

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

AMERICANS FOR PROSPERITY FOUNDATION,)
) Petitioner,)
) v.) No. 19-251
ROB BONTA, ATTORNEY GENERAL)
OF CALIFORNIA,)
) Respondent.)

-----)
THOMAS MORE LAW CENTER,)
) Petitioner,)
) v.) No. 19-255
ROB BONTA, ATTORNEY GENERAL)
OF CALIFORNIA,)
) Respondent.)

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4 Petitioner,)
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6 ROB BONTA, ATTORNEY GENERAL)
7 OF CALIFORNIA,)
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13 ROB BONTA, ATTORNEY GENERAL)
14 OF CALIFORNIA,)
15 Respondent.)

16 - - - - -
17 Washington, D.C.
18 Monday, April 26, 2021

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20 The above-entitled matter came on
21 for oral argument before the Supreme Court of the
22 United States at 10:00 a.m.

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24
25

1 APPEARANCES:

2

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4 of the Petitioners.

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10 Sacramento, California; on behalf of the
11 Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 19-251,
5 Americans for Prosperity Foundation versus
6 Bonta, and the consolidated case.

7 Mr. Shaffer.

8 ORAL ARGUMENT OF DEREK L. SHAFFER

9 ON BEHALF OF THE PETITIONERS

10 MR. SHAFFER: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 We're here because the California
13 Attorney General is demanding that tens of
14 thousands of charities annually disclose their
15 top donors nationwide as listed on Schedule B to
16 IRS Form 990.

17 This demand casts a profound
18 nationwide chill and it does so for no good
19 reason, Your Honors. As the district court
20 found following a full bench trial, California's
21 upfront collection of Schedule Bs does not
22 further the state's law enforcement goals. That
23 finding is both dispositive and unassailable.

24 Forty-six states today police
25 charities without any such blanket demand.

1 California itself likewise did so for years,
2 Your Honors, without any problems. These
3 Schedule Bs never find any legitimate use unless
4 and until a complaint comes in, as happens for
5 only a fraction of 1 percent of all charities.

6 Even when reviewed, Schedule Bs, for
7 all of their extreme sensitivity, have only
8 trifling utility. California used them in only
9 a handful of investigations over 10 years. The
10 rare times when Schedule B has use, Your Honors,
11 California has much narrower mean -- narrower
12 means to obtain it, namely, a targeted audited
13 letter -- audit letter to the charity of
14 concern. Indeed, it's California's standard
15 practice to issue precisely such an audit letter
16 requesting Schedule Bs and other documentation
17 from any charity it investigates.

18 At bottom, California's justification
19 reduces to a claimed law enforcement interest in
20 having all Schedule Bs prophylactically
21 warehoused before it re-requests Schedule B
22 pursuant to any actual investigation. That does
23 not begin to justify the First Amendment
24 intrusions here posed, as 40 amicus briefs from
25 hundreds of concerned parties spanning the

1 spectrum agree.

2 Because California's upfront
3 suspicionless demand for donor information is
4 not narrowly tailored as it must be under this
5 Court's precedents, it is unconstitutional in
6 all its applications and certainly in a
7 substantial number of them.

8 We respectfully urge this Court to
9 hold it facially invalid.

10 CHIEF JUSTICE ROBERTS: Mr. Shaffer,
11 your main argument is that we should apply
12 strict scrutiny to the disclosure requirements
13 here. But, with respect to political speech,
14 which is -- we've held is, of course, at the
15 heart of the First Amendment, when we have an
16 issue of compelled disclosure, we apply exacting
17 scrutiny.

18 And doesn't it seem strange that when
19 it's -- you're talking about charitable
20 association, you would apply a more rigorous
21 test than we apply to political association?

22 MR. SHAFFER: Well, Mr. Chief Justice,
23 I hate to dispute your premise, but I think that
24 among the Petitioners, it's the Thomas More Law
25 Center that urges strict scrutiny. We, for

1 Americans for Prosperity Foundation, have no
2 quarrel with that. We think they make the
3 argument well for that standard, but -- but the
4 prime imperative for the Petitioners, Your
5 Honor, is simply to stress that, under any
6 standard of exacting scrutiny that calls for
7 narrow tailoring, this law is -- this demand is
8 facially invalid and due to be -- due to be
9 struck down --

10 CHIEF JUSTICE ROBERTS: Well --

11 MR. SHAFFER: -- across the board.

12 CHIEF JUSTICE ROBERTS: -- well --

13 MR. SHAFFER: And -- and that --
14 sorry, Mr. Chief Justice.

15 CHIEF JUSTICE ROBERTS: I was going to
16 say thank you for the correction. But, when it
17 comes to tailoring, what -- what exactly is your
18 understanding? I think -- what that means? I
19 think it's not well settled under the exacting
20 scrutiny standard.

21 MR. SHAFFER: Well, I think Shelton
22 gives you the holding, Mr. Chief Justice.
23 Shelton specifically struck down the demand that
24 teachers disclose their associations, and it did
25 so for lack of -- of proper tailoring, even

1 while recognizing that there might be a
2 substantial relationship to the understandable
3 goal of protecting kids in schools.

4 And so it -- you have the holding
5 there. Gremillion articulates the standard too
6 specifically in this context. And I do know, to
7 your prior question, that even in the election
8 context, Buckley does speak in terms of strict
9 scrutiny. It simply holds that disclosure is
10 the least restrictive in that -- least
11 restrictive alternative in that context,
12 categorically different from this context, and
13 one where, of course, there's an interest in
14 public disclosure that California disavows in
15 this case.

16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas.

18 JUSTICE THOMAS: Thank you, Mr. Chief
19 Justice.

20 Counsel, a couple of quick questions.

21 How would it affect your analysis if
22 the organization involved just did something
23 that was not controversial, such as provide free
24 dog beds or taking care of stray puppies or
25 something like that? Would your analysis change

1 in any way?

2 MR. SHAFFER: It wouldn't, Justice
3 Thomas. And I do note that among the amici
4 supporting us is PETA joining the brief by the
5 nonprofit alliance. And -- and so their work
6 too can be controversial and, depending upon
7 one's views of how puppies should be handled,
8 there can be controversy around that.

9 We might not have thought before 2013,
10 when California leaked the Schedule B of the
11 Asian Americans For Advancing Justice, that that
12 would be especially threatening for the donors
13 there. But today, in 2021, sad to say, it could
14 be a life-or-death issue that their identities
15 have been disclosed.

16 Think about religious charities.
17 Think about medical organizations that may take
18 views about masking, about vaccinations. In --
19 in our very divisive times, it's tough to
20 identify with certainty a charity that is
21 non-controversial in those -- in those respects.

22 And -- and even if there were that --
23 that sort of a charity to posit, Justice Thomas,
24 there are understandable concerns -- religious
25 convictions, desire not to be -- lose privacy,

1 not to be harassed by solicitations -- that
2 donors legitimately have for, you know,
3 charities across the spectrum.

4 JUSTICE THOMAS: This -- in this era,
5 there seems to be quite a bit of -- quite a bit
6 of loose accusations about organizations, for
7 example, an organization that had certain views
8 might be accused of being a white supremacist
9 organization or racist or homophobic, something
10 like that, and, as a result, become quite
11 controversial.

12 Do you think that that -- that that
13 sort of labeling would change your analysis?

14 MR. SHAFFER: Well, I think it's part
15 of the problem here, Justice Thomas. And there
16 is expert testimony in the record from Paul
17 Schervish for both of these Petitioners
18 explaining that precisely because there is such
19 intensity of views and there's such a -- a -- a
20 proclivity to vilify perceived enemies in our
21 times, that's part of what puts so much -- it
22 raises the stakes, if you will, and raises the
23 concerns of reasonable donors for charities all
24 across the spectrum.

25 So that's there. But I also think

1 this Court's precedent recognizes the history
2 and the common sense that says donors to
3 associations are concerned about having their
4 identities revealed. That was true in Shelton.
5 That was true for the NAACP. It was true for
6 the Republican Party and donors to the
7 Republican Party in the Pollard case, where this
8 Court summarily affirmed.

9 JUSTICE THOMAS: The -- what if this
10 -- the State of California did exactly what the
11 U.S. Government is doing and just simply
12 requires this information as a part of your tax
13 returns if you claim a deduction?

14 MR. SHAFFER: Well, I -- I'd note,
15 Justice Thomas, that that is categorically
16 different from the AG's interest in policing
17 charitable fraud. They -- they don't serve the
18 tax function in California.

19 Also, Congress has made a statutory
20 judgment specifically for the IRS about a nexus
21 between Schedule B and the information listed in
22 there and how it's to be used.

23 And how is it to be used, Justice
24 Thomas? For federal tax collection. So it's a
25 comparison potentially of the individual donors'

1 deductions on their federal tax forms, and the
2 IRS has nationwide jurisdiction consistent with
3 the nationwide scope of a Schedule B. None of
4 that is true in California.

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Breyer.

8 JUSTICE BREYER: Thank you.

9 If you win in this case, I think the
10 Court will have in some form held that the
11 interest of the donors in maintaining privacy of
12 their giving to a charity, interests of the
13 charity in receiving those money, here at least
14 outweighs the interest of the State in having a
15 law on the books that, even if it never is
16 actually enforced, frightens people into
17 behaving properly. Okay? Something like that.

18 Well, if we hold that, can we
19 distinguish campaign finance laws, where the
20 interest is even stronger in people being able
21 to give anonymously? Can we distinguish laws
22 that require them to disclose their givers? How
23 would you distinguish that, if you would?

24 And the other thing --

25 MR. SHAFFER: Yes, Justice Breyer.

1 JUSTICE BREYER: -- I would like to
2 hear you distinguish is just what Justice Thomas
3 brought up. The IRS requires disclosure for tax
4 purposes, okay, private disclosure. The --
5 California wants disclosure, so it has a
6 potential for finding out, and that potential,
7 as I said, might in and of itself discourage
8 people from acting improperly in respect to --
9 to charity.

10 So I'd like to hear the distinction,
11 if you want to make them, between those two
12 things.

13 MR. SHAFFER: I would, Justice Breyer.
14 Let me please take those in turn.

15 For the first question, let me
16 emphasize there is no law on the books in
17 California requiring Schedule B. What you have
18 is bureaucratic whim, and we submit that's
19 different from a considered legislative
20 judgment.

21 Number two, the interest is not in
22 reviewing Schedule Bs. It's in having them on
23 hand prophylactically on a suspicionless basis
24 from all charities to then review a tiny handful
25 when an external complaint comes in.

1 We're not here challenging the
2 individualized request for a Schedule B from a
3 particular charity which the AG is always doing
4 if they actually have reason to read a Schedule
5 B. So the -- the interest on the State side of
6 it, we respectfully submit, is really quite
7 negligible.

8 And you also alluded to a deterrence
9 rationale. Let me emphasize, Justice Breyer,
10 you won't find that rationale in the red brief
11 from California. That is not only a post-hoc
12 justification for this law, it's a post-hoc
13 justification that comes solely from amici
14 before this Court.

15 And -- and there's no -- not a shred
16 of evidence to support that. And, of course,
17 there's no more reason to think a Schedule B
18 sitting in the AG's hands as part of a warehouse
19 is any more deterring by virtue of sitting
20 there. It's only if it actually serves law
21 enforcement purposes that it might be that.

22 And, of course, as you note, it is on
23 file with the IRS in any event. So, if there's
24 a deterrent effect associated with filing it, it
25 rationally follows that it -- it's already being

1 served before California asks for it too.

2 Now, for the IRS, number one, there's
3 a statute from Congress. Number two, it is for
4 tax collection purposes. Number three, it has
5 nationwide scope to it. And, number four,
6 there's a whole statutory design, Justice
7 Breyer, that has criminal and civil penalties
8 for any violation of confidentiality.

9 There's no framework like that in
10 California, and, in fact, the record shows the
11 opposite in terms of how likely these are to
12 leak.

13 CHIEF JUSTICE ROBERTS: Justice Alito.

14 JUSTICE ALITO: What does the -- the
15 record show about the number of concrete cases
16 in which California has used this information
17 prior to an audit?

18 MR. SHAFFER: Justice Alito, we think
19 there are five instances where that's happened
20 in the past 10 years. California seems to
21 contend that there were 10. The district court
22 found five.

23 And the reason the district court
24 found five is based on the testimony of the
25 State's lead auditor, Steve Bauman, who had been

1 serving as an auditor since 1988, had been the
2 lead auditor since 2001, was designated as
3 California's witness on this critical subject
4 matter.

5 And he, in his experience, Justice
6 Alito, had used it once. He could think of one
7 instance. When he surveyed all the auditors,
8 they came up with five instances. And then the
9 AG's attorneys added to get to 10, but that's
10 the most they can get to.

