Nos. 19-251 & 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

MATTHEW RODRIQUEZ,

Respondent.

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

BRIEF FOR RESPONDENT

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March 24, 2021

(*Additional caption listed on inside cover*)

THOMAS MORE LAW CENTER,

Petitioner,

v.

MATTHEW RODRIQUEZ,

Respondent.

QUESTION PRESENTED

Whether the First Amendment prohibits a State from requiring tax-exempt charities to submit, confidentially and for state oversight and law enforcement purposes, a copy of the schedule identifying major donors that they provide to the IRS.

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INTRODUCTION

California requires tax-exempt charities soliciting within the State to submit to state charity regulators a copy of the Schedule B form that they file annually with the Internal Revenue Service. That form, which lists a charity's largest donors, helps state regulators detect whether a charity is misusing charitable assets, such as by diverting funds for a donor's personal enrichment. It also helps them uncover whether a charity is deceiving the donating public by misrepresenting the size or efficiency of its programs. California forbids the public disclosure of this confidential information, and the State has adopted enhanced security protocols in recognition of past shortcomings and the need to protect donor information.

Petitioners principally contend that California's requirement is unconstitutional on its face. But they have not demonstrated that it has a broad chilling effect across the State's large and diverse population of charities, as would be required to justify the drastic remedy of facial invalidation. Their contention that state charity regulators virtually never use major-donor information for oversight or enforcement purposes is contradicted by the record. And their arguments misunderstand the Attorney General's longstanding role—grounded in the common law—in supervising charities and protecting charitable assets for their intended public purposes.

Petitioners also maintain that California's requirement cannot be applied to them because their work on controversial issues risks exposing their donors to public hostility. This Court has authorized such as-applied challenges in situations where disclosure would lead to threats, reprisals, or harassment. The

records in these cases, however, do not establish that the State's nonpublic reporting requirement would have any such consequences for the small number of donors who must be listed on a Schedule B and who would otherwise prefer to remain unknown. On this record, the court of appeals properly rejected petitioners' as-applied claims.

STATEMENT

A. Factual and Legal Background

1. More than 100,000 charities operate in California.[1] For some, educating the public or conducting policy-related research is a key part of their activities. Others focus on the delivery of specific services, such as providing food and shelter, cleaning parks and beaches, rescuing abandoned animals, and helping victims of natural disasters.[2]

The defining feature of a charity is that it serves an indefinite group of beneficiaries or the public at large, rather than an identifiable person or group of persons. *See, e.g.*, *Russell v. Allen*, 107 U.S. 163, 166-167 (1883). Organizations that constitute themselves as charities are required to use donated assets for their dedicated public purposes and not for private gain. *See, e.g.*, Cal. Bus. & Prof. Code § 17510.8; *Pac. Home v. Los Angeles Cnty.*, 41 Cal. 2d 844, 852 (1953). Because of those public purposes, charities may obtain favorable tax treatment, including exemptions from

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[1] Attorney General's Guide to Charities (Apr. 2020) at 1, *available at* https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf (last visited Mar. 24, 2021).

[2] *See generally* Urban Institute, The Nonprofit Sector in Brief 2019 (June 2020) (national statistics on types of charities), *available at* https://nccs.urban.org/publication/nonprofit-sector-brief-2019 (last visited March 21, 2021).

federal and state income tax and the ability to collect tax-deductible donations. *See, e.g.*, 26 U.S.C. § 501(c)(3); Cal. Rev. & Tax Code § 23701.

These characteristics of charities give rise to distinct regulatory and enforcement concerns. In particular, beneficiaries typically lack a means to monitor the organization's activities. *See, e.g.*, Fremont-Smith, Governing Nonprofit Organizations 301 (2004). Moreover, unlike corporate shareholders, those who donate to charities have little or no financial incentive to carefully monitor the organizations' use of their gifts. *See United Cancer Council, Inc. v. Comm'r*, 165 F.3d 1173, 1179 (7th Cir. 1999). And the tax-exempt status attached to charities, as well as the tax-deductibility of charitable contributions, offer opportunities for unscrupulous donors and managers to misuse charitable resources for personal advantage.

In England before the founding, the responsibility to protect charitable assets for their dedicated purposes resided with the Crown acting as *parens patriae*. *See* Governing Nonprofit Organizations at 32, 301. In the United States, that responsibility has historically been vested in state attorneys general. *See id.* at 305-306, 443. Under both the common law and statutory enactments, state attorneys general represent the public beneficiaries of charitable trusts and exercise supervisory authority over charitable entities. *See, e.g.*, *id.* at 305-306, 443; *People ex rel. Ellert v. Cogswell*, 113 Cal. 129, 136 (1896).

In California, the Supervision of Trustees and Fundraisers for Charitable Purposes Act vests the state Attorney General with primary responsibility for supervising charities in the State and for protecting charitable assets. Cal. Gov't Code § 12598. The Act

authorizes him to investigate mismanagement, deceptive solicitation practices, and breaches of charitable trust duties. *See, e.g.*, *id.* §§ 12588, 12598. He may bring enforcement actions to correct misconduct and to recover improperly diverted or misused funds. *See, e.g.*, *id.* §§ 12591, 12596; Cal. Corp. Code § 5250. And state law provides that charitable corporations are subject to examination by the Attorney General at all times so that he may ascertain the condition of their affairs and their compliance with their charitable trust obligations. *See* Cal. Corp. Code § 5250.

California law also requires state agencies to annually inform the Attorney General of applications for charitable tax exemptions they receive. Cal. Gov't Code § 12594. The Attorney General may inspect tax return information filed with the state Franchise Tax Board, for the purpose of enforcing organizations' charitable trust obligations. Cal. Rev. & Tax Code § 19547. He may also provide information to the Franchise Tax Board and the federal Internal Revenue Service and advise those entities of circumstances that may warrant review or reconsideration of an organization's tax-exempt status.

The Charitable Trusts Section within the California Department of Justice is responsible for discharging the Attorney General's supervisorial functions. Pet. App. 10a, 20a-21a.[3] That Section is staffed by lawyers and auditors who investigate and file enforcement actions involving misconduct by charities and

[3] "Pet. App." and "J.A." refer to the appendices filed in No. 19-251. "Law Center Pet. App." and "Law Center J.A." refer to the appendices filed in No. 19-255. "E.R." and "S.E.R." refer to the excerpts and supplemental excerpts of record filed in Ninth Circuit No. 16-55727. "Law Center E.R." refers to the excerpts of record filed in Ninth Circuit No. 16-56855.

fundraisers, such as false solicitations, self-dealing by directors, and the mismanagement or diversion of charitable funds. *See* Attorney General's Guide to Charities at 83. The Section also contains the "Registry of Charitable Trusts," which is the repository for filings that charities and fundraisers are required to make. *See* Cal. Gov't Code §§ 12584, 12587.1.

2. California law requires charities operating or soliciting donations within the State to register with the Registry and to submit certain information regarding the nature and administration of the assets that they hold for charitable purposes. *See* Cal. Gov't Code §§ 12585, 12586(a). Nonprofit organizations that do not hold assets for charitable purposes—including, for example, many organizations that focus on lobbying or other advocacy activities—are not required to register. *See id.* §§ 12581, 12582.1. Religious charities are exempt from the requirement. *Id.* § 12583; *see also id.* (listing additional exemptions).

The Registry requires registered charities, as part of their annual submission of registration documents, to submit a copy of the federal Form 990 that they filed for that year with the IRS, including any accompanying attachments. Cal. Code Regs. tit. 11, § 301; J.A. 437; E.R. 566, 756.[4] Form 990 is an information

[4] The Foundation incorrectly suggests (at 7-8) that Schedule Bs were not required to be filed until 2010. The Registry has required Schedule Bs to be submitted since the IRS began requiring them. *E.g.*, S.E.R. 94. And in 2005, the applicable regulation and instructions stated that charities were generally required to file a complete copy of their Form 990, including its schedules. *See* Cal. Code Regs. tit. 11, § 301 (2005); J.A. 437; *see also* E.R. 566-567, 756-757.

return used by tax-exempt charities to provide financial and other information to the IRS. Pet. App. 99a; J.A. 59-64.[5]

Schedule B to that form generally requires charities to report contributions from donors who gave $5,000 or more in the tax year. 26 C.F.R. § 1.6033-2(a). For charities that meet certain financial requirements, the form requires that they report only donations from donors who contributed more than two percent of the organization's total contributions. *Id.* § 1.6033-2(a)(ii)(3)(A). Schedule B mandates reporting of the specified donors' names and addresses and whether their contribution was cash or in-kind. J.A. 60. If the gift was in-kind, Schedule B requires a description of the property and its fair market value. J.A. 61. The form was created by the IRS in 2000; before then, donor information was reported on a separate schedule created by the charity and attached to the Form 990. *See* Colvin & Owens, *Outline on Form 990 Donor Disclosure*, 35 Exempt. Org. Tax Rev. 408 (2002). The IRS uses significant-donor information to facilitate enforcement of self-dealing and other restrictions on tax-exempt entities. *See* H.R. Rep. No. 413, 91st Cong., 1st Sess. 36 (1969); U.S. Br. 26.[6]

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[5] In the rare scenario where a charity required to register is not exempt from federal taxation (and thus does not file a Form 990 with the IRS), California requires the charity to submit a complete Form 990 with schedules or an IRS Form 1120 (a corporate income tax return) to comply with state reporting provisions. *See* Cal. Code Regs. tit. 11, § 301.

