S.C. §§7213, 7431; *see also* Brief for the United States, *supra*, at 3. Yet California imposes no penalties whatsoever. Indeed, California has never even disciplined any of the employees responsible for the public exposure of Schedule B forms, nor has it ever notified any charity or donor whose information was made public. JA320-25, 344-45, 429.

Moreover, if this Court were to endorse California's position, presumably *every* State could demand Schedule B forms, as each State has the same interest in policing charitable fraud. Permitting dozens of States to collect Schedule Bs would exponentially compound both the risk of disclosure and the chill on associational rights. *See* States Brief, *supra*, at 7-10.

The logic of the Ninth Circuit's decision also extends far beyond collecting Schedule Bs. If law enforcement can compel disclosure of information presumptively protected by the First Amendment in the name of investigative efficiency without narrow tailoring, the First Amendment may no longer protect peaceful protest groups from having to hand over lists of all their supporters, *cf. Familias Unidas*, 619 F.2d 391; unions from being forced to divulge lists of all their dues-paying members, *cf. Local 1814*, 667 F.2d 267; or publishers from having to disclose all who buy their books or other content, *cf. Rumely v. United States*, 197 F.2d 166 (D.C. Cir. 1952), *aff'd*, 345 U.S. 41 (1953). Nor is the Ninth Circuit's reasoning confined to Schedule B and the subset of donors listed on it. The fewer the number of donors listed on a Schedule B, the less information law enforcement can glean from it. And there is no ostensible reason why the result under exacting scrutiny would be any different when and if California (or any other State) asserts a law-enforcement interest in compelling up-front disclosure of all donors, or most donors, to facilitate possible investigation. No matter the length of a particular donor list at issue, the First Amendment protects privacy of association and demands a rigorous showing before any such governmental compulsion can be upheld. California made no such showing here, nor could it.

III. CALIFORNIA'S DISCLOSURE DEMAND IS UNCONSTITUTIONAL AS-APPLIED TO AFPF

If this Court upholds California's demand against facial challenge, it should hold that the demand is unconstitutional as applied to AFPF.

A. California Has Not Shown That Its Demand for AFPF's Schedule B Satisfies Exacting Scrutiny

To satisfy exacting scrutiny in an as-applied challenge, California must show that the disclosure requirement seeks only the specific donor information from AFPF that California truly needs. *See Gibson*, 372 U.S. at 551-58; *Louisiana v. NAACP*, 366 U.S. at 296-97; *Bates*, 361 U.S. at 525-27; *NAACP v. Alabama*, 357 U.S. at 464-65; *see also Pollard*, 283 F. Supp. at 257 ("[E]ven if a State can legitimately compel a limited disclosure of individuals affiliated with a group, it does not follow that the State can compel a sweeping and indiscriminate identification of all of the members of the group in excess of the State's legitimate need for information."), *aff'd*, 393 U.S. 14.

California has not offered any such justification. Indeed, before AFPF initiated this lawsuit, AFPF had "never been the subject of a complaint of any sort," JA331-32, nor had AFPF ever been investigated by the California Attorney General for misconduct as a charity, JA327-28. The Attorney General had not alleged or suspected any wrongdoing by AFPF. JA201-02. As in this Court's prior decisions addressing similar disclosure demands, "[t]he strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon such a slender showing as here made by [California]." *Gibson*, 372 U.S. at 555-56.

At a minimum, therefore, California's demand for Schedule Bs is unconstitutional as applied to AFPF

because California has not shown that its disclosure demand is tailored to a legitimate need specifically for AFPF's donor information.

B. Disclosing AFPF's Schedule B Would Expose AFPF And Its Donors To Threats, Harassment, and Reprisals

California's disclosure demand is also unconstitutional as applied to AFPF because where, as here, "disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required." *Louisiana v. NAACP*, 366 U.S. at 296. Even in election cases, where disclosure interests are at their zenith, this Court has held that a facially constitutional disclosure requirement is unconstitutional as applied to a particular group if the group "can show a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassment, or reprisals.'" *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 88 (1982) (quoting *Buckley*, 424 U.S. at 74); *accord, e.g.*, *Doe*, 561 U.S. at 201.

To demonstrate a reasonable probability of threats and harassment, it suffices for an organization to submit "specific evidence of past or present harassment of members due to their associational ties." *Buckley*, 424 U.S. at 74. An organization can also rely on "evidence of the experiences of other chapters espousing the same political philosophy." *Brown*, 459 U.S. at 101 n.20. This Court has expressly "rejected" the argument that an organization "prove that 'chill and harassment [are] directly attributable to the specific disclosure from which the exemption is sought.'" *Brown*, 459 U.S. at 101 n.20 (quoting *Buckley*, 424 U.S. at 74).