11 And I would just commend to the Court
12 the relevant record excerpts on this point. You
13 can see Mr. Bauman's testimony at JA Americans
14 for Prosperity Foundation Appendix 397 to 99.

15 JUSTICE ALITO: California says that,
16 on this record, you haven't even shown an
17 entitlement to succeed on an as-applied
18 challenge.

19 What do you understand California to
20 demand you prove that you haven't already
21 proved?

22 MR. SHAFFER: I don't know, Justice
23 Alito, what you could possibly ask a charity in
24 the position of these Petitioners to prove that
25 they didn't prove.

1 Again, they had expert testimony.
2 They had testimony from their officers. They
3 had instances of horrific threats and violence,
4 including death threats that were directed
5 against the organizations or their proxies who
6 were in the same position that donors would be
7 in.

8 And I would note, Justice Alito, that
9 what California contemplates for an as-applied
10 challenge is very different from what you and
11 the Court contemplated in Doe v. Reed, where it
12 was 130,000-plus petitioners who could have
13 their First Amendment interests all adjudicated
14 together.

15 As we understand what California is
16 requiring, it's not just an extremely onerous
17 standard that's essentially impossible to meet,
18 but you'd have tens of thousands of charities
19 all having to go to court to try to vindicate
20 their First Amendment interest.

21 That's just not workable, and it's not
22 a satisfactory solution to the First Amendment
23 problem here posed, we submit.

24 JUSTICE ALITO: California had quite a
25 few leaks in the past, but they now tell us that

1 they've changed their practices and they're
2 serious about confidentiality.

3 What should we make of that? Should
4 we hold them forever to their past breaches?

5 MR. SHAFFER: Justice Alito, we think
6 that they -- they fall down before you even get
7 to the confidentiality problems. Having
8 adequate confidentiality protections, which they
9 demonstrably lack, is a necessary but not
10 sufficient condition to their demand being
11 upheld.

12 And -- and, really, it's the lack of
13 narrow tailoring, the lack of a state
14 interest -- and, by the way, Justice Alito, I
15 should emphasize, for Mr. Bauman's cases, it was
16 -- those were not instances where it was the
17 upfront collection of Schedule B that was
18 useful. They, for all they know, obtained it
19 via audit letter.

20 So we think the confidentiality issues
21 add to the record of unconstitutionally, but
22 they're -- and -- and -- and even as to those,
23 just focusing on them, there's nothing
24 California can do at this point that would
25 convince reasonable donors and charities that

1 have seen the dismal record of confidentiality
2 lapses that now those have truly been fixed.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 JUSTICE SOTOMAYOR: Counsel, if we
7 were to apply the type of narrow tailoring you
8 advocate, I don't see how the public disclosure
9 at issue in Doe would have survived. In Doe,
10 this Court held that Washington State's
11 requirement that signatories to referendum be
12 publicly disclosed was substantially related to
13 its interest in protecting electoral integrity.

14 But, there, the State Secretary -- the
15 State's Secretary of State -- pardon the
16 redundancy -- checked signatures for fraud.
17 That doesn't seem to be anything like narrow
18 tailoring if that's what we were applying.

19 It seems to me, as the Chief Justice
20 pointed out, that McCutcheon is different than
21 what we have been doing under exacting scrutiny.
22 Under your theory of the case, though, Doe
23 shouldn't survive.

24 MR. SHAFFER: If I may, Justice
25 Sotomayor, we think that Doe, respectfully, is

1 categorically inapposite. It is explicitly
2 specific to the electoral context. The Court
3 said so repeatedly in its opinion. And it --
4 and it turns --

5 JUSTICE SOTOMAYOR: Counsel, please.

6 MR. SHAFFER: -- on the significant
7 finding --

8 JUSTICE SOTOMAYOR: If -- if that were
9 the case, then Doe didn't have to go through its
10 analysis. It would have just said it's
11 electoral.

12 MR. SHAFFER: I -- I --

13 JUSTICE SOTOMAYOR: And yet, it went
14 through it. And Buckley itself said that --
15 that the NAACP's exacting scrutiny was something
16 different than what's the least -- the least
17 restricted means of doing something.

18 MR. SHAFFER: And, Justice Sotomayor,
19 we think you could stop short of requiring the
20 least restrictive alternative even in this
21 context and still reach the same result --

22 JUSTICE SOTOMAYOR: All right. So --

23 MR. SHAFFER: -- because there's no
24 tailoring here.

25 JUSTICE SOTOMAYOR: -- let me -- let

1 me go to everything you're saying about
2 California, okay?

3 I assume that the vast majority of
4 charities are not involved in fraud. You're
5 seeming to assume that the numbers of cases in
6 which this is useful has to be dramatically
7 large because charities are dramatically largely
8 committing fraud. What if I disagree with you,
9 number one?

10 Number two, the interest that
11 California has in this schedule is, in part --
12 there was testimony by the head of the
13 charitable organizations and by the
14 investigating -- auditing team that if you give
15 out a subpoena or an audit letter, that it tips
16 off -- and there has been history of these
17 letters tipping off -- fraudsters and then
18 hiding -- and then hiding their illegality.

19 So the audit -- this -- this
20 disclosure saves some time because audit and
21 subpoena letters take them a long time to get
22 the information. B, it helps them identify,
23 when a report comes in of problems, whether it
24 supports further investigation. And, C, it
25 helps avoid the tipping that they're concerned

1 about.

2 Given that state interest, if the
3 State had properly kept this nonpublic, why
4 would it be not narrowly tailored?

5 MR. SHAFFER: Let me take, if I may,
6 the last part of that --

7 JUSTICE SOTOMAYOR: Or even fit our
8 usual definition of exacting scrutiny?

9 MR. SHAFFER: Justice Sotomayor, you
10 articulated the sole rationale California has
11 for upfront collection. And let me emphasize to
12 the Court it is not only post hoc and
13 hypothesized, it is not genuine. Okay?

14 It is also contrary -- and I'll
15 explain why. It is contrary to the factual
16 findings that the district court made. You can
17 see it in Petitioners' Appendix 47a. You will
18 find no witness who identified any specific
19 instance where the tampering that supposedly
20 concerns California occurred.

21 If the AG were genuinely concerned
22 about tipping off charities, they would never
23 do, Your Honor, what they always do, which is
24 send an audit letter at the outset of any
25 investigation telling a charity that it is being

1 investigated and asking it to supply Schedule B,
2 if relevant, along with all other relevant
3 documentation, which charities always do.

4 And during the years and years that
5 tens of thousands of registered charities were
6 not filing Schedule Bs, no one ever complained
7 about that or sought to change it. It was a
8 bureaucrat in the AG's office who said: Oh,
9 let's just require that all these be filed.

10 That did not come from audit stop.
11 That did not come from line attorneys.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 MR. SHAFFER: And let me add just one
14 other point if I may, Justice Sotomayor. It's
15 implausible that the State is using Schedule Bs
16 specifically in this prophylactic fashion. They
17 have all the other 990 information, including
18 Schedules L, M, and J that go to interested
19 party transactions, in kind donations, and
20 officer and employee compensation.

21 It is really, I think, not a genuine
22 interest that the State is asserting, and, at
23 best, it is a negligible one --

24 CHIEF JUSTICE ROBERTS: Thank --

25 MR. SHAFFER: -- in the upfront

1 prophylactic collection.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Kagan.

5 JUSTICE KAGAN: Mr. Shaffer, I'd like
6 you to assume a set of facts with me, and
7 they're this: that there are some donors to
8 some charities who are genuinely concerned about
9 public disclosure for fear of harassment or
10 threats, but that a very substantial majority of
11 donors in a very substantial majority of
12 charities are not concerned about that. In
13 fact, they rather like public disclosure of
14 their generosity.

15 If that's so, could you win a facial
16 challenge?

17 MR. SHAFFER: Yes, Justice Kagan, for
18 two reasons. One is that in the First Amendment
19 context, we need only show a substantial number
20 of instances in which the --

21 JUSTICE KAGAN: No, I'm -- I'm saying
22 -- you know, the -- the great majority are not
23 concerned about this.

24 MR. SHAFFER: Well, respectfully, I
25 would -- I would -- I would question Your --

1 Your Honor's premise. I think you have from
2 Paul Schervish the fact that --

3 JUSTICE KAGAN: You -- you -- you
4 know, my --

5 MR. SHAFFER: -- this is part of the
6 donor bill of rights --

7 JUSTICE KAGAN: Excuse me, Mr.
8 Shaffer. I -- my premise is supported by a lot
9 of facts. Most charities disclose their donors,
10 and, in fact, it's part of their strategy, that
11 the more disclosure there is, the more
12 fundraising and association there is.

13 So, anyway, let's just take my facts
14 as a given --

15 MR. SHAFFER: I will --

16 JUSTICE KAGAN: -- that a very
17 substantial majority of charities disclose
18 themselves and don't mind disclosure.

19 MR. SHAFFER: As to that, Justice
20 Kagan, this Court in City of Los Angeles v.
21 Patel explained what the proper analysis is as
22 to whether you have some voluntary compliance
23 and non-objections. Those are outside of the
24 constitutional analysis. We are not here to --

25 JUSTICE KAGAN: Mr. Shaffer -- Mr.

1 Shaffer, just take my -- my -- just take it as a
2 stipulation that the great majority of donors do
3 not mind disclosure by anybody.

4 MR. SHAFFER: And I apologize, Justice
5 Kagan --

6 JUSTICE KAGAN: Can you -- can you win
7 a facial challenge on that premise?

8 MR. SHAFFER: Yes, because we're not
9 here to enjoin those charities from disclosing
10 their donors to California or anyone else. They
11 can continue to do so. California can request
12 it. And they can comply with that request.
13 We're here on behalf --

14 JUSTICE KAGAN: Okay. I mean, I guess
15 --

16 MR. SHAFFER: -- of those charities --

17 JUSTICE KAGAN: -- I would have
18 thought that a facial challenge, you need to
19 show that, you know, some significant number of
20 people in the world actually have this concern.
21 And, otherwise, you should bring an as-applied
22 challenge. I thought that that was the whole
23 point of the distinction between the two.

24 MR. SHAFFER: And -- and I -- I do
25 rest on *City of Los Angeles v. Patel*, which

1 basically explained that that is not the correct
2 analysis when you have some who will voluntarily
3 comply and others who are resisting the demand.

4 JUSTICE KAGAN: Okay. Can I ask
5 another question, Mr. Shaffer?

6 MR. SHAFFER: You look at those who
7 are resisting and rely upon the First Amendment.

8 JUSTICE KAGAN: I -- I heard you say
9 to Justice Alito that even if there were a
10 guarantee that this information was never
11 disclosed -- let's say that California had at
12 least as good protections in place as the IRS
13 does, better maybe. If that were so, could you
14 win a facial challenge?

15 MR. SHAFFER: Yes, because, facially,
16 there's no statute that protects
17 confidentiality. Facially, you have the
18 attorney --

19 JUSTICE KAGAN: You know, again --
20 again, Mr. Shaffer, I'm just stipulating that
21 the statute does exist, that there is at least
22 as good a protection as in the IRS context.
23 Could you win a facial challenge?

24 MR. SHAFFER: Yes, Justice Kagan, we
25 -- we respectfully submit you could because of

1 the lack of a state interest and the lack of
2 narrow tailoring. In Shelton II, the Court was
3 explicit, even if the information would remain
4 private and secure by the government, it was
5 still unconstitutional.

6 JUSTICE KAGAN: Thank you, Mr.
7 Shaffer.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch.

10 JUSTICE GORSUCH: I -- I'd like to
11 pick up where we just left off and understand
12 more clearly your -- your thoughts on why a
13 facial challenge is appropriate here.

14 MR. SHAFFER: Yes, Justice Gorsuch. I
15 think anything short of facial relief here would
16 be a Pyrrhic victory for charities and donors
17 that are counting upon this Court's precedents
18 and principles to protect them.

19 And the reason for that is, if you
20 have to go to court and bring the as-applied
21 challenge and -- and -- and go through the
22 hurdles that California and the Ninth Circuit
23 would interpose, even these Petitioners, who
24 have been litigating for seven years, Justice
25 Gorsuch, with the benefit of experts and

1 percipient witnesses and their officers and
2 horrific experiences that were recounted in
3 court, we're still struggling to establish our
4 First Amendment rights.

5 And if every charity that's in this
6 position and has concerns about exposure of
7 their donors has to go down that same winding
8 path, then the First Amendment will have lost
9 before the next as-applied challenge begins.

10 And -- and we think, analytically,
11 doctrinally, in terms of precedent, it's
12 especially clear in the First Amendment context
13 that if we convince you there are a substantial
14 number of instances where the law is
15 unconstitutional, that warrants facial
16 invalidation.