[6] In May 2020, the IRS promulgated a rule limiting the Schedule B filing requirement to Section 501(c)(3) organizations (including private foundations) and entities organized under Section 527. *See* 85 Fed. Reg. 31959, 31961 (May 28, 2020).

The California Department of Justice likewise uses information on the Schedule B for oversight purposes. In particular, state investigators use it as a tool to detect and address diversion of charitable assets. For example, state investigators can use a Schedule B to cross-reference donor information with other parts of the Form 990 in order to see if a charity is paying a for-profit entity run by one of its largest donors for goods and services, or if it is making grants to benefit a donor's family members, in violation of the organization's legal obligations. *See, e.g.*, E.R. 577-578, 716-718, 1062; S.E.R. 983; Cal. Corp. Code §§ 5231, 5250. Likewise, Schedule B information can help investigators detect circumstances in which a charity is unlawfully repaying a "loan" and misreporting it as a liability on its Form 990 when in fact it was a donation. *See* E.R. 717-718; Cal. Corp. Code § 5231 (requiring good faith stewardship of charitable assets); Cal. Code Regs. tit. 11, § 301 (requiring truthful reporting).

Schedule Bs are also a tool for uncovering gift-in-kind fraud. While the value of cash gifts is straightforward, valuations for in-kind contributions (such as unsold merchandise or pharmaceuticals) are susceptible to manipulation. When a charity exaggerates the value of that kind of contribution, its publicly available financial reports will make it appear more successful in providing program services—and more effective at minimizing the share of revenues spent on fundraising and administrative costs—than it really is. *See generally People v. Orange Cnty. Charitable Servs.*, 73 Cal. App. 4th 1054, 1067 (1999). The donor information, specific gift descriptions, and valuations contained on a Schedule B help investigators detect these sorts of deceptive practices. *See, e.g.*, E.R. 578-579, 715-717, 974, 1059-1062; J.A. 395.

Schedule B information can also help track in-kind donations transferred from one charity to another and reveal when a charity improperly acted as a pass-through for the donations and illegally reported their value as revenue and expenses on its Form 990. *See, e.g.*, J.A. 395. A charity that is only a middleman for an in-kind gift—accepting the donation on paper but not assuming legal title and responsibility for it—is not permitted to count the donation as part of its revenue when received or program expenses when transferred to another charity. Law Center E.R. 508-509. A charity that counts such pass-through gifts as true donations pads its reported revenue, misleading the public about the extent of its programs and efficiency. *See, e.g.*, *Orange Cnty. Charitable Servs.*, 73 Cal. App. 4th at 1067. This type of fraud can also conceal from regulators evidence of mismanagement and misuse of charitable assets. By providing the source and description of charities' largest in-kind gifts, Schedule Bs help charity regulators identify and address these sorts of improper schemes. *See infra* p. 32.

In light of these uses, attorneys and auditors in the Charitable Trusts Section typically review a charity's Form 990—including the Schedule B—and other documents as the first step in evaluating a complaint about a charity. *E.g.*, J.A. 311; E.R. 969, 997; Law Center E.R. 541. When they conclude that further and more formal investigative steps are warranted, the information in a Schedule B can help provide a roadmap for the investigation. E.R. 717.

Over the years, the majority of charities registered in California have routinely submitted their Schedule Bs as required. E.R. 579, 756-757, 774-775. Beginning in 2010, upon the hiring of additional staff, the Registry began more systematically addressing

deficient filings by charities. E.R. 580, 757. Those efforts involved sending increased numbers of deficiency letters requesting different types of required documents that registrants had failed to include with their filings. E.R. 580. Some of the letters requested submission of missing Schedule Bs. E.R. 374-376, 580. The head of the Charitable Trusts Section at that time directed Registry staff to address absent Schedule Bs in deficiency letters after she reviewed a sample of complaints against charities and the accompanying files and noticed fewer Schedule Bs filed than in the past. J.A. 314-316.

3. Under federal law, charities' Form 990s generally must be made available to the public. 26 U.S.C. § 6104(d)(1). Schedule Bs filed by private foundations—which are charities with a small number of donors, often in the same family—are also public documents. *Id.* § 6104(d)(3)(A). But federal law treats Schedule B forms submitted to the IRS by Section 501(c)(3) public charities—which solicit and receive donations from the public at large—as confidential. *Id.*[7]

California similarly treats Schedule Bs submitted to the Registry by 501(c)(3) public charities as confidential. That confidentiality requirement was first expressed as a policy of the state Department of Justice. Pet. App. 9a. In 2016, the Department codified the policy in a regulation providing that "[d]onor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General

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[7] *See generally* https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities (last visited March 21, 2021).

and shall not be disclosed[.]" Cal. Code Regs. tit. 11, § 310(b). The regulation allows disclosure in a judicial or administrative enforcement proceeding or in response to a search warrant. *Id.*

Consistent with that regulation, Schedule Bs are housed in a confidential database maintained by the Department's in-house data center and used only by the Charitable Trusts Section. *See* Pet. App. 10a; J.A. 343. They are not accessible to other sections or divisions of the state Department of Justice, including senior management. *See* J.A. 343-344; E.R. 1000. They are not part of a charity's filings included on the Department's public website. Pet. App. 10a.

State law authorizes discipline for negligent, intentional, or dishonest conduct by state employees that harms the public service. *See generally* Cal. Gov't Code § 19572. Employees who violate their duties or agency policies by failing to safeguard confidential information or who harm the public service by pretextually targeting charities are thus subject to discipline. California also prescribes criminal sanctions for the willful taking of official records. *Id.* § 6200.

There have at times been shortcomings in the Department's implementation of its confidentiality policies. In 2015, during the pendency of this case, the Foundation's retained expert identified flaws in the Registry database after performing an extensive analysis. E.R. 387, 391. He and his team found Schedule B forms that had been inadvertently posted on the Registry's public-facing website. E.R. 387. When the Registry was notified, the documents were removed within 24 hours. E.R. 387-388. The expert also identified a document-coding flaw that would have allowed users to manipulate document naming conventions and retrieve documents with no links on the public-

facing website that were housed in the Registry's confidential database. E.R. 391. The vulnerability was fixed within eight days. E.R. 872. Although these shortcomings were unfortunate and contrary to Department policy, there was no evidence at trial that the broader public saw the confidential documents or that any harm resulted.

To improve its performance, the Registry implemented additional quality-control measures beyond its then-existing protocols. E.R. 897-898. In particular, it began an enhanced process of screening documents before uploading them onto the website, using search criteria designed to identify confidential documents and to prevent them from being posted publicly. E.R. 898.

B. Procedural Background

1. Petitioners Americans for Prosperity Foundation and the Thomas More Law Center solicit funds from California donors. Pet. App. 6a. They are exempt from federal tax under Section 501(c)(3) of the Internal Revenue Code. *Id.* The Foundation has operations in California and has at times been exempt from state tax. E.R. 98.[8] It is devoted to education and training on public issues, such as free markets and the proper role of government. *See* Foundation Br. 10. The Law Center is a public interest law firm that represents clients and communicates with the public on matters including freedom of speech and religion. *See* Law Center Br. 4.

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[8] *See* https://www.ftb.ca.gov/file/business/types/charities-non-profits/revoked-entity-list.html (last visited March 24, 2021).

Petitioners annually filed unredacted Schedule Bs with the IRS. Pet. App. 11a. The Foundation's Schedule B forms for the years 2010 to 2014 listed between four and ten donors. J.A. 441. The Law Center listed between 23 and 60 donors on its Schedule Bs during the same period, although federal law required it to list only between two and seven. Law Center E.R. 22-23; *see also* Law Center Br. 45 n.3. But petitioners did not submit their unredacted Schedule Bs to the Registry. Pet. App. 10a-11a. In 2012 and 2013, the Registry informed petitioners that their registration filings were deficient because they lacked unredacted Schedule Bs. *Id.* at 11a.

2. In response, petitioners filed separate lawsuits against the Attorney General, each alleging that the requirement to submit a Schedule B to the Registry violated the First Amendment on its face and as applied to them. Pet. App. 11a; E.R. 108; Law Center Pet. App. 52a. The district court initially entered preliminary injunctions prohibiting the collection of petitioners' Schedule B forms. Pet. App. 70a-73a; Law Center Pet. App. 90a-96a. The court of appeals vacated those injunctions in substantial part, allowing the Attorney General to require the submission of petitioners' Schedule Bs but enjoining their public disclosure. Pet. App. 57a-69a. The district court then conducted separate bench trials in each case and issued permanent injunctions against the enforcement of the Schedule B requirement against each petitioner. *See* Pet. App. 13a-14a.

With respect to petitioners' facial claims, the district court recognized that the court of appeals had previously rejected a facial challenge to the State's Schedule B requirement. Pet. App. 42a-43a (citing *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307

(9th Cir. 2015)); *see also* Law Center Pet. App. 52a. The district court explained that the "'strong medicine' of facial invalidation need not and generally should not be administered when the statute under attack is unconstitutional as-applied to the challenger before the court." Pet. App. 43a. The court therefore "focuse[d] solely" on the as-applied challenges. *Id.*; *see also* Law Center Pet. App. 52a-53a.

