App. No. ____

In The

Supreme Court of the United States

Americans for Prosperity Foundation,

Petitioner,

v.

Xavier Becerra,
in his official capacity as the Attorney General of California,

Respondent.

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

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To the Honorable Justice Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner respectfully requests that the time to file a Petition for a Writ of Certiorari be extended sixty days from June 27, 2019, to and including August 26, 2019. The court of appeals entered its judgment on September 11, 2018 (*see* Appendix A), and denied (over the dissent of five judges) Petitioner's timely petition for rehearing *en banc* on March 29, 2019 (*see* Appendix B), placing the due date for a petition for a writ of certiorari at June 27, 2019. This application is being filed at least 10 days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction pursuant to 28 U.S.C. § 1254(1). The California Attorney General as Respondent takes no position relative to this request.

Background

This case involves the forced disclosure of the names and addresses of a charity's major donors, wholly outside the context of any election and any claimed interest in public disclosure of the donor information. Starting in 2010, the California Attorney General began demanding that thousands of charities—including the Americans for Prosperity Foundation, a 501(c)(3) organization—submit a copy of their confidential Schedule B to IRS Form 990 as part of their annual registration with the State or face various penalties, including fines against their officers personally and suspension of their right to fundraise in California. Schedule B lists the names and addresses of a charity's major donors nationwide.

Following a bench trial, a federal district court permanently enjoined the Attorney General's disclosure demand as applied to the Foundation on the ground that it unconstitutionally infringes upon the freedoms of speech and association. *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016). "[P]rivacy in group association" has long been held "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Accordingly, to compel private associations to disclose donors or members, the government must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest," *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963), and any such compelled disclosure must be "narrowly drawn," *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (citation omitted). The district court concluded from a robust evidentiary record, including multiple days of live testimony, *e.g.*, that the Attorney General's blanket demand for Schedule B from thousands of charities was not narrowly tailored to the State's interest in policing charitable fraud, 182 F. Supp. 3d at 1054–55, and that disclosure would have an irreparable chilling effect on the Foundation and its supporters because the Foundation's supporters demonstrably face and fear threats, harassment, and violence when their affiliation with the Foundation becomes publicly known, *id.* at 1055–56.

A panel of the Ninth Circuit vacated the injunction and directed judgment for the Attorney General. *See* Appendix A (opinion of Fisher, J., joined by Paez and

Nguyen, JJ.). Drawing on cases from the elections context, the panel expressly jettisoned any requirement that California "narrowly tailor" its chosen means to its asserted ends in order to satisfy "exacting scrutiny." *Id.* at 16, 23.

The Ninth Circuit denied the Foundation's petition for rehearing *en banc*. *See* Appendix B. Five judges dissented. *Id.* at 5–24 (Ikuta, J., dissenting from the denial of rehearing *en banc*, joined by Callahan, Bea, Bennett, and R. Nelson, JJ.). The dissenters maintained that the panel made "crucial legal errors" by "declin[ing] to apply *NAACP v. Alabama*" and instead applying "a lower form of scrutiny adopted by the Supreme Court for the unique electoral context" that does not separately inquire into narrow tailoring. *Id.* at 6; *see also id.* at 18. In applying this lesser scrutiny, the panel broke with decisions from the First, Fourth, Fifth, Sixth, Tenth Circuits, and D.C. Circuits, *see id.* at 11–13 & n.1, *en route* to a conclusion that "is contrary to the reasoning and spirit of decades of Supreme Court jurisprudence," *id.* at 24.

Reasons for Granting An Extension Of Time

The time to file a Petition for a Writ of Certiorari should be extended by sixty days for three reasons.