17 Here, we think it is unconstitutional
18 in all its applications when you have a charity
19 that doesn't want to produce its Schedule B, and
20 California has no narrow tailoring.

21 And, if I may, Justice -- Justice
22 Gorsuch, at JA 42022, you have California
23 officials specifically testifying they never
24 considered even a narrow alternative. That is a
25 constitutional defect that runs across all these

1 cases.

2 JUSTICE GORSUCH: What is your
3 understanding of the relationship between
4 exacting scrutiny and strict scrutiny?

5 MR. SHAFFER: The Court's not been
6 perfectly clear about what one means relative to
7 the other. I think what is clear in terms of
8 the interest from NAACP versus Alabama on
9 forward, it needs to be a compelling interest.

10 And I think it -- it's also clear at
11 least when -- in the election context that we've
12 been talking about, categorically, disclosure is
13 at least presumed to be the least restrictive
14 alternative. Buckley indicates it satisfies
15 really strict scrutiny.

16 And I think, in -- in the charitable
17 context that we're talking about here, it may be
18 less clear exactly what the standard of scrutiny
19 is. But it is clear from this Court's
20 precedents and holdings that there is at least
21 narrow tailoring that is required. Once the
22 court requires that, California's demand cannot
23 survive. The Ninth Circuit was able to uphold
24 it only by dispensing with narrow tailoring
25 altogether.

1 JUSTICE GORSUCH: And what would, on
2 -- on your view, if anything, stop California
3 from issuing boilerplate requests to all
4 charities to disclose their Schedule Bs after
5 this or to add it as part of a tax collection
6 process?

7 MR. SHAFFER: Well, the -- the
8 California Attorney General has no
9 authorization, no mission to be collecting
10 taxes. That -- that's something that's
11 completely separate in California.

12 But, if you're positing bad faith, we
13 might challenge it as bad faith, Justice
14 Gorsuch. The record is perfectly --

15 JUSTICE GORSUCH: No, no, no, no, no.
16 I'm -- I'm -- I'm -- I'm positing -- I'm sorry,
17 maybe I wasn't clear -- two possibilities: One,
18 fine, you get rid of this rule, but the AG
19 issues a boilerplate request to organizations
20 for the purposes of policing potential fraud,
21 one. Two, that in the tax collection process,
22 separate and apart from the AG, California
23 starts mandating the disclosure of Schedule Bs.

24 MR. SHAFFER: Well, I think they'd
25 have to satisfy exacting scrutiny in either of

1 those instances. Hopefully, you'd get a
2 considered legislative judgment that balances
3 the competing considerations here and makes sure
4 that there truly is narrow tailoring happening.

5 And all we ask this Court to do in
6 order to decide this case is stand by its
7 precedents and principles. States need to think
8 hard and tread carefully before they infringe
9 upon the First Amendment rights that are at
10 issue.

11 And -- and I would reserve rights,
12 respectfully, to challenge either of the
13 programs that you just posited, Justice Gorsuch,
14 but they will have to withstand exacting
15 scrutiny in our view of -- of the precedents and
16 the principles that decide this case.

17 JUSTICE GORSUCH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you, Chief
21 Justice.

22 Good morning, Mr. Shaffer.

23 MR. SHAFFER: Good morning.

24 JUSTICE KAVANAUGH: Can you
25 distinguish the -- what California is doing from

1 what the IRS is doing and -- and explain how you
2 would have us distinguish those two things?

3 MR. SHAFFER: Well, we think the IRS
4 clearly has a better set of defenses than --
5 than California does because of their statutory
6 mandate, because of the role that Schedule Bs
7 play in tax collection specifically and in
8 individual donors' exemptions, because of the
9 IRS's nationwide charter that corresponds with
10 the nationwide scope of Schedule Bs, and because
11 you have a strict confidentiality regime that
12 exists from the statute on down through careful
13 protocols that are implemented on the ground.

14 As to the chill, that too is
15 different. For the IRS, it's not a demand by
16 state law enforcement, which is what's at the
17 core of NAACP versus Alabama and its progeny.
18 The submission to a single federal regulator
19 pursuant to a tight nexus in careful statutory
20 design is much more limited than one state just
21 asking for this willy-nilly and then other
22 states essentially without limitation piling on
23 by the dozens to the same request.

24 Also, Justice Kavanaugh, the IRS is
25 not in the business of posting submissions

1 online the way that California is and has
2 resulted in so many of these leaks quite
3 predictably.

4 And -- and last, the -- I -- I -- I'd
5 note the IRS has credited concerns about
6 Schedule B and is moving in the opposite
7 direction of California. They're asking
8 themselves the tough questions about whether
9 they really need it and is it really worth it.
10 California, quite gratuitously, is -- is fishing
11 for Schedule Bs without seeing any real utility
12 in them at least in the upfront collection.

13 JUSTICE KAVANAUGH: Do you agree that
14 what the IRS is doing is constitutional?

15 MR. SHAFFER: It's a different case,
16 Justice Kavanaugh, that we have not brought. I
17 think it has stronger defenses for the reasons
18 we've discussed. And all I would say about it
19 is it will be subject to the -- to exacting
20 scrutiny in our view, and you can count on the
21 United States to provide, I'm sure, a very
22 powerful defense if that were the challenge.

23 JUSTICE KAVANAUGH: If California -- I
24 guess a related question -- but, if California
25 passed this same scheme in a statute and it was

1 designed for tax collection and they had a
2 strict confidentiality law that mirrored the
3 federal protections, it would rise or fall as
4 the IRS program rises or falls, correct?

5 MR. SHAFFER: Not quite, Justice
6 Kavanaugh. By the way, before the statute
7 passed, all these amici who are here before the
8 Court, I'm quite confident in saying, would be
9 lobbying the California legislature --

10 JUSTICE KAVANAUGH: I understand --

11 MR. SHAFFER: -- to think about that.

12 JUSTICE KAVANAUGH: -- I understand
13 that, but suppose that they passed an exact
14 duplicate statute of the federal statutory
15 program.

16 MR. SHAFFER: I still don't think it
17 works, Justice Kavanaugh. I don't think it's as
18 powerful as the IRS's justification because it
19 is a nationwide form that lists donors
20 nationwide, very few of whom will be in
21 California.

22 And, of course, California, you know,
23 its -- its jurisdiction and concerns stop at its
24 borders in a way that is not true for the
25 federal government and the IRS.

1 JUSTICE KAVANAUGH: One very different
2 question but quickly: Do you agree on the text
3 of the First Amendment that the freedom to
4 peaceably assemble is distinct from the freedom
5 to petition the government for a redress of
6 grievances?

7 MR. SHAFFER: Yes. I think the Becket
8 Fund's amicus brief is extremely persuasive on
9 that point from a textualist and originalist
10 perspective and in explaining why the sort of
11 demand you have from California is a direct
12 restraint on that precious freedom as understood
13 by the framers and codified in the First
14 Amendment.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett.

18 JUSTICE BARRETT: Good morning,
19 counsel. I want to pick up where Justice --

20 MR. SHAFFER: Good morning.

21 JUSTICE BARRETT: -- Kavanaugh left
22 off. So what if you had a law, say, on a state
23 university's campus, that made it illegal for
24 anyone to engage in any speech whatsoever.

25 But it was also the case that most of

1 the students just shrugged and said, that's
2 fine, I'm not planning to, you know, demonstrate
3 or picket, and there was just a small percentage
4 of people who were bothered by it.

5 Would it be facially unconstitutional?

6 MR. SHAFFER: Of course, it would,
7 Justice Barrett. And I don't know that there's
8 any case from this Court that suggests the
9 opposite.

10 JUSTICE BARRETT: Okay.

11 MR. SHAFFER: And I -- I'm sorry.

12 JUSTICE BARRETT: Oh, go ahead. No,
13 finish.

14 MR. SHAFFER: And I think City of Los
15 Angeles v. Patel explains precisely why you look
16 only at those who are objecting and are standing
17 on their constitutional rights, not those who
18 simply succumb.

19 JUSTICE BARRETT: Okay. And this is
20 where it relates to Justice Kavanaugh's question
21 then. That's because it's an invasion of speech
22 directly. So I'd like you to discuss a little
23 bit how you conceive of this right.

24 Is it an independent right, say, the
25 freedom to associate and the freedom to

1 associate anonymously, or is it simply, I mean,
2 because showing chill makes sense if you're
3 saying that this is simply to protect -- and
4 this goes to Becket's amicus brief -- speech
5 down the road?

6 So can you describe a little bit the
7 nature of the right that's at stake here?

8 MR. SHAFFER: Sure. We think that
9 there are multiple ones, but let me start with
10 this, Justice Barrett, if I may.

11 We think even the indirect restraint
12 would be subject to exacting scrutiny and would
13 require narrow tailoring for the reasons set
14 forth in NAACP versus Alabama and its progeny,
15 particularly in Shelton and in Gremillion, where
16 narrow tailoring is required and -- and the
17 concern is indistinguishable from what you have
18 here in terms of the concept and the nature of
19 the right.

20 But we also think that there is a
21 direct infringement on the right peaceably to
22 assemble. I -- I -- I can't argue that any
23 better than the Becket Fund has, but we agree
24 with their arguments, and also the right to
25 solicit. Keep in mind that this is a condition

1 to charities being able to speak as charities
2 and hold themselves out as charities to the
3 public. And Senator McConnell's brief, along
4 with others, explains that point very well.

5 JUSTICE BARRETT: Do you think the
6 right to anonymously associate is an inherent
7 part of the freedom of assembly?

8 MR. SHAFFER: Yes, it is. It was
9 precious to the framers. Anonymity was a -- a
10 core concern of theirs that's reflected in this
11 Court's precedents, McIntyre, Talley, and on
12 down the line.

13 But, also, the right to assemble is
14 the right to assemble privately and peaceably.
15 And when the government comes asking tell us who
16 your donors are, that is a direct infringement.

17 JUSTICE BARRETT: Okay. And I want to
18 ask you something. You've repeatedly
19 distinguished the IRS form from the California
20 use of Schedule B because of the fact that it's,
21 you know, kept strictly confidential and the IRS
22 has a nationwide mandate. And you keep talking
23 about the distinction between this not being a
24 statute in California but being, you know,
25 something that was -- I think you described it

1 as subject to the executive's whim.

2 And I guess I don't understand why all
3 of those things matter. I would have thought
4 state action is state action. So, if
5 California, which has a state-wide mandate,
6 passes a statute and, you know, as Justice Kagan
7 asked you about keeping things strictly
8 confidential, keeps it strictly confidential,
9 it's done by statute, and it only applies to
10 donors in the State of California, is that a
11 different case?

12 MR. SHAFFER: Doe v. Reed explained
13 very well why the first thing in the analysis,
14 even after you have least restrictive
15 alternatives established in the election
16 context, it started with the state's interest
17 and it had to credit that before it went on to
18 the analysis of chill.

19 And whether there's a statute that
20 reflects the considered legislative judgment
21 that, yes, this is really warranted and it's
22 really useful should make a difference to this
23 Court's analysis. And I commend to you Justice
24 Stevens' Footnote 3 in his concurrence in Doe v.
25 Reed explaining that the strength of the state's

1 interest goes up depending upon whether you have
2 a considered and surer legislative judgment
3 that's been made.

4 Here, you have the opposite of that,
5 and you have the acknowledgment of California --
6 again, it -- it's reflected in the Joint
7 Appendix and it's incontestable that they
8 haven't even thought about narrow tailoring.

9 JUSTICE BARRETT: Thank you, counsel.

10 CHIEF JUSTICE ROBERTS: A minute to
11 wrap up, Mr. Shaffer.

12 MR. SHAFFER: Yes, if I may, Mr. Chief
13 Justice.

14 We think the rule of law that decides
15 this case is clear, not fuzzy. Even if there
16 may be semantic differences or questions of
17 doctrine as far as strict scrutiny versus
18 exacting scrutiny and least restrictive
19 alternatives versus narrow tailoring being
20 required, this Court's holding and precedent are
21 clear in Shelton and in Gremillion. Unless
22 those are overruled, narrow tailoring at the
23 very least, at a bare minimum, is required here.

24 This Court has insisted upon it
25 repeatedly, and it is -- and it has done so

1 across the larger realm of First Amendment
2 scrutiny. We don't know of heightened scrutiny
3 in the First Amendment context that does not
4 call for narrow tailoring, that does not say a
5 state cannot be infringing upon these precious
6 liberties gratuitously and -- and -- and
7 disproportionately.

8 Here, California's narrow -- narrower
9 alternative is obvious and unanswerable. It's
10 an individualized audit request that we are not
11 challenging and that California is relying upon
12 in every case, redundantly, after the
13 prophylactic upfront collection. To collect
14 gratuitously and redundantly is the opposite of
15 doing it narrowly.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 General Prelogar.