With respect to those challenges, the district court held that California's Schedule B filing requirement was unconstitutional as applied to both petitioners. Pet. App. 41a; Law Center Pet. App. 51a. In the Foundation's case, the court concluded that the requirement was not substantially related to sufficiently important state interests because, among other reasons, those interests "can be more narrowly achieved." Pet. App. 47a. In the court's view, the Attorney General had failed to show "the necessity of Schedule B forms." *Id.* at 44a. In the Law Center's case, the court did "not doubt that the Attorney General does in fact use the Schedule Bs it collects." Law Center Pet. App. 56a. But it still concluded that the state requirement violated the First Amendment because it was "possible for the Attorney General to monitor charitable organizations without Schedule B." *Id.* at 54a. In both cases, the court entered permanent injunctions prohibiting the Attorney General from requiring either petitioner to file its Schedule B. Pet. App. 56a; Law Center Pet. App. 67a.

3. The court of appeals reversed. Pet. App. 1a-40a. It first determined that California's Schedule B requirement was subject to "exacting scrutiny," which demands a "substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 15a (internal quotation marks

omitted). The court explained that the standard requires "'the strength of the governmental interest [to] reflect the seriousness of the actual burden on First Amendment rights.'" *Id.* at 16a-17a (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)). But it does not demand "the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny," or require the State to "choose the least restrictive means of accomplishing its purposes." *Id.* at 16a.

The court next held that the State's requirement satisfied exacting scrutiny. Pet. App. 17a, 39a. The record demonstrated that California has a strong interest in the collection of Schedule B information and that the requirement furthers the interest in preventing fraud and self-dealing. *Id.* at 22a. Quick access to Schedule B filings increased the State's efficiency and allowed investigators to flag suspicious activity. *Id.* at 19a. The Attorney General "offered ample evidence of the ways his office uses Schedule B information in investigating charities that are alleged to have violated California law." *Id.* at 21a. Although the district court had reached a different conclusion, "it did so by applying an erroneous legal standard" that effectively required the State to show it was using the least restrictive means available. *Id.* at 21a-23a.

With respect to petitioners' as-applied claims, the court of appeals declined to decide whether public disclosure of their Schedule B information would create a constitutionally significant risk of retaliation against listed donors. Pet. App. 34a. Based on the trial evidence, there was not a reasonable probability that public disclosure would actually occur. *Id.* at 34a-38a. Although confidentiality lapses had happened, as a result of both technological vulnerabilities and human

error, the court recognized that the State had improved its protocols. *Id.* at 35a-38a. Given those changes, the evidence did not support an inference that either petitioner's Schedule B would be inadvertently disclosed. *Id.* To the extent that the district court found otherwise, that finding was clearly erroneous because the district court focused solely on past lapses without taking into account the new safeguards. *See id.* at 38a.

In reaching its conclusions, the court of appeals noted "several questionable evidentiary rulings" by the district court. Pet. App. 13a n.2. For example, the Foundation claimed that the State's requirement was a concern for its donors, yet the court did not allow the Attorney General to obtain discovery regarding that issue. *See id.* And although a central issue in the case was how the Attorney General used Schedule B submissions in investigations, the district court did not allow the State's witnesses to testify about ongoing investigations when "the Attorney General understandably refused to name the charities under current investigation." *Id.* at 21a-22a n.3.

The court of appeals also rejected petitioners' facial challenges. Pet. App. 39a-40a. That question was controlled by the court's prior decision in *Center for Competitive Politics*, 784 F.3d 1307. Pet. App. 40a. But even considering the issue anew, the evidence at trial did not establish that the State's Schedule B requirement "fails exacting scrutiny in a substantial number of cases, judged in relation to its plainly legitimate sweep." *Id.* (internal quotation marks and alterations omitted).

The court of appeals denied petitions for rehearing en banc. Pet. App. 74a-77a. Dissenting from that de-

nial, five judges would have concluded that California's disclosure requirement could not be constitutionally applied to the Foundation. *Id.* at 77a-97a; *see also id.* at 98a-109a (response to dissent).

SUMMARY OF ARGUMENT

This Court has directed that First Amendment challenges to reporting or disclosure requirements are reviewed under "exacting scrutiny." That standard demands a substantial relation between the requirement and a sufficiently important governmental interest. It also requires that the strength of the government's interests reflect any actual burden on First Amendment rights. The Court has not subjected reporting or disclosure requirements to strict scrutiny or to the type of narrow tailoring required under strict scrutiny. Here, petitioners have not identified any sound reason for applying anything other than the established exacting scrutiny standard to California's requirement that tax-exempt charities provide state regulators—on a confidential basis—with a copy of the same federal Schedule B form that they routinely provide to the federal government. That nonpublic reporting requirement applies evenhandedly without regard to a charity's mission or viewpoint, and it does not compel or restrict any speech or association.

Petitioners principally ask the Court to invalidate California's Schedule B requirement on its face, but neither petitioner has made the showing required to justify that drastic remedy. Their claim for facial relief is substantially premised on the assertion that state charity regulators "virtually never use[] Schedule B." *E.g.*, Foundation Br. 1. The evidence at both trials, however, showed that state charity regulators routinely review Schedule B information, along with other documents, in evaluating complaints against

charities. It also detailed the ways in which Schedule B information helps regulators to detect wrongdoing, such as by assisting them in identifying when a donor uses a charity to funnel contributions to himself or when a charity misleads the donating public by overstating the extent of its programs or its administrative efficiency.

Nor did petitioners show that California's nonpublic reporting requirement leads to a broad-based chilling effect across the large and diverse population of charities within the State, which would be necessary to invalidate the State's requirement on its face. Many charities engage in activities that arouse little public debate or passion; petitioners identify no basis for concluding that the nonpublic reporting of donors to those causes would lead to any chilling effect. Instead, petitioners argue that shortcomings in the State's implementation of confidentiality protocols makes California's nonpublic reporting requirement tantamount to a public disclosure law. That is not correct—and, in any event, allegations about shortcomings in the implementation of a state requirement are properly considered in the context of an as-applied claim, not as a basis for facial invalidation.

Petitioners also failed to show that California's limited and nonpublic reporting requirement lacks the requisite fit with the State's oversight and law enforcement interests. They argue that state charity regulators should use alternative means to discharge their charitable oversight and enforcement responsibilities. Under exacting scrutiny, however, a State is not required to show that its chosen approach is the only way to achieve its objectives. The alternatives petitioners propose, moreover, would have significant shortcomings. Subpoenas or audit letters would lead

to delays and provide unscrupulous charities with opportunities to hinder an investigation. Neither would meet the State's need to efficiently and effectively discharge its oversight and enforcement duties with respect to the more than 100,000 charities soliciting donations from state residents.

Finally, the court of appeals properly rejected petitioners' as-applied claims. Expressive organizations that are subject to a facially valid reporting requirement may bring an as-applied challenge by showing that the requirement would subject their members or donors to harassment, threats, or reprisals. But petitioners have not substantiated their claim that the donors listed on their Schedule Bs would face any such reprisals if petitioners complied with the State's nonpublic reporting requirement. The State has enhanced its protocols to protect Schedule B information and has adopted a regulation enshrining the confidential status of that information. Especially in light of these changes, the court of appeals correctly held that petitioners faced no reasonable probability that the limited information provided on their federal Schedule Bs would be exposed to public view.

ARGUMENT

I. NONPUBLIC REPORTING REQUIREMENTS ARE SUBJECT TO EXACTING SCRUTINY, NOT STRICT SCRUTINY

Petitioners argue that the court of appeals applied the wrong standard of scrutiny in evaluating their claims. The Law Center contends (at 17, 26-29) that government reporting requirements are subject to strict scrutiny. The Foundation agrees with the State that exacting scrutiny applies, but contends that the standard imposes a narrow tailoring requirement under which the government apparently must show that

it has selected the least restrictive means to achieve its ends. *See* Foundation Br. 20-29. Both contentions are incorrect.

1. Under this Court's precedents, requirements to report information about an organization's supporters to government regulators, or to disclose such information to the public at large, are reviewed under "exacting scrutiny."

As the Foundation notes (at 22), this Court's articulation of the constitutional principles applicable to state disclosure and reporting requirements traces to *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). That case considered Alabama's demand for the names and addresses of rank-and-file members of the NAACP, for the claimed purpose of enforcing a state law regarding the registration of corporations. *Id.* at 451, 464. The Court observed that effective advocacy, particularly of controversial views, is enhanced by individuals' ability to associate and amplify their voices. *See id.* at 460. The Court recognized that disclosure requirements do not directly restrict such group associations, but in some circumstances may have the effect of discouraging them. *Id.* at 461-462. Where they do, the State must have an interest "sufficient to justify" the harm. *Id.* at 463.

In that case, the NAACP "made an uncontroverted showing" that prior disclosure of members' identities had led to economic reprisals, physical threats, and other forms of public hostility, which jeopardized members' collective ability to advocate their beliefs. *See NAACP*, 357 U.S. at 462-463. The State lacked an interest sufficient to justify that harm because exposure of members' names had no "substantial bearing" on Alabama's purported interest in determining

whether an organization was doing business within the State. *Id.* at 464.