1. Although counsel for Petitioner has been working diligently, the press of other matters will make preparation of a complete and concise petition difficult absent an extension of time. Among other matters, counsel of record for Petitioner is preparing to argue at a summary judgment hearing on June 6, 2019 in *Cal. Inst. of Tech v. Broadcom Ltd.*, No. 2:16-cv-03714 (C.D. Cal); supervising intensive

motions practice and now appellate proceedings in *Florida v. Kraft*, No. 19-1499 (Fla. Dist. Ct. App.); briefing an appeal before the Federal Circuit in *Agility Pub. Warehousing Co., K.S.C.P. v. United States*, No. 19-1886 (Fed. Cir.) (opening brief due July 16, 2019); briefing an appeal before the Ninth Circuit in *Blue Oak Med. Grp. v. State Comp. Ins. Fund*, No. 18-56610 (9th Cir.) (answering brief due July 10, 2019); and awaiting an expedited judgment that is anticipated before June 14, 2019 (when an existing standstill agreement with the Department of Justice is set to expire) and may spawn emergency proceedings in *N.H. Lottery Comm'n v. Barr*, No. 19-CV-163 (D.N.H.).

2. Consistent with the constitutional dimensions and nationwide implications of the issues posed by this case, dozens of charities across the political spectrum—including the NAACP Legal Defense Fund and the Center for American-Islamic Relations—as well as eleven States filed amicus briefs supporting the Foundation before the Ninth Circuit. Such interest and support is expected to continue in support of the forthcoming petition for certiorari review, and all concerned (including the Court) will benefit from affording additional time for *amici* to coordinate among themselves in organizing and streamlining any submissions supporting the petition.

3. There is a reasonable probability that this Court will grant the petition. This case presents an exceptionally important constitutional question under the First and Fourteenth Amendments as to whether a State may, outside the electoral context, compel thousands of charities to divulge the names and

addresses of their major donors even if the State fails to show that its blanket demand is narrowly tailored to an asserted interest in enforcing state laws regulating charities. Six circuits have held that this kind of compelled disclosure must be narrowly tailored to, or the least restrictive means of, achieving the State's interest. *See United States v. Comley*, 890 F.2d 539, 543–44 (1st Cir. 1989); *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984); *Familias Unidas v. Briscoe*, 619 F.2d 391, 399 (5th Cir. 1980); *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987); *Clark v. Library of Cong.*, 750 F.2d 89, 94 (D.C. Cir. 1984). For example, the Fifth Circuit held in *Familias Unidas* that a disclosure requirement was unconstitutional because it "sweeps too broadly." 619 F.2d at 400. "Even when related to an overriding, legitimate state purpose, statutory disclosure requirements will survive this exacting scrutiny only if drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than is absolutely necessary." *Id.* at 399. Similarly, the Fourth Circuit held in *Master Printers* that, "[t]o survive the 'exacting scrutiny' required by the Supreme Court" in this context, "the government must show that the disclosure and reporting requirements are justified by a compelling government interest, and that the legislation is narrowly tailored to serve that interest." 751 F.2d at 705.

In the decision below, the Ninth Circuit held to the contrary. "The panel's contrary conclusion eviscerates the First Amendment protections long-established by the Supreme Court." Appendix B at 23. By applying a watered-down standard

"where *NAACP v. Alabama*'s higher standard should have been triggered, the panel lowered the bar governments must surmount to force disclosure of sensitive associational ties." *Id.* This is an issue of paramount importance. The compelled disclosure of the names and addresses of a group's supporters can profoundly chill the "constitutionally enshrined rights of free speech, expression, and association." *Gibson*, 372 U.S. at 556–57.

This case thus presents a clear circuit split over a question of exceptional importance. Additional time is warranted so that counsel may prepare a complete and concise Petition for this Court's consideration and so that interested *amici* may organize their support and submissions.

Counsel for the Respondent takes no position on the relief requested.

Conclusion

For these reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended by sixty days, to and including August 26, 2019.