19 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR
20 FOR THE UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING VACATUR AND REMAND

22 GENERAL PRELOGAR: Mr. Chief Justice,
23 and may it please the Court:

24 In its reply brief and again this
25 morning in response to Justice Sotomayor's

1 questions, the Foundation concedes that exacting
2 scrutiny does not contain a least restrictive
3 means requirement and for good reason.

4 This Court's cases make clear that
5 while fit matters under exacting scrutiny, the
6 standard is less stringent than strict
7 scrutiny's narrow tailoring test. The court of
8 appeals thus applied the correct legal standard
9 to this reporting requirement.

10 The court also correctly rejected
11 Petitioners' facial challenge. Petitioners
12 haven't shown that disclosure in the typical
13 case involving the typical charity would expose
14 donors to the risk of threats, harassment, or
15 reprisal. Absent that showing of an
16 across-the-board First Amendment burden, they
17 provide no basis to strike down this law on its
18 face. Instead, Petitioners' evidence of burden
19 focused on the harm to their own donors.

20 We agree that the court of appeals'
21 analysis of the as-applied challenge was
22 incomplete, and the cases should therefore be
23 remanded for the court to properly assess the
24 potential chilling effect on Petitioners'
25 donors.

1 I welcome the Court's questions.

2 CHIEF JUSTICE ROBERTS: General, how
3 do you think an as-applied challenge would work?
4 It -- is a charity supposed to -- you know, the
5 -- the Schedule B is due to be disclosed. Are
6 they supposed to attach an affidavit or
7 something saying we're a very controversial
8 charity and we think, if people knew who gave
9 money to us, they would be -- their rights to
10 association would be chilled?

11 GENERAL PRELOGAR: This Court has
12 recognized, Mr. Chief Justice, in cases like
13 Buckley that there shouldn't be unduly stringent
14 standards of proof for purposes of adjudicating
15 an as-applied challenge. So I think that a
16 charity in that circumstance that thinks that
17 its donors are going to face a reasonable
18 probability of threats or harassment could come
19 forward with any kind of evidence that would
20 bear on that question. But that --

21 CHIEF JUSTICE ROBERTS: Well, but I
22 mean -- do you mean of -- of the 60,000 or how
23 many there -- ever many there are, I guess
24 that's my question. When you say "come forward
25 with," does that mean they file a statement

1 saying we're a very controversial charity; to
2 prove that, here are a number of examples where
3 our donors were harassed? And -- and then
4 somebody in the AG's office would make a
5 judgment about it? I just -- I -- I just don't
6 understand how it works.

7 GENERAL PRELOGAR: I think it could
8 work in two different ways. So, first, there
9 might be those kinds of administrative
10 procedures where the charity could seek an
11 exemption from the Attorney General's Office
12 itself directly. But, of course, here, the way
13 that this was pressed in the lower courts was
14 through a judicial challenge where the charity
15 did not disclose a Schedule B requirement and
16 then subsequently --

17 CHIEF JUSTICE ROBERTS: Well, I mean,
18 do -- do you -- would -- would you require that,
19 anybody who wanted to not have to disclose it
20 would have to go into court?

21 GENERAL PRELOGAR: Not necessarily if
22 they want to take advantage of any
23 administrative remedies that might exist. And I
24 think this Court, in cases like Buckley and Doe
25 versus Reed, recognized that there do have to be

1 those meaningful opportunities to obtain the
2 as-applied challenge but that that's what
3 sufficiently safeguards First Amendment rights
4 in this context --

5 CHIEF JUSTICE ROBERTS: How would --

6 GENERAL PRELOGAR: -- in that they're
7 --

8 CHIEF JUSTICE ROBERTS: -- how would
9 the -- the administrative person in the
10 California Attorney General's Office decide
11 whether a particular charity qualified for an
12 as-applied exemption?

13 GENERAL PRELOGAR: We think that the
14 relevant information would pertain to whether
15 there is actually a risk of harassment, threats,
16 or reprisal. So that could turn on things like
17 hostility to the organization itself, any
18 documented record of those kinds of threats
19 against the organization, its members, its
20 donors, other organizations like it.

21 CHIEF JUSTICE ROBERTS: Well, how many
22 examples of people being abused do you have to
23 have before you'll say yes, that's a -- that
24 charity is a controversial one and they don't
25 have to file the Schedule B?

1 GENERAL PRELOGAR: I don't think that
2 it turns on a particular number. Instead, what
3 this Court has used to describe the framework is
4 whether there's a reasonable probability, and
5 it's emphasized that that's a flexible standard
6 that there shouldn't be unduly stringent burdens
7 of proof. That's the exact reason we think this
8 case should be sent back for the court of
9 appeals to properly measure the chilling effect
10 based on this kind of evidence, which we think
11 does create a serious concern in this case.

12 CHIEF JUSTICE ROBERTS: Justice
13 Thomas.

14 JUSTICE THOMAS: Thank you, Mr. Chief
15 Justice.

16 Counsel, you -- you speak of a
17 chilling effect. What role would accusations
18 that a particular organization is racist or is
19 white -- supports white supremacy, that if --
20 that if there's a view of that organization to
21 that -- with that reputation, would it be a
22 chilling effect if these -- if its contributors
23 think that that information or that their
24 contributions to the organization would be
25 disclosed, is it more than -- would that be more

1 of a concern in that case than it would be, say,
2 in the case of the organization that provides
3 dog beds for adopted dogs or something?

4 GENERAL PRELOGAR: Yes, I agree
5 completely, Justice Thomas, that we think that
6 with respect to the organizations that might be
7 subject to forms of public backlash or that are
8 associated with particular causes that have been
9 the subject of public attention, that that might
10 very well create that kind of chilling concern
11 if the organization can show that it triggers
12 this probability of -- of threats or harassment.

13 But that is clearly distinguishable
14 from the case of the typical donation to the
15 typical charity that isn't at all controversial,
16 that doesn't trigger that kind of public
17 backlash. And as Justice Kagan noted, many
18 charities already disclose the identities of
19 their donors. Many sell their donors'
20 identities to third parties.

21 So there's just no basis in this
22 record to conclude that, in the case of the
23 general application of this disclosure
24 requirement, there's going to be anything
25 remotely like the risks associated with

1 organizations that instead have provoked that
2 kind of public debate.

3 And I would just emphasize as well
4 that, in that respect, we think the record here
5 is on all fours with the record the Court
6 confronted in Doe versus Reed because, there,
7 the Court recognized that although, with respect
8 to particular referendum petitions, there might
9 be risks of harm arising from disclosure, there
10 was no basis to think that that would apply
11 across the board in each and every case.

12 JUSTICE THOMAS: I'd like your
13 reaction to -- somewhat related, but your
14 reaction to this sentence from the reply --
15 NAACP's reply brief in the NAACP case, and I
16 quote, "The right of anonymity is an incident of
17 a civilized society and a necessary adjunct to
18 freedom of association and to full and free
19 expression in a democratic state."

20 What do you think of that? Is -- is
21 there such a right?

22 GENERAL PRELOGAR: I think that what
23 this Court has recognized in considering claims
24 like that is that privacy may in many cases be
25 essential to the effective exercise of

1 associational rights, but it's not invariably
2 the case that that will be so.

3 What the Court has said in cases like
4 Buckley is that there's a possibility that a
5 disclosure requirement will interfere with
6 association insofar as privacy might sometimes
7 be important to protect the associational
8 rights. But that's exactly why the Court has
9 adopted exacting scrutiny as the proper
10 framework for measuring these claims, to ensure
11 that there is an actual burden on First
12 Amendment rights produced by a disclosure
13 requirement for purposes of assessing whether
14 the state's law is valid.

15 JUSTICE THOMAS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer.

18 JUSTICE BREYER: I'd like to know what
19 you think of the argument raised in several of
20 the amici briefs anyway that this case is really
21 a stalking horse for campaign finance disclosure
22 laws.

23 What's the difference? If we hold in
24 your opinion, the government's view -- if we
25 were to hold against you and for the broader

1 claims of the rule at issue in this case that
2 the Petitioner brings, how would you distinguish
3 disclosure in the campaign finance context? The
4 right at issue, you heard Justice Thomas very
5 eloquently explain that right, and it would
6 certainly seem to apply as much.

7 And the need in the political fora,
8 money is involved in both cases, and the need to
9 give anonymously would seem as strong, and you
10 could argue about the government's interest.
11 So, if that broad interest exists here, how
12 would you -- and wins, how would you distinguish
13 campaign finance, or would you?

14 GENERAL PRELOGAR: So I think that
15 campaign finance disclosure requirements would
16 still be distinguishable insofar as there are
17 different interests, government interests that
18 are asserted in support of those laws and where
19 the Court might conclude that there aren't other
20 alternatives that could equally be as effective
21 in pursuing those goals.

22 But I want to be clear that we think
23 that the same standard of review applies to
24 disclosure requirements across the board. And
25 this distinction between electoral cases and

1 non-electoral cases is illusory because the
2 relevant point that this Court has recognized is
3 that disclosure requirements are subject to
4 exacting scrutiny because they only affect
5 protected associational rights indirectly, and
6 they don't present the same risk the
7 government's seeking to suppress particular
8 ideas or viewpoints or try -- or types of
9 association, and for that reason, they should be
10 subject to a less stringent standard of review.

11 We urge the Court to adopt and apply
12 that framework to this disclosure requirement as
13 well.

14 CHIEF JUSTICE ROBERTS: Justice Alito.

15 JUSTICE ALITO: I was interested in
16 your colloquy with the Chief Justice. Has
17 California ever said that it will grant an
18 exemption if a nonprofit submits an affidavit or
19 other proof that its donors will be chilled by
20 disclosure?

21 GENERAL PRELOGAR: I'm not aware of
22 any evidence about that in the record. And,
23 ultimately, these kinds of administrative
24 remedies, I'm drawing a parallel to the campaign
25 finance regulations and, for example --

1 JUSTICE ALITO: Well, if it's not in
2 the record, then does every nonprofit that fears
3 its donors will be chilled have to do what these
4 Petitioners have done, which is to take
5 California to court and fight the state tooth
6 and nail for more than six years in order to
7 avoid potential public disclosure of its list of
8 donors?

9 GENERAL PRELOGAR: To the extent
10 they're pursuing an as-applied exemption, I
11 think that that's so, but I don't think there is
12 anything wrong with it.

13 And the -- the corresponding rule that
14 would facially invalidate this law would mean
15 that in the mine-run case where there is no
16 First Amendment burden at all, nevertheless, the
17 state would be precluded from regulating and
18 pursuing its important interests in policing
19 charitable fraud in this way.

20 JUSTICE ALITO: Do you think that
21 would provide adequate protection for First
22 Amendment rights? Do you doubt that donors to
23 organizations that take unpopular positions on
24 hot-button issues have reason to fear reprisals
25 if those donations are made public? Do you

1 think that's a legitimate fear in our current
2 atmosphere, or -- or do you think it's paranoid?

3 GENERAL PRELOGAR: No, I think that
4 that can produce a chilling effect in individual
5 cases. But I don't think there's any indication
6 in this record that that kind of chilling effect
7 is created across the board with respect to the
8 average person donating to the average
9 charitable organization.

10 And there's simply no evidence here to
11 conclude that individuals would stop donating to
12 charitable organizations if this reporting
13 requirement to the state were enforced in the
14 mine-run case.

15 JUSTICE ALITO: Let me ask you about
16 your position with respect to this particular
17 case because I found it a bit puzzling. You say
18 that the case should be remanded so the Ninth
19 Circuit can consider "how significant the harm
20 would be to Petitioners' contributors if their
21 identities became publicly known."

22 You know what the record here shows.
23 The district court conducted a trial and it
24 found ample evidence that the contributors to
25 Petitioners would be harassed. And the brief

1 filed by the American Civil Liberties Union and
2 the NAACP Legal Defense Fund and other groups
3 says, "Petitioners have shown that people
4 publicly affiliated with their organizations
5 have been subjected to threats, harassment, or
6 economic reprisals in the past and are likely to
7 be chilled."

8 What more do you think these
9 Petitioners would have to show?

10 GENERAL PRELOGAR: Well, I think the
11 way that that kind of evidence factors in in
12 this case, which, of course, involves a
13 nonpublic disclosure requirement, is in
14 measuring the chilling effect.

15 So the reason that we think that the
16 court of appeals was incomplete in its analysis
17 is because, although it concluded that there was
18 no future prospective risk of inadvertent
19 disclosure, it didn't consider the way that the
20 past history here of unfortunate widespread
21 public disclosure might factor into a
22 prospective donor's chill with respect to
23 whether to continue associating with
24 Petitioners.

25 And we think a donor would think about

1 not just the risk of future disclosure but also
2 how severe the consequences would be. The more
3 severe the consequences, the greater the
4 chilling effect, even if that threshold risk of
5 inadvertent disclosure remains relatively
6 slight.