In *Bates v. City of Little Rock*, 361 U.S. 516 (1960), two cities required that the NAACP publicly disclose its member rolls. The Court rejected those requirements in light of evidence that public identification of members had been followed by harassment, threats of bodily harm, and a substantial drop-off in memberships. *Id.* at 521 n.5, 524. The Court explained that "[w]hen it is shown that state action threatens significantly to impinge upon constitutionally protected freedom," courts must determine "whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Id.* at 525. The demonstrated harm to plaintiffs' associational interests could not be justified in that case because the cities' interests in implementing their licensing-tax schemes lacked a "relevant correlation" to compelled public identification of members. *Id.* Subsequent cases applied a similar analysis. [9]

In *Buckley v. Valeo*, the Court synthesized the principles articulated in these cases and explained that "[s]ince *NAACP v. Alabama*" the Court has subjected

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[9] *See Gibson v. Fla. Legislative Investigation Comm'n*, 372 U.S. 539, 550 (1963) (rejecting compelled revelation of members' names because there was "no semblance of" a nexus between NAACP and alleged "subversive activities" being investigated); *Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark. 1968), *aff'd sub. nom Roberts v. Pollard*, 393 U.S. 14 (1968) (per curiam) (state statute conferring subpoena power on local prosecutors was unconstitutional as applied to demand for political party contributors' identities, because requested information was not relevant to the local investigation and because public interest in disclosure was not sufficient "to outweigh" interests of party and its contributors).

requirements to provide membership or donor information to "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (footnote omitted). Under that standard, there must be a "'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.* (footnotes omitted). The governmental interests must be sufficient to justify the extent of the burden on First Amendment rights. *Id.* at 68.

Since *Buckley*, the Court has repeatedly applied exacting scrutiny to government reporting or disclosure requirements. *See Doe*, 561 U.S. at 196; *Citizens United v. FEC*, 558 U.S. 310, 366 (2010); *Davis v. FEC*, 554 U.S. 724, 744 (2008). And it has expressly recognized that exacting scrutiny is different from—and less stringent than—strict scrutiny. *See Doe*, 561 U.S. at 199 n.2.

These precedents demonstrate that the Law Center is mistaken in contending (at 27) that *NAACP* set strict scrutiny as the governing test. It is true that *NAACP* stated that the "subordinating interest of the State must be compelling." 357 U.S. at 463 (citation omitted); *see also Bates*, 361 U.S. at 524 (similar). But that word in isolation cannot bear the weight the Law Center ascribes to it. *NAACP* pre-dates the crystallization of defined tiers of First Amendment scrutiny. And the Court made clear that the dispositive question was whether Alabama had shown an interest "sufficient to justify" the demonstrated harm to First Amendment freedoms. 357 U.S. at 463. That is consistent with how this Court has framed the requisite governmental interest under exacting scrutiny, explaining that "the strength of the governmental interest must reflect the seriousness of the actual burden

on First Amendment rights." *Doe*, 561 U.S. at 196 (citation omitted).

2. There is no sound reason to depart from the established exacting scrutiny standard and subject nonpublic reporting requirements to strict scrutiny. Exacting scrutiny properly safeguards expressive and associational interests. It limits States to requirements that directly serve their regulatory objectives, in circumstances where the strength of their interests is commensurate with any burdens imposed. *See Buckley*, 424 U.S. at 66, 68. It also recognizes that, in particular cases, where a reporting or disclosure requirement is likely to lead to risks of reprisals or other harms, an organization may bring an as-applied challenge seeking an exemption from the requirement. *See, e.g.*, *Doe*, 561 U.S. at 201 (discussing cases).

Nonpublic reporting requirements are fundamentally different from the restrictions that the Court has subjected to strict scrutiny. For example, this Court has applied strict scrutiny to laws that restrict speech based on content or viewpoint. *See, e.g.*, *Reed v. Town of Gilbert*, 576 U.S. 155, 164-165 (2015). Laws like those are presumptively unconstitutional because they directly suppress speech and distort the public marketplace of ideas. *See id.* at 163. Similarly, in various cases on which the Law Center relies (at 28-29, 32), the Court addressed laws that directly impinged upon associational or speech rights. Among other things, those laws compelled expressive organizations to accept unwanted members, required individuals to

associate with organizations whose ideas they rejected, or directly prohibited certain fundraising communications.[10]

In contrast, a nonpublic reporting mandate tied to legitimate state regulation like California's does not compel or prohibit any speech to members of the public or any association. It does not restrict the amount of funds a charity can raise or from whom it can receive funds. It applies evenhandedly, without regard to any charity's mission or point of view. And California's requirement mandates reporting to state charity regulators only the same information that tax-exempt entities already provide to the federal government.

As this Court has recognized even in the context of laws requiring *public* disclosure, "disclosure requirements may burden the ability to speak but they . . . do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (citations and internal quotation marks omitted); *see also Doe*, 561 U.S. at 196 (distinguishing between "a prohibition on speech" and a "*disclosure* requirement"). The Court thus has consistently applied exacting—not strict—scrutiny to requirements to provide membership or donor information to government officials. *Supra* pp. 19-22.

3. The Foundation (at 20) agrees with the State that exacting scrutiny is the applicable standard. It contends, however, that the standard requires "narrow tailoring," by which it appears to mean that the

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[10] *See, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (compelled admission of members to club); *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion) (termination of public employees affiliated with opposing political party); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) (upholding prohibition on certain fundraising solicitations for judicial candidate).

State must choose the least restrictive means to achieve its ends. Foundation Br. 24-28; *see also* Law Center Br. 27-29, 32. That is also incorrect.

Exacting scrutiny does involve consideration of the fit between a requirement's goals and the means chosen to pursue them. As explained, there must be a "'substantial relation'" between the requirement and a sufficiently important government interest. *Doe*, 561 U.S. at 196. "[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (internal quotation marks omitted). But exacting scrutiny does not require the State to demonstrate that it has acted in the least-restrictive way possible. Instead, the State's interests must be "sufficient to justify" the extent of any demonstrated deterrent effect. *NAACP*, 357 U.S. at 461, 463.

The Foundation (at 24-25) seeks to locate a more stringent tailoring requirement in this Court's decisions in *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961). In *Shelton*, the Court invalidated an Arkansas statute requiring every teacher to file an annual affidavit listing every organization to which the teacher belonged or regularly contributed within the last five years. *Shelton*, 364 U.S. at 480, 490. The statute did not make the information confidential, and a member of the Capital Citizens Council testified that the group intended to gain access to the information to try "to eliminat[e]" from the school system employees who supported organizations with which the Council disagreed. *Id.* at 486 n.7. The Court also recognized the "constant and heavy" pressure that the requirement would place on teachers "to avoid any ties which might

displease those who control [their] professional destin[ies]." *Id.* at 486. In light of these burdens and the statute's "completely unlimited" sweep, the Court struck the statute down. *Id.* at 488-490. The Court explained that the law's "comprehensive interference with associational freedom [went] far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." *Id.* at 490.

The Foundation (at 24) emphasizes *Shelton*'s statement that governments cannot pursue their interests "by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." 364 U.S. at 488 (footnote omitted). But that statement, and the substance of the Court's analysis of Arkansas's "unlimited and indiscriminate" law, *id.* at 490, are consistent with exacting scrutiny's requirement that the strength of the State's interest be commensurate with the demonstrated burden to associational interests. *See NAACP,* 357 U.S. at 463; *Doe*, 561 U.S. at 196; *supra* pp. 20-24. And nothing in *Shelton* or cases that followed it suggests that the Court was adopting a least-restrictive-means test for measuring the constitutionality of state reporting or disclosure requirements. *See, e.g.*, *Gibson*, 372 U.S. at 546 (constitutionality of demand for identity of NAACP members depended on whether the State had shown "a substantial relation between the information sought and a subject of overriding and compelling state interest").

In *Gremillion*, the Court observed that States may regulate the time and manner of literature distribution so long as such regulations are "'narrowly drawn to prevent the supposed evil.'" 366 U.S. at 297 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

The Court explained that *Shelton* exemplified application of the "narrowly drawn" principle by invalidating "a detailed disclosure of" teachers' "every conceivable kind of associational tie" that had "no possible bearing" on the teacher's occupational fitness. *Id.* (internal quotation marks omitted). That is consistent with the requirement under exacting scrutiny that the means and ends have a substantial relation, but not with a least-restrictive-means test. Moreover, in another context, this Court has rejected the contention that the phrase "narrowly drawn" necessarily requires a showing that the State has adopted the least-restrictive alternative. *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477-480 (1989).

Buckley also did not impose a least-restrictive-means test, as petitioners suggest. *See* Foundation Br. 27-28; Law Center Br. 39. In *Buckley*, the Court "note[d] and agree[d] with" the plaintiffs' "concession that disclosure requirements certainly in most applications appear to be the least restrictive means" of achieving Congress's goals. 424 U.S. at 68 (footnote omitted). But the Court made clear that the question under exacting scrutiny is whether the challenged disclosure requirement is substantially related to the government's interest and whether that interest is sufficient to justify the extent of any burden on associational rights. *Id.* at 64, 68.

4. Petitioners are also mistaken in arguing that exacting scrutiny is reserved for challenges to election-related cases. *See* Foundation Br. 2, 27-30; Law Center Br. 29-31. The Court has not drawn the sort of categorical distinction between electoral and non-electoral cases that petitioners suggest. To the contrary, *Buckley* expressly adopted the framework that had been applied in *NAACP* and other cases that

plainly fall outside the election context. *See Buckley*, 424 U.S. at 64-66 & nn.73-75.[11]

In addition, *Buckley*'s framework is not confined to regulations that promote campaign transparency. *See* Foundation Br. 28-29. As the Law Center acknowledges, *Buckley* recognized that federal election-disclosure requirements not only furnish the public with information about candidates but also—and "not least significant[ly]"—serve the government's interest in gathering data to detect violations of contribution limits. 424 U.S. at 67-68; *see* Law Center Br. 29. That interest in enforcing the law is the same type of interest underlying California's Schedule B requirement here.