The district court found "ample evidence establishing that [AFPF], its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." Pet. App. 49a. The district court also found a "reasonable probability" that compelled disclosures of Schedule B would subject AFPF's donors to threats, harassment, or reprisals, thereby warranting as-applied relief, Pet. App. 48a-49a, a conclusion to which the Ninth Circuit failed to accord adequate deference, *see* Pet. App. 30a-34a.

The record at trial demonstrates how AFPF and its supporters have endured death threats, bomb threats, cyber-attacks, violent protests, boycotts, and numerous other types of threats, harassment, and reprisals. Threats have been sent to AFPF via social media, email, and telephone. JA256-58. AFPF's employees have been stalked, threatened, and spit upon. JA217, 256, 258-59, 269-70. A contractor who worked at AFPF's headquarters posted online about working in the "belly of the beast" and threatening to "slit" the "throat" of AFPF's CEO. JA224-25. AFPF's headquarters were evacuated after a bomb threat. JA257. The hacker group Anonymous disabled the website of Americans for Prosperity, the 501(c)(4) sister organization of AFPF. JA240-41, 248-49. An online, first-person video game depicted a player shooting zombies at an office location with Americans for Prosperity banners. JA284-86. At AFPF's annual summit, donors felt "personally threatened" as protestors blocked exits, "tried to push and shove and keep people in the building," and knocked a 78-year-old attendee down the stairs. JA291-94. Protestors in Michigan stormed an event tent "with knives or box-

cutters cutting at the ropes of the tent," collapsing the heavy tent on at least a dozen attendees. JA218-21.

Known and perceived associates of AFPF have faced harassment and threats. Charles and David Koch, two high-profile associates of AFPF, "have faced threats, attacks, and harassment, including death threats," Pet. App. 50a, such as threats to "[s]hoot them as traitors" and "put a bullet in the[ir] head[s]," JA241-45. "[D]eath threats have also been made against their families, including their grandchildren." Pet. App. 50a. Likewise, the R and M Fink Foundation, a private family foundation that publicly reports its contributions to AFPF, received "numerous death threats." JA262-63.

Art Pope, whose family foundation contributes publicly to AFPF, received an "assassination" threat due to his foundation's donations. JA281-84. His business suffered boycotts and picketing largely because of his affiliation with AFPF. JA287-91. Pope has considered ending his contributions to AFPF because of this retaliation. JA294.

After a blog published a list of suspected AFPF donors, they faced "personal threats" and boycotts of their businesses. JA211-12. Other actual, potential, or perceived donors report that they have been targeted for audits and investigations by government officials. JA249-50, 266-68. Concerns about government targeting and retaliation "carries through the whole donor community." JA271.

Donors face even greater risk insomuch as disclosure of AFPF's Schedule B to California "obviously and profoundly" risks public leaks. Pet. App. 53a. Efforts to identify and publicize AFPF's

donors are manifold and unrelenting. *E.g.*, JA239-40. Addresses of their children's schools have been posted online. Pet. App. 79a; JA215. Media have published donor information even when it is years old: In 2013, for example, the National Journal published decade-old Schedule Bs of AFPF after finding them mistakenly posted on a State's website. JA212-13.

Echoing public animus, California's former Attorney General accused "the Koch brothers" of engaging in a "brazen attempt to launder money through out-of-state shell organizations," JA45, and called to close the "loophole" that allows "certain groups to evade transparency by maintaining the anonymity of their donors," JA50. Despite later acknowledging that Charles Koch and David Koch had not engaged in money laundering as alleged, JA51-53, California never formally retracted the false accusation, JA239.

In a similar vein, the Senior Assistant Attorney General for the Charitable Trusts Section testified that she harbors suspicions against AFPF because of *this lawsuit*:

> You're suing us … and you don't want to give us your Schedule B, so that has put my suspicions somewhat on alert…. I basically don't have any specific suspicions, per se, but the litigation causes me to have some concerns.

JA201-02; *see also* JA415-16 (reaffirming this testimony).

In short, submitting AFPF's Schedule B to California "would be devastating to [AFFP's] fundraising efforts, JA260-61, as it would have "a

chilling effect" on actual and potential AFPF donors, JA300-02.

The district court was thus well within its discretion in finding "a reasonable probability that the compelled disclosure of [AFPF]'s contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74; *see* Pet. App. 48a-50a. These interests are more—not less—important in today's highly divisive climate. *See Americans for Prosperity v. Grewal*, 2019 WL 4855853, at *20 (D.N.J. 2019) (granting a facial challenge to a donor disclosure statute and noting in *dicta* that an as-applied challenge would have also had merit in part because our society "has become far more divisive than it was even in 2010"). At a minimum, therefore, California's disclosure demand violates the First Amendment as applied to AFPF.

CONCLUSION

This Court should reverse the Ninth Circuit's judgment and remand with instructions to enter a permanent injunction against enforcement of the Attorney General's facially unconstitutional demand for Schedule Bs or, at a minimum, vacate and remand with instructions to reinstate the district court's permanent injunction against enforcement of the demand for AFPF's Schedule Bs.

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