7 JUSTICE ALITO: Well, again, you know
8 what the record here shows. Is it sufficient or
9 not? I -- I don't quite understand what your
10 position is.

11 GENERAL PRELOGAR: Our position is
12 that the court of appeals should complete its
13 analysis and conduct that inquiry in the first
14 instance. And, ultimately, the -- the interest
15 of the United States here is in -- in the legal
16 standards that apply to disclosure requirements
17 in this context. So we haven't taken an
18 ultimate position on the outcome of the
19 as-applied exemption, but we do think it needs
20 to be given meaningful consideration.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: I am think -- I'm
25 thinking along Justice Alito's questioning, and

1 it seems to me that you are basically asking a
2 question that the Ninth Circuit -- you're saying
3 the Ninth Circuit didn't answer.

4 And it's -- and the question you think
5 the Ninth Circuit didn't answer is do -- can --
6 do donors have a reasonable fear -- given the
7 state's past disclosure problems, is it
8 reasonable for them to be chilled?

9 Is that what you're asking the Court
10 to do?

11 GENERAL PRELOGAR: Yes, Justice
12 Sotomayor, that's largely how we think the
13 chilling effect should be measured in this case.

14 JUSTICE SOTOMAYOR: All right. Now,
15 if that's the way you think it should -- and I
16 actually may agree with you that that's what our
17 -- our case law would suggest. Is that a
18 factual question or is that a legal question
19 that we should answer?

20 GENERAL PRELOGAR: That's, I think, a
21 mixed question, and in this realm, the Court has
22 recognized that mixed questions should generally
23 be answered de novo by looking at how the legal
24 standard applies to the particular facts.

25 JUSTICE SOTOMAYOR: Now let me tell

1 you how -- what I've been struggling with in
2 this case, and perhaps you'll tell me if I'm
3 struggling rightly or wrongly, given our -- what
4 you believe our exacting scrutiny standard
5 requires.

6 It seems to me that what we look at
7 first is, can a disclosure hurt a party? We
8 don't -- generally, we ask three questions, but,
9 if I take them backwards, we look at, is there a
10 potential burden?

11 And I think it goes without dispute in
12 this case that the Petitioners have shown that a
13 disclosure of their donors could harm them. I
14 don't think you dispute that, correct?

15 GENERAL PRELOGAR: If it were a public
16 disclosure, that's correct.

17 JUSTICE SOTOMAYOR: That's the point.

18 Now the question is, if it's not a
19 public disclosure, which this law purports to
20 be, we would balance whatever -- whether the
21 state has a substantial interest, not a
22 compelling interest but a substantial interest,
23 in this information.

24 And I guess the other side is saying,
25 given the number of times we use it, even if

1 it's small, 10 times, this is a substantial
2 interest. It helps us in our law enforcement.

3 So the issue really is, has the State
4 proven that it's really not -- it's really going
5 to keep this private? Isn't that the bottom
6 line?

7 GENERAL PRELOGAR: I think that is a
8 critical component of the inquiry here. And we
9 agree that there is a big difference between
10 public and nonpublic disclosure requirements
11 because, of course, nonpublic reporting reduces
12 the risk that there will be any harassment and
13 reprisal from third parties themselves.

14 But just pulling back and to -- to
15 provide our view on the overarching legal
16 question that you were referring to, Justice
17 Sotomayor, we do think that it's appropriate in
18 every case to take account of both the burden on
19 First Amendment rights and to use that as the
20 framework or benchmark for assessing the
21 sufficiency of the state's interests. That's --

22 CHIEF JUSTICE ROBERTS: Justice Kagan.

23 JUSTICE KAGAN: General Prelogar, I'd
24 like to get your views on this question that's
25 come up about when a facial challenge is

1 appropriate and when, on the contrary, it's not
2 and -- and a person should be remitted to an
3 as-applied challenge.

4 And as you answer that question, I'd
5 like you to answer Justice Barrett's
6 hypothetical, which is that, you know, it would
7 seem irrelevant that lots of people don't care
8 about a blanket restriction on speech. So why
9 is that any different here?

10 GENERAL PRELOGAR: So I'll begin with
11 that hypothetical, and -- and the big difference
12 with the situation that Justice Barrett was
13 positing is that that would have been a direct
14 prohibition of speech, and that creates all the
15 concerns that maybe government's trying to
16 suppress viewpoints or ideas and it triggers
17 strict scrutiny in the ordinary course.

18 Disclosure requirements are different
19 because this Court has recognized that they may
20 affect each in association, but they do so only
21 indirectly, and so it's necessary in every case
22 to take account of the actual burden that's
23 presented with respect to First Amendment
24 rights.

25 And I think that that explains why a

1 facial challenge should not succeed here,
2 because there is no evidence in this record that
3 there is any kind of widespread substantial
4 burden in the typical application of this
5 statute to the typical person contributing to a
6 charity.

7 The evidence the Petitioners had
8 focused on the harm to their own donors. We
9 agree that that evidence is cause for concern,
10 but just like in Doe versus Reed, there is no
11 reason to generalize here and suggest that the
12 average person contributing to a charity would
13 be similarly situated with respect to those
14 harms.

15 JUSTICE KAGAN: And -- and I heard
16 some questioning at the -- at the end of Mr.
17 Shaffer's round about maybe this isn't an
18 indirect restriction, maybe associational rights
19 are being directly violated and some reference
20 to the Becket Fund brief.

21 Do you have a view on that?

22 GENERAL PRELOGAR: Well, I think that
23 that would run counter to this Court's
24 longstanding precedent concerning disclosure
25 requirements. The Court has again and again

1 characterized those as indirect. And that's the
2 reason that the Court's applied a different
3 level of scrutiny, exacting scrutiny, to those
4 requirements.

5 The Court has said that disclosure
6 poses the possibility but not the same certainty
7 or inevitability of affecting associational
8 rights. And so it would be a sea change in this
9 Court's precedent to instead subject disclosure
10 requirements to the same kind of scrutiny that
11 attaches to more direct regulations of speech or
12 association.

13 JUSTICE KAGAN: General, there's been
14 a lot of confusion about what exactly exact --
15 what exactly "exacting scrutiny" means. You
16 started by saying it's definitely not a least
17 restrictive alternative test. Some people say,
18 well, it has to be narrowly tailored.

19 What do you think of that and -- and,
20 you know, what's the proper level of tailoring
21 in this context?

22 GENERAL PRELOGAR: We think that the
23 problem with trying to label it narrow tailoring
24 is that that immediately connotes either the
25 strict scrutiny least restrictive means test or

1 at least it suggests that there's some kind of
2 universal fixed means-end fit formulation that
3 applies in this context.

4 And, instead, the way we read this
5 Court's precedents, exacting scrutiny requires
6 that the strength of the governmental interests
7 must reflect the seriousness of the actual
8 burden on First Amendment rights.

9 That incorporates, in our view, an
10 element of flexibility in the means-end fit
11 analysis that's intrinsically tied to that
12 actual First Amendment burden. And the more
13 significant the burden, the -- the more
14 stringent the showing the state will have to
15 make that it has a sufficiently strong interest
16 in regulating through its chosen means.

17 JUSTICE KAGAN: Thank you, General.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch.

20 JUSTICE GORSUCH: Good morning,
21 General. I -- I -- I guess I'm -- I want -- I
22 want to poke a little bit further into this --
23 the -- the facial challenge question and your
24 responses, as I understand your response that a
25 charity would have to come forward with some

1 evidence that it's likely to be harassed or that
2 its donors might be.

3 But doesn't that kind of put the --
4 the cart before the horse or invert the First
5 Amendment analysis because you're placing donors
6 and organizations, so the argument goes, in --
7 in the unenviable position of having to prove
8 that they have been harassed in order to
9 vindicate their First Amendment rights for
10 privacy in associations?

11 GENERAL PRELOGAR: Well, Justice
12 Gorsuch, I think, again, drawing on this Court's
13 analysis in Buckley, it -- it's certainly true
14 that courts have to ensure that they are not
15 holding organizations to unduly stringent
16 burdens of proof.

17 And I -- I would point the Court
18 actually to this Court's analysis in Shelton,
19 which Mr. Shaffer repeatedly relied on. There,
20 the Court was --

21 JUSTICE GORSUCH: I understand those
22 are nice words, but I -- I -- I'm -- I'm looking
23 for something a little more concrete, General.
24 How would you protect -- if -- if -- if you
25 agree, as I understand you do, with Justice

1 Thomas that the right to association includes a
2 right to privacy in that association, how do you
3 protect that when you're requiring donors and
4 organizations to come forward to prove that they
5 have been harassed?

6 GENERAL PRELOGAR: Well, to be clear
7 -- and I want to make sure that I'm being
8 absolutely clear on this point -- what the Court
9 has said is that privacy in association may
10 sometimes be critical to the effective exercise
11 of the right, but that's not invariably the
12 case.

13 Now, with respect to the actual
14 evidence that organizations need to come
15 forward, ultimately, they -- they don't need to
16 show that there have been specific incidents of
17 harassment tied to the particular disclosure
18 requirement at issue. Instead, the Court has
19 said that any evidence that suggests that there
20 is public hostility to the organization, to its
21 individual members, that there have been past
22 practices to -- to demonstrate a pattern of
23 hostility, could suffice to show that there
24 really is a chilling effect in this
25 circumstance. But if the --

1 JUSTICE GORSUCH: So do you think, for
2 example, then -- then that the government could
3 compel private organizations to hand over
4 their -- I don't know, some examples in the
5 briefs I saw were their holiday card list so
6 that it can ensure the accuracy of mail delivery
7 or a young person's -- a list of the people
8 they've dated so they can do a survey on
9 marriage patterns?

10 What would be wrong with, in -- in
11 your view, those sorts of things, at least
12 unless they come forward and show that they've
13 been harassed or are very likely to be as a
14 result of this disclosure? Why -- why isn't
15 that -- put another way, why -- why would it be
16 wrong to think of this as a problem of
17 compelling speech?

18 GENERAL PRELOGAR: Well, I think that
19 the big difference with those hypotheticals is
20 they would likely present very different balance
21 of interests with respect both to the burden and
22 to the state interest. And so just taking each
23 of those in turn --

24 JUSTICE GORSUCH: But, in each case,
25 you're compelling speech from a party who

1 doesn't wish to. Why isn't that a problem?

2 GENERAL PRELOGAR: Oh, to be clear, no
3 party here is suggesting that these disclosure
4 requirements should be analyzed under compelled
5 speech precedent.

6 JUSTICE GORSUCH: I'm asking you
7 whether they -- whether they should be.

8 GENERAL PRELOGAR: I don't think they
9 would succeed if they were. The -- the Court
10 has held in cases like Zauderer that so long as
11 what's being compelled is purely factual
12 information, the First Amendment won't
13 necessarily be violated.

14 Now, of course, they present serious
15 associational freedom concerns, and I think that
16 that's why the parties here have focused this
17 case on the privacy and in -- in association.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh.

21 JUSTICE KAVANAUGH: Thank you, Chief
22 Justice.

23 And good morning, General Prelogar.

24 There's an impressive array of amicus
25 briefs supporting Petitioners here across the

1 ideological spectrum, and one of them is from
2 the American Civil Liberties Union, the NAACP
3 Legal Defense and Educational Fund, and the
4 Human Rights Campaign, among others, and that
5 brief says -- and I'm going to quote you
6 something and then get your reaction to it -- "A
7 critical corollary of the freedom to associate
8 is the right to maintain the confidentiality of
9 one's associations absent a strong governmental
10 interest in disclosure. If the state could
11 categorically demand disclosure of associational
12 information, the ability of citizens to organize
13 to defend values out of favor with the majority
14 would be seriously diminished."

15 Your reaction to that amicus brief and
16 the amicus briefs more generally that are
17 supporting Petitioners?

18 GENERAL PRELOGAR: With respect to
19 that amicus brief in particular, a critical part
20 of that brief was to observe that -- and to
21 argue that this disclosure requirement should be
22 treated as a public disclosure requirement. So
23 I just want to flag at the outset that the ACLU
24 and the NAACP themselves recognize that there is
25 a critical distinction between public and

1 nonpublic disclosure.

2 With respect to the amicus briefs and
3 -- and that showing more broadly, it's certainly
4 the case that there are many organizations that
5 may desire that kind of privacy in association.
6 The relevant question is whether the states
7 should be foreclosed from regulating in a
8 particular way based on a showing that the
9 disclosure requirement truly creates First
10 Amendment burdens.