Finally, *Buckley* did not "'fashion[] a per se rule'" in the election context "that the 'narrow tailoring prong of the *NAACP v. Alabama* test is satisfied.'" Foundation Br. 28-29 (quoting Pet. App. 82a). *NAACP*'s test did not include any such prong. *Supra* p. 19. In both cases, the Court assessed the constitutionality of an information-disclosure requirement not by considering whether the government had acted in the least intrusive way possible but rather by examining whether the requirement served the government's interests and whether those interests were sufficient to justify any demonstrated First Amendment burden. *See NAACP*, 357 U.S. at 463-466; *Buckley*, 424 U.S. at

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[11] The Law Center (at 29) misreads *Buckley*'s statement that "*NAACP v. Alabama* is inapposite." *Buckley*, 424 U.S. at 70. *Buckley* distinguished *NAACP* on its facts, not because a different standard of scrutiny applied. *See Buckley*, 424 U.S. at 69 (NAACP made "uncontroverted showing" that disclosure of members' identities led to threats and public hostility); *id.* at 71 (*Buckley* challengers did not "tender[] record evidence of the sort proffered" in *NAACP*).

68-72. That is the proper mode of analysis under exacting scrutiny, and it applies here as well.

II. PETITIONERS' FACIAL CHALLENGES TO THE SCHEDULE B REQUIREMENT FAIL

Beyond their arguments concerning the proper standard of scrutiny, petitioners primarily contend that California's Schedule B requirement is unconstitutional on its face. *See* Foundation Br. 30-47; Law Center Br. 33-43. Facial challenges are disfavored. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449-450 (2008). Ordinarily, a plaintiff may succeed only by establishing that the law is "unconstitutional in all of its applications" or, at a minimum, that it lacks a "plainly legitimate sweep." *Id.* at 449 (internal quotation marks omitted). In the First Amendment context, this Court has also recognized that a law may be facially overbroad but only if a challenger demonstrates that a "substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 449 n.6 (internal quotation marks omitted).

Petitioners have not satisfied any of these demanding standards. California's Schedule B requirement is substantially related to the State's regulatory and law enforcement interests. And the strength of those interests is sufficient to justify the State's confidential reporting requirement—particularly in the absence of findings or evidence that the requirement has a chilling effect across the broad and diverse population of charities operating in the State.

A. California's Requirement Is Substantially Related to the State's Regulatory and Law Enforcement Interests

1. The State has compelling interests in overseeing charitable entities and preventing the unlawful diversion of charitable assets and the deception of the donating public. Californians contribute billions of dollars each year to charitable causes.[12] When a charity misuses donations or redirects them for private enrichment, it harms donors, the causes they support, and the public interest. States also have powerful interests in protecting their residents from fraudulent solicitations and in enabling donors to make informed choices about their giving. *See, e.g.*, *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 623 (2003); *Riley v. Nat'l Fed'n of the Blind of N. Carolina*, 487 U.S. 781, 792 (1988).

Abuse of the charitable form affects state tax revenues as well. Under state and federal law, many charities pay no income tax and enjoy the ability to collect tax-deductible donations. *Supra* pp. 2-3. In California, state taxpayers generally may deduct contributions made to 501(c)(3) organizations, even if those organizations have not sought or received tax-exempt status from the State. *See* Cal. Rev. & Tax Code §§ 17201, 17024.5. If a charity deceives California donors into giving, the State loses out on revenue without any countervailing benefit to the public at large—whether the charity is based in California or elsewhere. *See* Law Center Br. 41.

2. California's Schedule B requirement is substantially related to the State's oversight and law enforcement interests. Quick access to major donor

[12] Attorney General's Guide to Charities at 68.

information allows state charity regulators to flag suspicious activity and to efficiently uncover and address misuse of charitable assets and other wrongdoing. "[P]reventing fraud and self-dealing in charities" is an important government interest, and collecting Schedule Bs "clearly further[s] those interests by making it easier to police for such fraud." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018); *see also* Pet. App. 19a-21a.

a. Petitioners' contrary arguments largely rest on their assertion that California charity regulators "virtually never" use Schedule B as part of their oversight or investigative functions. Law Center Br. 37; *see also* Foundation Br. 1, 8, 31. That is demonstrably wrong.

At trial, the head of the Charitable Trusts Section testified that she used Schedule B "[a]ll the time." J.A. 413. Another attorney in the Section said the same thing. S.E.R. 1002 ("I use it all the time"). A supervising auditor testified that his audit team used Schedule Bs in their investigations and identified specific kinds of wrongdoing that the information on the form helps them identify. E.R. 969-970; Law Center E.R. 541-542.

The evidence demonstrated that when state charity regulators receive a complaint about a charity, they typically begin their review by examining the entire Form 990—including Schedule B—among other documents. *See, e.g.*, J.A. 311; Law Center E.R. 541. The Schedule B is a tool that helps determine if further investigation is warranted. J.A. 413; Law Center E.R. 546-547; E.R. 1062-1063. If so, information on the Schedule B can help provide a "roadmap" for the investigative team. E.R. 717; *see also* Law Center E.R. 505.

For example, Schedule B information can provide information on whether a donor is in a position to obtain private benefits from the charity. With a Schedule B, state investigators can cross-reference donor information with other parts of the Form 990 to see if a charity is paying a for-profit entity run by one of its largest donors for goods and services or making grants benefitting a donor's family members, in violation of the organization's charitable trust obligations and California law. *See, e.g.*, E.R. 577-578, 716-718, 1062; S.E.R. 983; Cal. Corp. Code §§ 5231, 5250. In one investigation discussed at trial, information on a Schedule B helped investigators uncover that the founders and operators of an animal sanctuary were diverting family members' donations for personal use, such as first-class trips to Hawaii and travel to Las Vegas. Law Center E.R. 545-546; *see also* E.R. 577-578, 1012-1014 (similar use of Schedule B to determine that donor to private foundation was using donations for personal benefit).

In another investigation, Schedule B helped determine that a charity was misusing assets to subsidize a related for-profit entity. *See* Law Center E.R. 544-545. The charity had claimed that the for-profit entity was underwriting the charity's work, but no contributions from the for-profit entity were listed on the Schedule B. *Id.* at 545. That absence signaled that the charity was subsidizing for-profit activities instead of the reverse (as the charity had claimed). *Id.*; *see also* E.R. 575 (describing investigation where Schedule B helped track donations solicited for the ostensible purpose of assisting animals affected by Hurricane Katrina when the charity used the money for different purposes).

Information on a Schedule B also helps state investigators uncover suspect gift-in-kind donations. *See* E.R. 578-579, 715-717, 974, 1059-1062; J.A. 395. By overvaluing or misclassifying in-kind contributions, a charity may misrepresent its size and efficiency to the donating public and to regulators. *See supra* pp. 7-8. Those misrepresentations harm donors by convincing them to donate based on misleading information. *See Madigan*, 538 U.S. at 623. They also harm legitimate charities that compete with unscrupulous organizations for donations. E.R. 1738. The head of the Charitable Trusts Section testified that if staff see large in-kind donations reported on a Schedule B, that is a "very serious red flag." J.A. 434.

In addition, state charity regulators testified about how Schedule Bs can help track in-kind gifts to make sure that charities are not acting as mere accounting pass-throughs. *See supra* p. 8. A supervising auditor explained that Schedule B information has been used to help determine "a chain of events," including "where the gifts came from" and "where they went." J.A. 395. State witnesses testified about a particular gift-in-kind scam involving cancer charities. The charities misrepresented that millions of dollars of pharmaceuticals were donated to them when, in fact, they were simply passing them on to another charity, without ever having proper authority over them. Law Center E.R. 506-510. Schedule B information helped connect the chain of donors in this fraud because it allowed investigators to specifically match the donor-charities' names with pharmaceutical shipments falsely listed as gift-in-kind donations. E.R. 1741-1742.[13]

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[13] Additional evidence concerning the State's use of Schedule Bs is not in the record because the district court did not allow the

b. The evidence contradicts other of petitioners' characterizations. For example, the record does not support petitioners' centerpiece allegation that only five out of 540 "of the Attorney General's investigations" over a ten-year period "so much as implicated a Schedule B." Foundation Br. 33; *see also* Law Center Br. 42. As just discussed, the record established that state charity regulators routinely review Schedule Bs as part of their evaluation of complaints. *Supra* p. 30. And even taking the testimony cited by petitioners in isolation, the numerator in their fraction is inaccurate and the denominator is overstated. The numerator in petitioners' fraction only captures five matters identified by audit staff in response to an interrogatory in which the Foundation asked the Attorney General for ten instances involving the use of Schedule B. J.A. 398-399. The response identified ten, as requested, including five identified by legal staff. *Id.* The denominator is overstated because the 540 figure relies on the high-end estimate of average monthly investigations for each of the 120 months encompassed by the interrogatory. J.A. 400-401. That high-end estimate was the number of "[p]otential" investigations, not an actual count. J.A. 401.

Other of petitioners' depictions of the trial evidence are incomplete, out of context, or irrelevant. For example, it is true that *the Registry* does not use Schedule Bs "'day-to-day.'" Foundation Br. 32. That is

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Attorney General to introduce it. In the Foundation trial, for example, the district court excluded testimony regarding specific uses of Schedule Bs in ongoing investigations when the Attorney General would not reveal the names of the charities involved. Pet. App. 21a-22a n.3. The district court also did not permit a supervising auditor to testify about investigations he had supervised, and thus had personal knowledge of, on the basis that this was "hearsay." E.R. 973-975.

because the Registry functions as the repository of charitable filings. *Supra* p. 5. The information is used not by the Registry itself, but by legal and audit staff in the Charitable Trusts Section—outside the Registry—who discharge the Attorney General's oversight and enforcement duties. *Supra* pp. 4-5.