11 And I'll just emphasize as well that
12 there are an array of amicus briefs on the other
13 side, including from associations of nonprofits
14 -- the California Association of Nonprofits with
15 10,000 member organizations, the National
16 Council of Nonprofits with 25,000 member
17 organizations -- and what those briefs suggest
18 is that there is a critical role to be played in
19 having the state police charitable fraud to
20 ensure that donors have confidence in charitable
21 organizations, which itself increases the -- the
22 willingness to donate and, therefore, the
23 pursuit of philanthropic efforts.

24 JUSTICE KAVANAUGH: Turning to the
25 text of the First Amendment, do you agree that

1 there is a right of the people peaceably to
2 assemble?

3 GENERAL PRELOGAR: I certainly agree
4 that the assembly provision is an independent
5 First Amendment right, but, of course, here, no
6 party is pressing that, and, instead, that is
7 focused on the right to associate.

8 JUSTICE KAVANAUGH: And then, in terms
9 of applying strict or exacting scrutiny,
10 sometimes those words really are just asking the
11 question, not answering the question. You're --
12 you're asking whether the state has an interest
13 sufficiently compelling or important to warrant
14 an exception to a constitutional right or to
15 spell out the contours of the rights.

16 And two things the Court has often
17 looked to in applying that to state laws, say,
18 in the free speech context and others is, one,
19 whether the right -- the exception is
20 historically recognized, that a right has
21 coexisted with an exception of some kind
22 historically, and the second thing, this -- the
23 Court's often looked at, not exclusively, but
24 has looked at, is how many states have also
25 shared this same interest.

1 So, here, I think there's not a
2 historically recognized exception of this kind,
3 although I want to get your response to that.
4 And, second, what do you say about the fact that
5 this right -- this California interest can't be
6 all that important, so the argument goes,
7 because 46 other states have not sought this
8 kind of information?

9 GENERAL PRELOGAR: Well, let me take
10 each of those, but I'll do them in reverse
11 order.

12 On the number of states that regulate
13 in this way, I don't think it could possibly be
14 the case that California's law could be invalid
15 just based on that kind of head count.
16 Obviously, states in our federalist system can
17 choose to devote different levels of resources
18 to problems. They can choose to regulate in
19 different ways and have different priorities.

20 What California has shown is that it's
21 prioritized this issue of charitable fraud in
22 the state, it's devoted far more resources than
23 many other states, and I think it's done so
24 because of the sheer number of charitable
25 organizations that solicit in the state and the

1 amount of their donations, which are somewhat
2 unique in number, and that's prompted California
3 to act in this way.

4 So I think the relevant question isn't
5 how it compares to other states but whether it
6 has sufficiently justified this law.

7 JUSTICE KAVANAUGH: Thank you,
8 General.

9 CHIEF JUSTICE ROBERTS: Justice
10 Barrett.

11 JUSTICE BARRETT: Good morning,
12 General Prelogar. I have a question about
13 tailoring.

14 Let's say that I agree that exacting
15 scrutiny applies and that the Ninth Circuit
16 didn't really engage in any kind of tailoring
17 inquiry. I think what it did could more fairly
18 be described as a balancing, balancing of
19 interests.

20 You kind of demurred a little bit when
21 you were asked about what level, if any, of
22 tailoring is required. So do you agree there
23 has to be some kind of means-end fit or not?

24 GENERAL PRELOGAR: Yes, we do think
25 that there is a means-end fit, but we think that

1 it's incorporated into the requirement that the
2 strength of the governmental interest has to
3 reflect the seriousness of the actual burden on
4 First Amendment rights. And so that will vary
5 depending on the context or the circumstances
6 based on the showing with respect to First
7 Amendment burden.

8 And, again, the -- the more serious
9 the burden, then the less likelihood that the
10 state has a sufficiently strong interest in
11 regulating through its chosen means.

12 And -- and, Justice Barrett, just to
13 close the loop on this, I do think that the
14 court of appeals here considered alternatives.
15 It specifically discussed the audit letters,
16 subpoenas, and explained why those would be less
17 effective at allowing California to make use of
18 Schedule Bs at the outset in responding to
19 complaints before it formally opened an
20 investigation and cited that tip-off concern and
21 other concerns related to having that
22 information at an early stage.

23 So I don't think it's accurate to
24 suggest that there was no means-end fit analysis
25 in the lower court opinion.

1 JUSTICE BARRETT: Well, General, let
2 me read you this language from Shelton and tell
3 me if you think that this -- you would agree
4 that this is the standard we should apply when
5 thinking about means fit.

6 There, it -- the Court -- we said
7 that, in evaluating means-end fit, we struck
8 down the law because we concluded that the
9 government's purpose -- here is the quote --
10 "cannot be pursued by means that broadly stifled
11 personal liberties when the end can be more
12 narrowly achieved."

13 Would you be satisfied with that
14 standard?

15 GENERAL PRELOGAR: I think that
16 standard applies based on a showing of
17 substantial First Amendment burdens, and that's
18 specifically the context in which this Court
19 articulated that language in Shelton.

20 It said that the disclosure
21 requirement there would show every teacher in
22 the state from association because the teacher
23 lacked tenure protection and would naturally
24 avoid any associations that might cause concern
25 for the employer even though it didn't bear on

1 the fitness of the teacher to serve in that
2 capacity.

3 JUSTICE BARRETT: Okay. Let me ask
4 you about that predictive judgment then.

5 So, in -- in pressing for as-applied
6 challenges here or talking about whether this
7 record adequately establishes that the
8 Petitioners have reason or their donors have
9 reason to fear retaliation, what if the
10 Petitioners here had filed this challenge right
11 at the beginning before any of these incidents
12 of violence had occurred? How -- how is the
13 State -- State supposed to judge whether there's
14 chilling?

15 GENERAL PRELOGAR: So the Court
16 addressed this in Buckley and it said there,
17 with respect to minor political parties, that if
18 there's a new political party that doesn't have,
19 for example, a -- a history it can point to,
20 then it can rely on evidence with respect to
21 related organizations or organizations that
22 share similar missions.

23 So the Court has specifically
24 acknowledged this concern and made clear, again,
25 that there has to be --

1 JUSTICE BARRETT: But would it be
2 different, say, in California than in Alabama?
3 What evidence is the Court supposed to look to?
4 Political climate of the particular state?

5 GENERAL PRELOGAR: I don't think that
6 it should be limited in that -- in that way,
7 and, again, I don't think this should be an
8 unduly narrow inquiry. So I think that the
9 Petitioner should be able to come forward with
10 any evidence of harm that's occurred anywhere
11 for purposes of trying to show that there would
12 actually be a chilling effect in this case.

13 JUSTICE BARRETT: Thank you, General.

14 CHIEF JUSTICE ROBERTS: A minute to
15 wrap up, General.

16 GENERAL PRELOGAR: Thank you, Mr.
17 Chief Justice.

18 To wrap up, I'd like to focus on the
19 legal standards that we think the Court should
20 apply here. The Court's cases make clear that
21 exacting scrutiny applies to reporting
22 requirements, that the standard does not contain
23 a least restrictive means test, and that a
24 facial challenge should be rejected when, as
25 here, there is no basis to conclude the

1 disclosure poses a risk of threats, harassment,
2 or reprisals in nearly all of the law's
3 applications.

4 But the other relevant legal standard
5 is that organizations need to have a meaningful
6 opportunity to claim an as-applied exemption
7 from compelled disclosure when it would subject
8 their particular donors to harassment or
9 intimidation.

10 Petitioners presented evidence of
11 these kinds of harms, and we think the court of
12 appeals should have considered that evidence in
13 measuring the chilling effect of this law as
14 applied.

15 We'd urge the Court to confirm these
16 legal standards and remand for the court of
17 appeals to assess the as-applied challenge in
18 light of them.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 General.

21 General Feinberg.

22 ORAL ARGUMENT OF AIMEE A. FEINBERG

23 ON BEHALF OF THE RESPONDENT

24 MS. FEINBERG: Mr. Chief Justice, and
25 may it please the Court:

1 Petitioners advance two claims, a
2 facial challenge and an as-applied one. Those
3 claims are reviewed under exacting scrutiny, the
4 standard this Court has long applied to
5 reporting and disclosure requirements.

6 To prevail on their facial claim,
7 Petitioners must demonstrate that California's
8 Schedule B requirement is unconstitutional in
9 all or at least many of its applications.

10 The Petitioners' evidence centered
11 only on their own organizations. They did not
12 show that California's confidential collection
13 of the same information that charities already
14 provide to the IRS chills associational
15 interests in general or for a substantial number
16 of charities in the state.

17 At the same time, the state's upfront
18 collection of Schedule Bs is substantially
19 related to important oversight and law
20 enforcement interests.

21 Schedule Bs are used routinely by
22 state charity regulators to evaluate complaints.
23 When examined with other documents, a Schedule B
24 helps investigators determine if there is a
25 concern with self-dealing, diversion of

1 charitable assets, or gift-in-kind fraud that
2 warrants a formal investigation.

3 Now Petitioners' as-applied challenges
4 center on the claim that submitting their
5 Schedule B forms to state charity regulators
6 will lead to threats and harassment from the
7 public. The Schedule Bs are confidential under
8 California law, and the State has bolstered its
9 confidentiality protocols in response to past
10 lapses. There is no reasonable probability of
11 harm sufficient for as-applied relief.

12 I welcome the Court's questions.

13 CHIEF JUSTICE ROBERTS: I -- I guess I
14 want to follow up on that point you were just
15 making, General.

16 If -- if -- assume you have a charity
17 that supports a cause that is controversial, and
18 a number of organizations, people have said they
19 will make life miserable for anybody who
20 supports that charity. They'll picket outside
21 their house. They'll boycott anybody doing
22 business with them.

23 If -- if that person came to you and
24 said, I want to give a donation, but I want to
25 be sure that California will not disclose this,

1 that it will not get out, can you give me
2 100 percent assurance that that will not happen,
3 what -- what would you tell that person?

4 MS. FEINBERG: Mr. Chief Justice, I
5 don't think any organization can guarantee
6 perfection. But, here, the State has
7 promulgated a regulation codifying the
8 confidentiality -- confidential status of
9 Schedule Bs, and it has had -- has enhanced its
10 protocols in response to past lapses.

11 The district court at 62a of the Law
12 Center's petition appendix called those efforts
13 commendable. And so we don't think there's any
14 probability that those harms would come to pass
15 in light of the nonpublic nature of this
16 requirement.

17 CHIEF JUSTICE ROBERTS: I'm sorry,
18 there's no probability or -- I -- I didn't catch
19 the adjective there. No reasonable --

20 MS. FEINBERG: No reasonable
21 probability that the harms that Your Honor just
22 laid out would come to pass.

23 CHIEF JUSTICE ROBERTS: Reasonable
24 probability. Okay.

25 You -- you talked about the State

1 routinely using this Schedule B information and
2 all the -- I just want -- want to make sure I
3 understand if your statements there were
4 consistent with the findings of the district
5 court or if they were meant to dispute those
6 findings?

7 MS. FEINBERG: Your Honor, the
8 district court discounted uses of the State's
9 Schedule B for evaluating complaints, although
10 it did state at 56a of the Law Center's petition
11 appendix that it did not doubt that the Attorney
12 General's Office used Schedule Bs.

13 It did not regard that as deficient
14 because, in its view, a use of Schedule B that
15 was not strictly necessary or where there were
16 not any other alternatives did not suffice to
17 substantially further the State's interest, and
18 we think that was legal error.

19 CHIEF JUSTICE ROBERTS: Justice
20 Thomas.

21 JUSTICE THOMAS: Thank you, Mr. Chief
22 Justice.

23 Counsel, the -- I'm interested in your
24 discussion of the nonpublic disclosure laws, the
25 -- the fact that you would have this internally

1 and not disclose it to the general public.

2 But through -- you know, throughout at
3 least recent history or not so recent history,
4 the Japanese internment cases, that census data
5 was used to locate them.

6 The -- the Council on American Islamic
7 Relations in their brief in this case say -- or
8 allege that the U.S. Government used this data
9 to -- to locate American Muslims.

10 The -- in the civil rights cases, like
11 the NAACP case, the local governments, state
12 governments wanted data in order to target the
13 NAACP.

14 So how can we say that there is a
15 difference in -- in -- in public disclosure
16 versus nonpublic disclosures?

17 MS. FEINBERG: Your Honor, the
18 concerns you raise, of course, are very
19 significant ones, but they are not present here.

20 The district court made no finding of
21 potential state reprisals or retaliation against
22 charities, and there is no evidence in the
23 record to support any such concern here.

24 JUSTICE THOMAS: With that in mind, do
25 you think it would be reasonable for someone who

1 wants to make a substantial contribution to an
2 organization that has been accused of being
3 racist or homophobic or white supremacist, that
4 in this environment that they would be chilled
5 because they have reduced or no confidence that
6 their -- the -- their contribution will be kept
7 confidential?

8 MS. FEINBERG: Your Honor, those
9 concerns are certainly relevant for
10 consideration of an as-applied challenge, but,
11 in any as-applied challenge, the question is, is
12 there a reasonable probability of threats,
13 harassment, or reprisals, which would turn on,
14 one, the risk that Your Honor noted about those
15 kinds of harassment but also the risk of public
16 disclosure. And, here, with a nonpublic
17 reporting requirement, those risks of public
18 threats would -- there would not be a
19 significant possibility of those.

20 JUSTICE THOMAS: So -- but you think
21 that there is -- in -- in that calculus, do you
22 include the possibility of an intentional leak
23 by someone who happens to disagree with or
24 dislike that particular group, that someone
25 would consider that a possibility?

1 MS. FEINBERG: Justice Thomas, that
2 generally certainly would be a relevant
3 consideration. I don't -- there is no evidence
4 in the record of -- suggestive of that sort of
5 willful or advertent kind of retaliation.

6 JUSTICE THOMAS: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Breyer.

9 JUSTICE BREYER: What do I read in the
10 record to show that this statement of the other
11 side is wrong? I assume you think it is. The
12 statement is, as I paraphrase it, there -- there
13 is no need for this. You can't say there isn't
14 some risk of leakage. It's never been necessary
15 really or hardly ever, and at the very least,
16 you could have a carefully tailored, a more --
17 like New York's, which is a more carefully
18 tailored statute, the same thing.

19 I thought the answer might be,
20 Mr. Smith, the charity, goes and buys a piece of
21 land or property in San Francisco or New York.
22 It belongs to a major donor. Maybe he overpaid.
23 Huh. This law means any charity will be very
24 careful before they get into that fix. That's
25 called, you know, preventative.

1 But you don't make that argument.
2 You're making the first. So what's the answer
3 to the first? And why didn't you make the
4 second argument? There's some good reason.

5 MS. FEINBERG: Justice Breyer, the
6 record shows that the upfront collection of
7 Schedule B assists state regulators in
8 evaluating complaints to detect precisely the
9 sort of self-dealing concerns that your question
10 is premised upon when, with upfront collection,
11 the State is able to evaluate complaints, look
12 for those kinds of situations, decide whether a
13 formal investigation is needed, and, if so,
14 focus the investigation on the relevant
15 concerns.

16 The alternatives posited by my friend
17 would not be sufficient to meet those needs.
18 The State would not have the ability to evaluate
19 -- to see Schedule B information in connection
20 with other information to decide if an
21 investigation is even needed.

22 Audit letters and subpoenas after the
23 fact lead to delays. They also lead to
24 considerable burdens on charities. And it is
25 not clear that Petitioners or other charities

1 would even provide the Schedule B in response.

2 I thought I heard my friend say that
3 any routine requests for those sort of audit
4 letters would be something he -- requests for
5 Schedule Bs would be something he would
6 challenge.

7 CHIEF JUSTICE ROBERTS: Justice Alito.

8 JUSTICE ALITO: Counsel, would your
9 scheme be facially unconstitutional if you
10 publicly disclosed these donor lists?

11 MS. FEINBERG: Your Honor, in that
12 circumstance, the burden on charities and their
13 supporters would be higher, and so a stronger
14 interest would be needed. We don't assert an
15 interest in public disclosure. There could be
16 circumstances where it could serve an interest,
17 but we don't assert any such interest here.

18 JUSTICE ALITO: Are -- are you willing
19 to say that that would be unconstitutional?

20 MS. FEINBERG: Your Honor, as a facial
21 matter, the challenger would still have to show
22 that it was operating unconstitutional in all or
23 a substantial number of cases, which would
24 require a showing that the sorts of public
25 threats, harassment, and reprisals would occur.

1 And as Justice Kagan was note --
2 noting before, many charities do not have those
3 types of concerns with the public knowledge of
4 donations.

5 JUSTICE ALITO: All right. The brief
6 filed by the ACLU and the NAACP Legal Defense
7 Fund says that we should regard your system as a
8 system of de facto public disclosure because
9 there have been such massive confidentiality
10 breaches in California.

11 And from the perspective of a donor,
12 that may make sense. A donor may say: This is
13 a state that has been grossly negligent in the
14 past. No sanctions against anybody who's leaked
15 this information. I have to assume that this
16 may happen again.

17 Why isn't that a reasonable way to
18 look at this?

19 MS. FEINBERG: I don't think even the
20 district court regarded it that way, Justice
21 Alito. At 62a of the Law Center petition
22 appendix, the district court said that the
23 Attorney General's Office efforts to rectify
24 past lapses and to prevent them in the future
25 were commendable.

1 JUSTICE ALITO: It said your past
2 record was shocking, did it not?

3 MS. FEINBERG: In the foundation
4 decision, it did. Following the court's
5 analysis of the evidence regarding the changes
6 to the State's protocols, it called those
7 efforts commendable. Its concern at the Law
8 Center -- its concern at that point was that the
9 State could not guarantee confidentiality.

10 JUSTICE ALITO: Let me get your -- let
11 me get a sense from you what you think would be
12 necessary in order for an as-applied challenge
13 to proceed. And let's take, as an example, the
14 brief filed by the Proposition 8 Legal Defense
15 Fund, where they detail evidence of vandalism,
16 death threats, physical violence, economic
17 reprisals, harassment in the workplace, the
18 well-known case of Brendan Eich.

19 Do you think that's sufficient? If
20 they came to you with that, would you grant them
21 an exemption?

22 MS. FEINBERG: Justice Alito, this is
23 a nonpublic disc -- reporting requirement, so
24 there is no reasonable probability that that
25 sort of threat, harassment, and reprisal from

1 the public would come to pass.

2 But we agree with the United States
3 that, as a general principle of law, there is a
4 flexible evidentiary standard, and challengers
5 to reporting or disclosure requirements can draw
6 from a wide range of evidence in order to
7 establish --

8 JUSTICE ALITO: Well, my time is up,
9 but -- so your answer is basically that no
10 as-applied challenge can ever succeed because
11 what you have at least purportedly is a private
12 disclosure system?

13 MS. FEINBERG: Justice Alito, there is
14 -- with a challenger who is asserting concerns
15 related to threats, harassment, and reprisals
16 from the public, that -- they would not be able
17 to satisfy the -- the standard because there
18 isn't a reasonable probability that that
19 information would be made known to --

20 JUSTICE ALITO: Again, I want to
21 understand your position. Your position is no
22 as-applied challenge can ever succeed?

23 MS. FEINBERG: There could be --

24 JUSTICE ALITO: For that reason?

25 MS. FEINBERG: Pardon me?

1 JUSTICE ALITO: For that reason, no
2 as-applied challenge could ever succeed?

3 MS. FEINBERG: With respect to a
4 nonpublic reporting requirement with a
5 challenger asserting claims -- asserting
6 threats, harassment, and reprisals from the
7 public, that would be a very difficult standard
8 to meet because --

9 JUSTICE ALITO: All right. Thank you.
10 My -- my time is up.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

13 JUSTICE SOTOMAYOR: Counsel, I
14 believe, and my memory could be wrong, that the
15 district court, in the end, commended you for
16 the efforts you had made for privacy but that it
17 concluded that, given the breaches -- the
18 breaches in the past that a reasonable person,
19 donor, might not have that much faith in the
20 AG's office and that it would chill them from
21 making donations. And that's one of the
22 reasons, if not the reason, it issued the
23 injunction, which the Ninth Circuit vacated.

24 So what are we to do with that? I
25 mean --

1 MS. FEINBERG: Your Honor --

2 JUSTICE SOTOMAYOR: -- isn't that the
3 nub of this? An exemption is only necessary if
4 you're going to make it public, and, you're
5 right, the district court has to determine
6 whether your office has a reputation or a
7 reasonable possibility that it's going to engage
8 in political retaliation and leak it secretly,
9 et cetera, et cetera.

10 But what do we do with that finding,
11 that given your past breaches you have
12 essentially turned this into a public disclosure
13 case?

14 MS. FEINBERG: Justice Sotomayor, I
15 read the district court's decision as, as you
16 note, commending the Attorney General's Office
17 for its changes but faulting the Attorney
18 General's Office for at that point not being
19 able to guarantee confidentiality.

20 We don't think that sort of guarantee
21 can be the standard and that the lack --

22 JUSTICE SOTOMAYOR: Well, let me just
23 give you an example. And -- and I think your --
24 someone said this earlier. It might have been
25 the other side.

1 How about if the requirement was that
2 you hand-deliver this list to somebody in the
3 AG's office who's going to put it in a locked
4 file? Is that a guarantee better than putting
5 it on the Internet with all of the anti-hacking
6 procedures you have? There is a normal human
7 fear about hacking, that they can hack anything.

8 MS. FEINBERG: In that hypothetical,
9 it's true that general concerns about hacking
10 would not be present. Here --

11 JUSTICE SOTOMAYOR: By the way, there
12 is a serious question. If someone came in and
13 argued that they were fearful on general
14 hacking, we probably, under Clapper, would say
15 they don't have standing to claim a -- a -- an
16 injury. But go ahead.

17 MS. FEINBERG: With respect to
18 hacking, Justice Sotomayor, it is a present risk
19 in modern society that no system can have a
20 100 percent safeguard against, but the important
21 point here --

22 JUSTICE SOTOMAYOR: That's including
23 the IRS, correct?

24 MS. FEINBERG: Indeed. Indeed. But
25 the important point here is that Petitioners did

1 not bring forward evidence suggesting that even
2 in light of that background risk, that charities
3 in general or at least a substantial number of
4 them were chilled in their contributions.

5 And, indeed, the amicus briefs from
6 Cal Nonprofits and the National Council of
7 Nonprofits said that robust Attorney General
8 oversight actually promotes charitable giving
9 because it promotes trust in the charitable
10 sector.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Ms. Feinberg, I'd also
13 like to ask you about the Petitioners'
14 as-applied challenge. You lost that below and
15 we -- in the district court, and its findings
16 are reviewed only under a clearly erroneous
17 standard.

18 And the district court said two
19 things. It said there was a pervasive recurring
20 pattern of inadvertent disclosure by California,
21 and it said that the donors would likely be
22 subject to threats and harassment if their
23 affiliations were disclosed.

24 So given those two findings, given a
25 clear error standard, how can you win on the

1 as-applied challenge?

2 MS. FEINBERG: Justice Kagan, we think
3 that the district court's ruling was premised on
4 its observation that California could not
5 guarantee constitutional -- confidentiality even
6 after bolstering its protocols.

7 If the Court disagrees with the Ninth
8 Circuit's approach to considering the district
9 court's characterization of the confidentiality
10 measures, the appropriate course would be as the
11 United States suggests, which is to -- would be
12 to vacate and remand on the as-applied
13 challenges only and to reconsider the question
14 in light of the district court's framing of the
15 confidentiality protections.

16 JUSTICE KAGAN: I'm wondering about
17 the relevance of your new regulation. You know,
18 usually we don't allow parties, govern -- the
19 government to come in and say, you know, we've
20 reformed our ways. We've changed our practices.
21 We'll do better in the future. You should give
22 us a pass. So why isn't that what you're asking
23 for here?

24 MS. FEINBERG: Justice Kagan, the reg
25 -- regulation codified existing practices in the

1 Attorney General's Office and an existing
2 policy. The Petitioners here are seeking
3 prospective facial invalidation. And the
4 district court considered the updated protocols
5 and the new regulation in connection with the
6 challenge. And we think that that -- they're
7 relevant for that reason.

8 JUSTICE KAGAN: On the question of
9 threats and harassment, if an organization comes
10 in or some of its members and -- and -- and
11 shows that they have been in the past subject to
12 such threats, do they need to do anything else
13 in your view? Is there a requirement that --
14 that they show that those threats have led to
15 chill, or is it enough if they show threats and
16 harassment?

17 MS. FEINBERG: In general, with
18 respect to a public disclosure requirement, the
19 question is whether there's a reasonable
20 probability that those threats, harassment, or
21 reprisals would occur.

22 And, if they do, it's reasonable to
23 conclude that that sort of significant
24 repercussions would arise would demonstrate a
25 deterrent for associations or making

1 contributions to charity because of the
2 significance of those sorts of consequences.

3 JUSTICE KAGAN: Thank you, Ms.
4 Feinberg.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Good morning. If
8 the First Amendment protects the right to
9 associate in private, why do we need to consider
10 harassment?

11 MS. FEINBERG: Justice Gorsuch, this
12 Court has said repeatedly, including in its
13 foundational cases, that the First Amendment
14 protects associational rights and those rights
15 may be implicated by disclosure and reporting
16 requirements, but they don't do so invariably.