Petitioners also claim that Schedule B has never triggered or obviated an investigation. *See* Foundation Br. 33; Law Center Br. 36. But state officials testified that while Schedule B is not the sole document that, standing alone, determines whether a formal investigation is pursued, it is an important part of the information used to assess whether a complaint has merit and warrants further (and more intrusive) examination. J.A. 413; Law Center E.R. 546-547; E.R. 1062-1063; *see Andresen v. Maryland*, 427 U.S. 463, 480 n.10 (1976) ("[l]ike a jigsaw puzzle," illegality is often pieced together from "many pieces of evidence that, taken singly, would show comparatively little"). And while a state attorney testified that "investigations are not Schedule B driven," the next sentence of her testimony was that "Schedule B is a tool of the investigation." J.A. 205; *see* Foundation Br. 33.[14]

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[14] Petitioners' portrayal of other trial evidence suffers from similar flaws. For example, the Law Center (at 37) faults a state attorney for not providing an example of his use of Schedule B in the last year. But he was not asked to do so. He was asked "[h]ow many times" he had "used Schedule B in the last year"; he answered that he had some open investigations in which Schedule B had been useful, but his time that year had been primarily spent litigating a matter that did not involve Form 990-related issues. Law Center J.A. 273. Nor is it correct to suggest that a state auditor testified that Schedule B is "not an 'important document' in *any* investigation." *See* Law Center Br. 37 (citing Law Center J.A. 458). At the cited passage, the auditor testified only

The Foundation (at 33-34) argues that the court of appeals erred in failing to defer to district court fact findings and in concluding that up-front collection of Schedule Bs substantially advances the State's oversight and enforcement interests. But the district court's analysis, in addition to being unsupported factually, was infected by legal error. As explained above, the district court erroneously concluded that the applicable standard of scrutiny required a showing that using Schedule B was the only possible way to serve the State's interests. *Supra* p. 13. And throughout the trials, the court declined to consider testimony concerning state regulators' use of Schedule B based on its conclusion that the evidence did not bear on the issues before it.[15] Nothing in the applicable standard of review required the court of appeals to disregard these errors. *See, e.g.*, *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394-396 (1948).

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that he did not recall whether internal reports on particular investigations had specifically listed Schedule B as an important document. Law Center J.A. 458. He also testified that Schedule B was used to help identify different types of charitable wrongdoing. J.A. 392-393.

[15] For example, in the Law Center trial, the district court instructed the State's counsel not to ask the head of the Charitable Trusts Section about examples in which she had used Schedule B that did not specifically involve the Law Center, because "[w]e're here talking about the Schedule B to this plaintiff." Law Center E.R. 510-511. Similarly, in the Foundation trial, the court did not allow the former head of the Section to testify about "precisely how Schedule B was helpful" in a particular case on the basis that it was "not relevant under the circumstances of her testimony." E.R. 576.

B. Petitioners Failed to Demonstrate a Significant Burden on First Amendment Rights

Petitioners' facial challenge also cannot succeed because they have not shown that California's Schedule B requirement burdens charities generally.

1. In *Doe*, this Court rejected a facial challenge to a requirement to publicly disclose the names of those who signed referendum petitions. 561 U.S. at 190-191. The plaintiffs' "argument rest[ed] almost entirely on the specific harm they [said] would attend disclosure" of signatures on a particularly contentious petition "or on similarly controversial ones." *Id.* at 200. The Court recognized that typical referendum petitions concerned a broad range of issues, including tax policy, budget, or other state law questions. *Id.* While voters "care about such issues, some quite deeply," there was "no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear[ed]" in connection with a specific petition provoking intense public debate. *Id.* at 201; *see also id.* at 202-203 (Alito, J., concurring) (similar). In light of "the State's unrebutted arguments that only modest burdens attend[ed] the disclosure of a typical petition," the Court rejected "plaintiffs' broad challenge" to the law. *Id.* at 201.

Similarly here, there is no basis on which to conclude that California's requirement results in any broad-based chill. To begin with, California's Schedule B requirement is confidential. *Supra* pp. 9-10. In addition, many charities engage in activities that arouse little (if any) public debate or passion. While the public may care deeply about many issues that are the subject of charitable concern—such as serving food

to needy families or providing shelter to those affected by natural disasters—"there is no reason to assume" that even the public disclosure of a donor's support for such causes would lead to the kind of backlash petitioners argue they have experienced. *See* 561 U.S. at 201. And some charities engage in activities, such as providing goods or services to beneficiaries, that do not principally (if at all) involve expressive activities.

Moreover, California's Schedule B requirement mandates the reporting of only the same information that tax-exempt charities already provide to other government agencies. Federal law requires both 501(c)(3) public charities and private foundations to submit Schedule Bs as part of their annual information return. *Supra* p. 9. In addition, tax-exempt entities in California generally are required to provide major-donor information to state tax authorities as part of their state return. *See* Cal. Rev. & Tax Code § 23772(b)(5); Cal. Code Regs. tit. 18, § 23772(a)(2)(B). Petitioners do not challenge either of those requirements; and they offer no persuasive explanation why the additional requirement to confidentially report the same information to another state agency would broadly deter donors across the State.

In light of these circumstances, petitioners cannot demonstrate that California's Schedule B requirement causes an unconstitutional chill in all or even many of its applications. *See Washington State Grange*, 552 U.S. at 456-458. And nothing in "the text" of the challenged provision or in "actual fact" demonstrates "a substantial number of instances . . . in which" California's requirement "cannot be applied constitutionally." *See N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988).

2. The circumstances present here are very different from those in the cases on which petitioners rely. *See* Foundation Br. 41; Law Center Br. 33-35. As discussed above, *Shelton* held facially invalid a statute that compelled teachers to broadly disclose their organizational affiliations to local school officials. 364 U.S. at 480, 490. The statute did not require that the information be kept confidential; each local school board was "left free to deal with the information as it wishe[d]." *Id.* at 486 (footnote omitted). And the disclosure requirement would put "constant and heavy" pressure on teachers (who lacked job security after any given school year) to avoid organizational ties that "might displease those who control [their] professional destiny." *Id*.

In contrast, California prohibits the public disclosure of Schedule B information. *Supra* pp. 9-10. And unlike the inevitable pressure that the untenured teachers in *Shelton* faced upon giving their employers comprehensive associational information, petitioners offer nothing more than speculation that California's Schedule B requirement has led to any similar chill for the broad sweep of charities operating within the State. *See* Foundation Br. 41-42. Mere speculation is not a sufficient basis on which to facially invalidate a state requirement. *See Washington State Grange*, 552 U.S. at 457; *United States v. Harriss*, 347 U.S. 612, 626 (1954).

The Law Center (at 33-35) also invokes *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984), where the Court explained that a statute directly restricting speech was subject to facial challenge when "in *all* its applications [it] create[d] an unnecessary risk of chilling free speech." *Id.* at 967-968 (emphasis added). That statute imposed an

across-the-board burden on free speech by limiting the amounts all charities were allowed to spend on fundraising activities—including on activities that disseminated the charities' expressive messages. *Id.* at 950, 967 n.16. A nonpublic disclosure requirement, like the one challenged here, does not similarly prohibit speech or association. Any indirect effect it could plausibly have on an organization's associational or expressive interests would depend on the particular circumstances of the organization, as the Foundation itself appears to recognize. *See* Foundation Br. 39 (claiming chill "especially among those [donors] who support controversial groups"). And for charities that must make their Schedule Bs public under federal law, *see supra* p. 9, there could be no plausible chilling effect whatsoever.

Petitioners also point to cases in which the Court held that certain laws requiring a speaker to identify himself as part of his speech violated the First Amendment. *See* Foundation Br. 3, 21; Law Center Br. 21-22. Anonymous political speech has longstanding roots in our constitutional tradition. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). In particular, this Court has recognized that laws requiring handbills or election pamphlets to identify their authors threaten core First Amendment values by revealing "unmistakably the content of [the speaker's] thoughts," distorting his message, and sometimes suppressing dissident speech entirely. *See id.* at 355; *Talley v. California*, 362 U.S. 60, 64 (1960).

Those important concerns are not implicated by the nonpublic reporting requirement at issue here. California's Schedule B requirement mandates confidential reporting of only limited information already provided to other regulators. That reporting "reveals

far less information" than the content of a handbill or pamphlet; it is made in confidence to regulators, who are required to use the information only for proper government purposes; and it does not affect the content of any expression. *See McIntyre*, 514 U.S. at 355 (distinguishing expenditure reporting from "compelled self-identification on all election-related writings").

3. Petitioners also attempt to support their claim of a chilling effect by focusing on how California has implemented its Schedule B requirement in practice. *See* Foundation Br. 39-42; Law Center Br. 14. In particular, both petitioners argue that the State has failed to adequately safeguard donor information. As explained below, those arguments are incorrect. *See infra* pp. 47-49. But in any event, they are properly considered in the context of petitioners' as-applied claims, not their facial challenge.

This Court's decision in *Washington State Grange* is instructive. The plaintiffs in that case brought a pre-enforcement facial challenge to a state law establishing a new primary system, alleging that it allowed primary voters who were not affiliated with a party to choose the party's nominee. *Washington State Grange*, 552 U.S. at 448. The Court explained that because certain implementations of the law would be consistent with the First Amendment, the facial challenge failed. *Id.* at 456-457; *see also N.Y. State Club Ass'n,* 487 U.S. at 11-14 (similar).

In this case, all agree that Schedule Bs reported to the State may not, as a legal matter, be disclosed to the public. Petitioners' theory of harm is substantially premised on their assertion that the Registry has failed to adequately implement that legal requirement in practice. Even if that were correct—and it is not,

see infra pp. 47-49—petitioners' contentions would at most support as-applied relief.

C. Petitioners' Arguments Concerning the Fit Between the Requirement and the State's Interests Are Unpersuasive

Petitioners also contend that the State's decision to collect Schedule B forms from registered charities is insufficiently tailored. Foundation Br. 34-39, 43-45; Law Center Br. 32, 37-38, 42-44. That contention is also incorrect.

1. California's Schedule B requirement is limited. The State only requires tax-exempt charities to provide the Registry a copy of the same form that they have already prepared and submitted to the federal government. The information on that form is nonpublic and is confined to the largest donations, for which abuse could pose the greatest risk to charities. *See* 26 C.F.R. § 1.6033-2(a). Petitioners did not establish that the Schedule B requirement covers any significant number of donors for charities generally. From 2010-2014, the Foundation's Schedule B form listed four to ten donors. J.A. 441. And the Law Center was required to list only between two and seven donors under the federal standard. Law Center E.R. 22-23. California's narrow requirement stands in sharp contrast to the demands this Court invalidated in *NAACP*, *Bates*, and *Shelton*, where government officials required submission of lists of all rank-and-file members or a complete accounting of every association a teacher had joined over a five-year period. *Supra* pp. 19-20, 24-25.

2. Petitioners contend that the Constitution requires the State to use still more limited alternatives. *See* Foundation Br. 34-39; Law Center Br. 12, 42. That is incorrect as a legal matter, *see supra* pp. 24-

26; and, in any event, the record makes clear that the alternatives suggested by petitioners would not adequately serve the State's interests.

Under exacting scrutiny, a State does not have to show that its chosen approach is the only way to effectively or efficiently achieve its objectives. In *Doe*, for example, the challengers argued that public disclosure of referendum signers' names was unnecessary because of numerous other available mechanisms to assure the integrity of the election process. *Doe*, 561 U.S. at 198. This Court rejected that argument because public disclosure helped the State accomplish its goals. The Court explained that state officials "ordinarily check[ed] 'only 3% to 5% of signatures,'" and the challenged disclosure could "help cure the inadequacies of the verification and canvassing process." *Id.* The Court did not agree with the dissent that the State should instead be required to adopt other measures to achieve its ends. *See id.* at 235 (Thomas, J., dissenting).

The alternatives proposed here, moreover, would not adequately serve the State's interests. *See* Foundation Br. 34-39; Law Center Br. 12, 41-42. Subpoenas and audit letters entail delays and commitment of resources—not only for the State but also for charities that may have to redirect resources from their charitable activities to respond to the audit. *See* Law Center E.R. 547. Petitioners are not correct in suggesting that state investigators issue an audit letter or subpoena whenever they look into a charity. *See* Foundation Br. 34. The record shows that when a complaint is received, state investigators typically begin their inquiry by examining the Form 990, including the Schedule B, and other documents. *Supra* p. 30. That initial review then determines whether more formal

and burdensome measures, such as subpoenas or audit letters, are warranted. *Supra* p. 30. In a State like California, where more than 100,000 registered charities solicit funds from state residents and 50 to 100 complaints can be received each month, E.R. 554-555, 559, it would not be feasible for the State to issue a subpoena or audit letter every time a complaint is received. *See* Law Center E.R. 512-513. Having Schedule Bs up front allows state charity regulators to efficiently discharge their substantial oversight and enforcement duties. *See* Law Center E.R. 546-547; E.R. 999, 1060; J.A. 402.

The practical realities of investigatory practice also make subpoenas and audit letters a poor substitute for the upfront Schedule B requirement. State officials testified that requests for information from charities can be met with incomplete or nonresponsive information. Law Center E.R. 546; E.R. 599. Audits can take one to four years to complete. E.R. 998. And once a charity is made aware that it is under suspicion, it may hide or tamper with evidence. E.R. 590, 998-990. The delay attendant to using subpoenas or formal audits potentially allows a charity to continue dissipating assets and engaging in fraud or other illegal activity. E.R. 590, 998-990, 1029.[16]

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[16] The Foundation cites a statement from a supervising investigator who said that *he* had not personally experienced a charity tampering with evidence in his investigations. Foundation Br. 36 (citing J.A. 69, 405-406). But the current and former heads of the Charitable Trusts Section both testified about the risk of charities providing fabricated, incomplete, or nonresponsive records; destroying records; or engaging in other dilatory tactics, including in situations in which the delay would allow the charity to further dissipate or hide assets. E.R. 590, 998-999. The current head of the Section stated that she was not aware of

Leaving charitable oversight to the IRS, as the Law Center proposes (at 37, 41), would not satisfy the State's supervisory and enforcement interests. A recent United States Treasury Inspector General report concluded that the IRS examined only 0.13% of exempt organizations' Form 990 returns in fiscal year 2019. *See* Obstacles Exist in Detecting Noncompliance of Tax-Exempt Organizations, Treasury Inspector General for Tax Administration, at 6 (Feb. 17, 2021).[17] And while the IRS can audit charities that act contrary to the conditions of their federal tax-exempt status, it lacks authority to recover charitable assets, dissolve charities, address governance violations, or remove directors and officers for mismanagement. *See* Gov't Accountability Office, Tax-Exempt Organizations: Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations, at 7 (Dec. 2014).

The Law Center also points (at 41) to the possibility of private lawsuits. But the intended beneficiaries of a charitable trust are often indefinite or diffuse; and they typically cannot, as a practical matter, monitor or enforce charities' trust obligations on their own behalf. *See, e.g.*, *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 159-162 (1987). The limited ability of beneficiaries to police charitable trusts is among the reasons that state attorneys general have historically been assigned the responsibility of enforcing charities' duties

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a scenario in which a specific request for a Schedule B had tipped off a charity, *see* Foundation Br. 36, but only after explaining that she had never had to ask the charity for the document because the Registry already had it, *see* J.A. 419.

[17] *Available at* https://www.treasury.gov/tigta/auditreports/2021reports/202110013fr.pdf.

to use their assets for the public purposes for which they were intended. *Supra* p. 3.

The Foundation attempts (at 36-38) to compare this case to *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988). That case, however, addressed statutory provisions that directly restricted speech. 487 U.S. at 794, 797-798. One provision limited the amount that could be paid to professional fundraisers for soliciting contributions, which effectively prohibited solicitations by certain charities. *Id.* at 794. Another provision required professional fundraisers to inform prospective donors of the percentage of contributions that would actually be turned over to the charity—a content-based regulation that compelled speech, altered the content of the speaker's message, and discriminated against small or unpopular charities. *Id.* at 795, 798-800. The Court applied the stringent scrutiny applicable to direct restrictions on speech, holding that the provisions were not narrowly tailored in part because the State could advance its interests through the less-intrusive means of financial disclosure and publication requirements. *Id.* at 794-795, 800-801. That analysis is plainly inapplicable here because California's Schedule B requirement is not a direct regulation of speech. In addition, *Riley* itself recognized that disclosure requirements—including those (unlike here) compelling the dissemination of information to the public—were an appropriate alternative to direct regulation of charities' speech. *See* 487 U.S. at 795, 800.

The fact that other States have chosen not to collect copies of Schedule B does not cast doubt on California's requirement. *See, e.g.*, Arizona et al. Br. 4-6. States have taken a variety of approaches to charita-

ble oversight, including with respect to the level of resources they have decided to devote to that effort. *See* Center on Nonprofits and Philanthropy, *State Regulation and Enforcement in the Charitable Sector* (Sept. 2016) at 8 (31% of jurisdictions had less than one full-time equivalent staff dedicated to oversight of charities; 80% had fewer than ten). In California, where hundreds of thousands of charitable entities operate and solicit billions of dollars of donations from state residents each year, reporting obligations like the State's Schedule B requirement are important tools for state officials to effectively and efficiently discharge their substantial regulatory task.

3. Finally, the Law Center (at 53-55) questions the connection between California's Schedule B requirement and state oversight interests because the California Department of Justice is not the state tax-collection agency. As explained above, however, state attorneys general play a distinct role in the supervision of charities and act as the representative of charities' public beneficiaries. *Supra* pp. 3-4. The Attorney General's comparatively broader enforcement mandate to ensure that charitable assets are used for their intended purposes makes it essential for the Department to have adequate tools to detect and prevent improper activities.

The Law Center is also mistaken in contending (at 53) that the State's Schedule B requirement is not connected to a government tax-benefit. California taxpayers generally are permitted to deduct donations to 501(c)(3) charities from their state income taxes. *Supra* p. 29. And under California law, a charity's state tax-exempt status "shall be revoked" if it fails to submit required filings to the Attorney General's Registry. Cal. Rev. & Tax. Code § 23703(b)(1). Although

the State divides oversight responsibilities between two separate agencies, the components of the oversight regime work together to ensure that charities do not abuse their special tax privileges or the assets they hold in trust for public purposes.

III. NEITHER PETITIONER IS ENTITLED TO AN AS-APPLIED EXEMPTION ON THIS RECORD

Where a reporting requirement is facially valid, an organization may obtain an as-applied exemption if it "show[s] a reasonable probability that the compelled" revelation of associational information will subject its members or donors "to threats, harassment, or reprisals from either Government officials or private parties." *Doe*, 561 U.S. at 200, 201 (internal quotation marks omitted). On this record, however, neither petitioner has made the showing that would be required for them to succeed.