17 So the --

18 JUSTICE GORSUCH: Well, we certainly
19 said that proof of harassment can be very
20 significant evidence that the First Amendment
21 right to associate has been infringed. But
22 we've also said that -- that the First Amendment
23 right to associate includes the right to do so
24 privately. Right?

25 MS. FEINBERG: The Court has

1 recognized that privacy is a concern where the
2 disclosure of associational information would
3 lead to deterrence of associations because of
4 the reactions that the information would prompt
5 in others.

6 JUSTICE GORSUCH: So could the
7 government on that account require private
8 associations to reveal any manner of information
9 -- their Christmas card lists, their dating
10 lists, their whatever -- so long as there's no
11 evidence or at least not a -- I think it was a
12 reasonable probability of reprisal?

13 MS. FEINBERG: Justice Gorsuch, I
14 think, in those situations, it would be much
15 more difficult for the government to justify,
16 first, because there would be a --

17 JUSTICE GORSUCH: Well, there's always
18 some good efficiency argument. I mean, we've
19 heard about efficiency in administration here.
20 I'm sure there's efficiency in Post Office
21 services or Census information. So let's
22 suppose the government can come up with
23 something that sounds like that.

24 MS. FEINBERG: In any case involving a
25 disclosure or reporting requirement, the

1 government must come forward with an interest
2 that is sufficiently important to justify the
3 burden. And in Your Honor's --

4 JUSTICE GORSUCH: So -- so you -- so
5 you then -- you do agree that there is this
6 right to privacy of association that the
7 government must overcome?

8 MS. FEINBERG: In -- where a -- where
9 a plaintiff demonstrates that a disclosure or
10 reporting requirement is, in fact, resulting in
11 the kinds of -- in the kinds of burdens that
12 Your Honor's hypothetical would likely show,
13 then yes.

14 JUSTICE GORSUCH: Oh, my -- my -- my
15 hypotheticals included no reprisals of any kind.
16 It's just a very -- they choose to associate
17 privately. Their Christmas card lists, their
18 dating history are private information. There's
19 no reprisals, though.

20 But could the government come in -- in
21 the name of efficiency and good government, come
22 in and require disclosure of those kinds of
23 lists?

24 MS. FEINBERG: I think that would be
25 very difficult because, in that situation, there

1 would be a significant burden on intimate
2 association. There would very likely be a
3 significant burden resulting from public
4 dissemination of that kind of information.

5 And, as a result, the government would
6 have to come forward with a commensurately
7 strong justification, and it wouldn't be clear
8 to me in that context what that interest would
9 be.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you, Chief
14 Justice.

15 And good morning, Ms. Feinberg. I was
16 asking Petitioners' counsel about the IRS
17 disclosure requirement, something that you have
18 emphasized in your briefing. And you heard
19 Petitioners' counsel's efforts to distinguish
20 the IRS situation from what California is doing
21 here. And I just want to give you an
22 opportunity to respond to that.

23 MS. FEINBERG: Justice Kavanaugh, for
24 -- California collects Schedule B information
25 for many reasons analogous to why the IRS does.

1 But, as a formal matter, regarding the
2 constitutional analysis, we agree with the
3 United States that it's different because the
4 IRS rule is a condition of a tax benefit, and
5 those rules are analyzed under a different
6 framework.

7 But the -- California's reasons for
8 collecting Schedule B upfront in -- collecting
9 Schedule Bs upfront is analogous to the IRS
10 because, in both circumstances, regulators have
11 concluded that knowing the number -- knowing the
12 identities of the very small number of
13 individuals who may be in a position to
14 influence the financial decisions of a charity
15 are relevant and important for regulatory
16 oversight purposes.

17 JUSTICE KAVANAUGH: One thing we've
18 looked at, the Court has looked at, in prior
19 cases involving individual rights is -- in
20 assessing the strength of the state's interest,
21 is how many states have similar laws.

22 And you heard me ask General Prelogar,
23 and she had a good answer about each state has
24 to assess its interests differently. But it --
25 still, doesn't it show that it's not really all

1 that essential to a state's interests if 46
2 other states have seen fit to regulate without
3 infringing on the right to assemble or the right
4 to associate in this same way? Just how would
5 you respond to that?

6 MS. FEINBERG: I don't think it
7 undermines California's interests for many of
8 the reasons that the United States articulated.
9 Different states have made different judgments
10 regarding their priorities, and different states
11 face very different regulatory challenges.

12 In California, there is a very large
13 population of charities that solicit billions of
14 dollars from state residents. And the State has
15 made it a priority to protect state residents
16 from diversion of charitable assets and
17 deception. And that is the basis on which
18 California has concluded that upfront collection
19 of Schedule B information is important for
20 furthering its interests.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: Good morning,
25 General Feinberg. Let's assume that I think

1 that California has a substantial interest in
2 collecting this information for purposes of
3 policing potential fraud. Let's also assume
4 that I think that the personal liberties --
5 right to association, right to speech -- are
6 significantly burdened.

7 What kind of means-end fit do I look
8 for then? Or how do -- how do I resolve those
9 competing interests?

10 MS. FEINBERG: Justice Barrett, you
11 would look at whether California's interests are
12 commensurate with those burdens. We think we
13 have clearly shown that here, given the uses of
14 Schedule B and how it helps in connection with
15 other information --

16 JUSTICE BARRETT: Was that a tailoring
17 requirement?

18 MS. FEINBERG: There is --

19 JUSTICE BARRETT: I'm not talking
20 about -- I'm not talking about least restrictive
21 alternatives. I'm -- assume I think exacting
22 scrutiny and not strict scrutiny applies. That
23 doesn't preclude, just like in intermediate
24 scrutiny -- scrutiny, it doesn't preclude a
25 means-end fit requirement, right?

1 MS. FEINBERG: Justice Barrett, we
2 agree that the exacting scrutiny encompasses
3 consideration of the means and ends, and the
4 degree of fit required will turn on the severity
5 of the burden.

6 Here, Petitioners have not
7 demonstrated such a burden with respect to all
8 or even --

9 JUSTICE BARRETT: But I told you to
10 assume that I said that they did. Let's assume
11 that I think these Petitioners have shown a
12 substantial burden, and I'm -- I'm granting that
13 California has a substantial interest.

14 So you're really advocating just a
15 balancing test, right? Like, does the burden
16 outweigh the benefit to California? You're not
17 -- you're not proposing any kind of means-ends
18 tailoring inquiry?

19 MS. FEINBERG: No, we do think there
20 is a means-ends fit analysis. And we think,
21 here, the means California has chosen are well
22 tailored to the end.

23 JUSTICE BARRETT: So well-tailored is
24 the standard, not narrowly tailored?

25 MS. FEINBERG: Justice Barrett, I'm --

1 the term "narrow tailoring" can mean many things
2 in many contexts, and so -- but we do think that
3 under exacting scrutiny and in Your Honor's
4 hypothetical, where there is a significant
5 burden, there would be a necessary means-end
6 fit. We think that it's satisfied here because
7 California --

8 JUSTICE BARRETT: Well, I understand
9 you think it's satisfied, but, in considering
10 that means-end fit, we look to alternatives and
11 see what other less restrictive alternatives
12 might be available, and it doesn't mean you have
13 to choose the least one. But we would consider
14 other alternatives, is that right?

15 MS. FEINBERG: Yes, Justice Barrett,
16 it would be a relevant consideration in
17 assessing whether the State has satisfied or is
18 acting with -- that the State's means are
19 sufficiently tailored.

20 JUSTICE BARRETT: Thank you. Let me
21 shift and ask you something else.

22 So we're at 250 organizations who
23 filed briefs in support of the Petitioners here
24 arguing that the disclosure mandate would harm
25 their rights. Is that enough for a facial

1 challenge? I -- I gather your position is no.
2 So I'm wondering how many would it take?

3 MS. FEINBERG: This Court's precedents
4 require a different standard for facial
5 invalidation, but even the most liberal is that
6 a facial challenger has to show a substantial
7 number of unconstitutional applications.

8 There is no such evidence here. And
9 as the United States pointed out, amicus briefs
10 in support of Respondent have indicated that
11 they support robust Attorney General oversight
12 because it actually promotes charitable giving
13 by promoting trust in the charitable sector.

14 JUSTICE BARRETT: Thank you, General
15 Feinberg.

16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, General.

18 MS. FEINBERG: Thank you, Mr. Chief
19 Justice.

20 However the Court resolves the
21 as-applied claims, there is no basis for
22 departing from the established exacting scrutiny
23 standard or invalidating California's
24 requirement with respect to all registered
25 charities.

1 Exacting scrutiny is the appropriate
2 standard for judging disclosure and reporting
3 policies. The standard requires the government
4 to have a sufficiently important interest and to
5 demonstrate that actual burdens on First
6 Amendment interests are justified, just as the
7 State has done here.

8 Facial challenges are reserved for
9 rare cases where a law is unconstitutional in
10 all or many of its applications. Petitioners
11 have not met that standard here because they
12 have not shown that California's requirement
13 chills contributions in general or for a
14 substantial number of charities operating within
15 the state.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal, Mr. Shaffer?

20 REBUTTAL ARGUMENT OF DEREK L. SHAFFER

21 ON BEHALF OF THE PETITIONERS

22 MR. SHAFFER: Thank you, Mr. Chief
23 Justice.

24 Let me begin where my friend left off.
25 Facial challenges are less rare in the First

1 Amendment context. The Court has special
2 solicitude for them in this context. This, Your
3 Honors, when we're talking about First Amendment
4 rights, is where facial challenges succeed. And
5 it succeeded in Stevens, in U.S. v. Stevens,
6 without the Court asking how many groups out
7 there would be interested in animal crush videos
8 and how many would just follow the general
9 chilling of reproach that was reflected in the
10 statute, as opposed to wanting to continue to
11 publicize those videos.

12 You can know, as you sit where you
13 sit, that, in fact, a substantial number of
14 charities and many multiples of their donors are
15 going to have the same interests that these
16 Petitioners do and suffer the same
17 constitutional deprivation absent facial
18 invalidation.

19 And that's the same judgment that the
20 Court made in Shelton, making that predictive
21 judgment, as Justice Barrett put it, as to
22 teachers, some of whom might have had
23 associations with the PTA and -- and other
24 innocuous associations, but the Court recognized
25 that there would be an inherent chilling effect.

1 What we have in our record vividly
2 illustrates just how pernicious the chill can
3 be, just how real the threat to donors is, but
4 that's always been baked into this Court's
5 precedents, and it should remain baked in, and
6 it's a recipe for facial invalidation.

7 That's especially true, Your Honors,
8 because I'm delighted to hear both the United
9 States and California agreeing today that
10 means-end fit is required. Once it is required,
11 we respectfully submit that ends the case.

12 It is undisputed that California --
13 California's prophylactic suspicionless demand
14 sweeps in the Schedule Bs of tens of thousands
15 of charities annually, and there are many
16 multiples of those charities in terms of the
17 donors whose information is being placed at risk
18 in this very threatening way.

19 And -- and according to the record,
20 Planned Parenthood's Schedule B, for instance,
21 contained hundreds and hundreds of donors that
22 were on there.

23 The record also makes clear -- and --
24 and my friend, Ms. Feinberg, did not deny --
25 that California's never reading these Schedule

1 Bs unless and until an external complaint comes
2 in from a news story, from an internal
3 whistleblower, from an aggrieved donor. And at
4 that point, if it thinks that there is a serious
5 complaint, it's asking for the Schedule B
6 pursuant to an audit letter.

7 So this is a totally gratuitous First
8 Amendment intrusion. And continuing to insist
9 upon some sort of means-end fit is dispositive
10 of the case and dispositive of it facially,
11 especially because we need only show a
12 substantial number -- a substantial number of
13 unconstitutional applications. Even if you
14 thought it was 5 percent or 10 percent of all
15 charities, we're still talking about thousands
16 and thousands and many multiples in terms of the
17 donors.

18 The notion that there's no evidence in
19 the record, general back -- of general backlash
20 and concerns among charities and donors I have
21 to respectfully correct.

22 If you look at the Thomas More Law
23 Center's Joint Appendix 197, you'll see
24 Professor Schervish's testimony about the donor
25 bill of rights and how important this principle

1 is to charities as a general rule, and note the
2 outpouring of amicus briefs, as -- as Your -- as
3 Your Honors have today.

4 Justice Sotomayor asked whether the
5 sole question is whether the state will truly
6 keep this information private. We don't think
7 it is. I respectfully agree with Justice
8 Gorsuch that that does put the cart before the
9 horse.

10 The Court in Doe v. Reed started by
11 analyzing the state's interest and whether it
12 was weighty enough. Here, California falls down
13 and it doesn't have, as it has in election -- in
14 the election context, disclosure as an
15 established least restrictive alternative. And,
16 also, in Shelton --

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:44 a.m., the case
20 was submitted.)

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23
24
25

Official - Subject to Final Review

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