1. Neither petitioner has established a significant risk that submission of their Schedule Bs to the Registry would lead to reprisals from the public against the small number of major donors that each petitioner is required to list on the federal form.

a. While all agree that a state regulation forbids the public disclosure of petitioners' Schedule Bs to the public, both petitioners contend that the State's confidential reporting requirement is tantamount to a public disclosure regime because of shortcomings in the implementation of confidentiality protections. Foundation Br. 1, 42; Law Center Br. 14. No doubt, the evidence at trial revealed past lapses. *Supra* pp. 10-11. But it also showed that those lapses were limited and were promptly remedied, and that state officials implemented new confidentiality protocols to address those concerns. *Supra* p. 11.

Petitioners first point to a flaw in the Registry's database that would have allowed users to manipulate document-naming conventions and retrieve confidential documents with no links on the public-facing website. Foundation Br. 40; Law Center Br. 14; E.R. 391. That lapse "was a singularity." Pet. App. 36a. It stemmed from an issue with a third-party vendor; it was a problem that major private companies had experienced as well; and it was promptly fixed when it came to state officials' attention. *Id.*; E.R. 393-394. Petitioners presented no evidence that any member of the public learned about or exploited the vulnerability.

Petitioners also cite instances in which Schedule Bs were mistakenly uploaded to the Registry's public-facing website. *See, e.g.*, Foundation Br. 40; Law Center Br. 14. Petitioners' expert identified these mistakes after he and his team spent hundreds of hours downloading and searching documents using extra computing power from an outside vendor. E.R. 369, 413-414. Those errors were unfortunate and contrary to the Department's policy, but they involved less than one-tenth of one percent of all the documents in the Registry's database. E.R. 837, 950. Petitioners did not present evidence that any of the inadvertently posted documents were viewed by a member of the public at large or that any charity suffered harm as a result of the mistakes. And since then, the Registry has bolstered its practices to protect against inadvertent posting of confidential documents. *Supra* p. 11.

Particularly in light of these changes, petitioners have not established a significant risk that submission of their Schedule B forms to the Registry will reveal their donors' identities to the public. Of course, humans sometimes err, and "[n]othing is perfectly secure on the internet." Pet. App. 37a. But where, as here,

the State has codified confidentiality protections in a binding regulation and takes concerted action to protect confidential information, there is no basis on which to conclude that its nonpublic reporting requirement poses significant risks that donor information will become public.

b. Nor does the trial evidence support petitioners' claims that the mere possibility of public disclosure would deter donors who would not otherwise be publicly known. The Law Center's president could not recall any conversation with a potential donor who wanted to contribute but was unwilling to do so because of controversy surrounding the organization's activities. Law Center E.R. 16-17. He was also unaware of any private-foundation funders being harassed as a result of their donations to the Law Center being publicly disclosed. Law Center E.R. 239-240, 244, 1013; *cf. Doe*, 561 U.S. at 201 (rejecting First Amendment claim where several referendum petitions had been released "apparently . . . without incident").

The Law Center argues (at 48) that the experience of two of its contributors supports its claim of donor chill. The first, co-founder Tom Monaghan, was "'perfectly willing'" to be listed on the organization's website and never asked to have his name removed. Law Center E.R. 16. He could not recall any conversation in which a donor or potential donor expressed concerns about threats or harm. Law Center E.R. 1074. Nor was he aware of any donor who had been harassed because of a contribution. *Id.*

The second donor sent a $25 contribution to the Law Center anonymously because the donor was afraid that ISIS would break into the Law Center's office and target its donors. *See* Law Center Br. 48; Law

Center E.R. 20. That donor's concern was focused on vulnerabilities in the organization's own security; such concerns would exist independent of Schedule B reporting requirements—which do not apply to that small donation in any event, *supra* p. 6.

The Law Center also cites (at 49-50) its expert's opinion that California's Schedule B requirement would have a chilling effect on its donors. But the expert did not interview a single Law Center donor or potential donor, or conduct any survey or statistical analysis. Law Center J.A. 222-224; Law Center E.R. 21. The Law Center claims (at 10 n.1) that this omission was due to chilling concerns. The expert testified, however, that in sociological research like his "[n]ot only are there ways" to maintain donor anonymity when conducting surveys, but researchers are "obligated" to use them by both university and federal regulation. Law Center J.A. 226.[18]

The Foundation likewise did not establish that the mere possibility that Schedule Bs would be inadvertently disclosed to the public would deter donations from individuals whose support for it would not otherwise be publicly known. In some years, at least half of the donors listed on its Schedule B were private foundations, whose donations were already disclosed to the public as required by federal law. E.R. 1148, 1507-

[18] The Law Center presented other evidence, including of vulgar communications to its office and abhorrent threats and violence directed at some of its clients; but it did not demonstrate a connection between that evidence and the asserted deterrent effects on significant donors to the organization. *See, e.g.*, Law Center E.R. 282 (hostile emails to elected official represented by the Law Center did not mention Law Center and pre-dated her association with it); Law Center E.R. 434, 436-437 (other testimony concerning absence of connection to Law Center).

1511. A donor testified that his family foundation's contributions were made with full awareness that they would be available for public view. E.R. 429-430, 493-494. He said that if the Foundation were required to provide its Schedule B to the California Attorney General, that would not change his desire for his family foundation to continue to contribute. E.R. 501.

The evidence at trial did show hostile responses to the organization's activities and staff, including threats and illegal acts by members of the public. But with respect to donors who would be affected by a risk of inadvertent disclosure of a nonpublic Schedule B form, the Foundation's evidence rested largely on vague and unsubstantiated hearsay testimony from its own employees. *See, e.g.*, E.R. 334. Limited, second-hand testimony of that sort is not sufficient to establish First Amendment harm. *See Buckley*, 424 U.S. at 71-72 & n.88; *Citizens United*, 558 U.S. at 370. Furthermore, the evidence at trial demonstrated that the Foundation had more than 2.5 million members and saw "steady growth" in both members and contributions. E.R. 1151, 1879-1880, 1885-1886. That stands in sharp contrast to the evidence of precipitous drop-offs in support and widespread harassment in cases in which this Court has approved an as-applied exemption to a facially valid disclosure requirement. *See Bates*, 361 U.S. at 521-522 & n.5; *NAACP*, 357 U.S. at 462-463; *Buckley*, 424 U.S. at 71 (recognizing concern when "fears of reprisal may deter contributions to the point where the movement cannot survive").

2. The Foundation briefly suggests (at 52) that confidential submission of its Schedule B to the Registry could also lead to reprisals from state officials. In *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 102 (1982), this Court held that

campaign disclosure provisions of Ohio law could not constitutionally be applied to the 60-member Socialist Workers Party in Ohio. The district court had found substantial evidence of both governmental and private hostility toward the organization based on, among other things, a "massive" FBI surveillance program, efforts to disrupt the organization, and police harassment of a candidate. *Id.* at 99-100 (internal quotation marks omitted).

Here, the district court made no finding of likely government retaliation. The Foundation's trial evidence was principally vague hearsay statements from staff about fears of improper targeting by federal and state agencies. *See, e.g.*, J.A. 266-268. And none of the cited statements from state officials themselves can plausibly be read as indicating any intention or willingness to abuse Schedule B information. *See, e.g.*, Foundation Br. 52 (noting former Attorney General's call for change in public disclosure laws); *see generally U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) (presuming regularity in official duties).

Tellingly, petitioners have submitted their Schedule Bs to the IRS for years, including at times when that agency's data-security and other practices were the subject of significant public criticism. E.R. 1866-1867; Law Center E.R. 15.[19] Yet neither petitioner established that filing its Schedule B with the IRS had

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[19] *See* Treasury Inspector General for Tax Administration, Improvements Are Needed to Strengthen Electronic Authentication Process Controls, at 2-3 (Sept. 7, 2016), *available at* https://www.treasury.gov/tigta/auditreports/2016reports/201620082fr.pdf (last visited March 24, 2021); Dep't of Treasury, Inspector General for Tax Admin., Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review (May 14,

any chilling effect. To the contrary, the Law Center's president was not aware of any instance in which a donor faced harassment or harm because of reporting the donor's identity to the IRS. Law Center E.R. 20. Indeed, the Law Center consistently reported the identities of dozens of additional donors beyond what the IRS required—a situation that gave the Law Center's president no concern. Law Center E.R. 240.

3. While petitioners have failed to demonstrate a reasonable probability that California's Schedule B reporting requirement would subject their donors to threats, harassment, or reprisals, the State has established a concrete and substantial interest in collecting that limited information for use in safeguarding the lawful stewardship of charitable assets. The Foundation's principal counter-argument is that the State has never received a complaint about it or suspected it of wrongdoing. *See* Br. 48. But the State's interest in collecting Schedule Bs up front extends to all registered charities soliciting funds from California residents.

As explained above, Schedule Bs are an important tool for protecting charitable assets given in trust to benefit the public. They aid state regulators in detecting wrongdoing, such as by helping to identify when a donor uses a charity to funnel contributions for the donor's own benefit or when a charity misleads the donating public by overstating the extent of its programs or its administrative efficiency. In light of those weighty interests and the absence of a concrete burden, petitioners are not entitled to as-applied relief

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2013), *available at* https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf (last visited March 23, 2021).

against the nonpublic collection of a copy of the same forms that they already must submit to the IRS.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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