Dated: May 28, 2019

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellee,* v. XAVIER BECERRA, in his Official Capacity as Attorney General of California, *Defendant-Appellant.*	No. 16-55727 D.C. No. 2:14-cv-09448-R-FFM
AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellant,* v. XAVIER BECERRA, in his Official Capacity as Attorney General of California, *Defendant-Appellee.*	No. 16-55786 D.C. No. 2:14-cv-09448-R-FFM

THOMAS MORE LAW CENTER, *Plaintiff-Appellee,* v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellant.*	No. 16-56855 D.C. No. 2:15-cv-03048-R-FFM
THOMAS MORE LAW CENTER, *Plaintiff-Appellant,* v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellee.*	No. 16-56902 D.C. No. 2:15-cv-03048-R-FFM OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted June 25, 2018
Pasadena, California

Filed September 11, 2018

Before: Raymond C. Fisher, Richard A. Paez and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Fisher

SUMMARY*

Civil Rights

The panel vacated the district court's permanent injunctions, reversed the bench trial judgments, and remanded for entry of judgment in favor of the California Attorney General in two cases challenging California's charitable registration requirement as applied to two non-profit organizations that solicit tax-deductible contributions in the state.

Plaintiffs qualify as tax-exempt charitable organizations under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). They challenge the Attorney General of California's collection of Internal Revenue Service Form 990 Schedule B, which contains the names and addresses of their relatively few largest contributors. Plaintiffs argue the state's disclosure requirement impermissibly burdens their First Amendment right to free association.

The panel held that the California Attorney General's Schedule B requirement, which obligates charities to submit the very information they already file each year with the IRS, survived exacting scrutiny as applied to the plaintiffs because it was substantially related to an important state interest in policing charitable fraud. The panel held that plaintiffs had not shown a significant First Amendment burden on the theory that complying with the Attorney General's Schedule B nonpublic disclosure requirement would chill contributions. The panel further concluded that

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

even assuming arguendo that the plaintiffs' contributors would face substantial harassment if Schedule B information became public, the strength of the state's interest in collecting Schedule B information reflected the actual burden on First Amendment rights because the information was collected solely for nonpublic use, and the risk of inadvertent public disclosure was slight.

COUNSEL

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OPINION

FISHER, Circuit Judge:

We address the constitutionality of a California charitable registration requirement as applied to two non-profit organizations that solicit tax-deductible contributions in the state. Americans for Prosperity Foundation (the Foundation) and Thomas More Law Center (the Law Center) qualify as tax-exempt charitable organizations under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). They challenge the Attorney General of California's collection of Internal Revenue Service (IRS) Form 990 Schedule B, which contains the names and addresses of their relatively few largest contributors. The Attorney General uses the information solely to prevent charitable fraud, and the information is not to be made public except in very limited circumstances. The plaintiffs argue the state's disclosure requirement impermissibly burdens their First Amendment right to free association by deterring individuals from making contributions.

The district court held that the Schedule B requirement violates the First Amendment as applied to the Foundation and Law Center and permanently enjoined the Attorney General from demanding the plaintiffs' Schedule B forms. We have jurisdiction under 28 U.S.C. § 1291, and we vacate the injunctions, reverse the judgments and remand for entry of judgment in the Attorney General's favor.

We hold that the California Attorney General's Schedule B requirement, which obligates charities to submit the very information they already file each year with the IRS, survives exacting scrutiny as applied to the plaintiffs because it is substantially related to an important state interest in policing charitable fraud. Even assuming arguendo that the

plaintiffs' contributors would face substantial harassment if Schedule B information became public, the strength of the state's interest in collecting Schedule B information reflects the actual burden on First Amendment rights because the information is collected solely for nonpublic use, and the risk of inadvertent public disclosure is slight.

I.

A.

California's Supervision of Trustees and Charitable Trusts Act requires the Attorney General to maintain a registry of charitable corporations (the Registry) and authorizes him to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the [Registry]." Cal. Gov't Code § 12584. To solicit tax-deductible contributions from California residents, an organization must maintain membership in the Registry. *See id.* § 12585. Registry information is open to public inspection, subject to reasonable rules and regulations adopted by the Attorney General. *See id.* § 12590.

As one condition of Registry membership, the Attorney General requires charities to submit a complete copy of the IRS Form 990 they file with the IRS, including attached schedules. *See* Cal. Code Regs. tit. 11, § 301.[1] One of these

[1] In July 2018, the IRS announced it would no longer require certain tax-exempt organizations, other than 501(c)(3) organizations, to report the names and addresses of their contributors on Schedule B. *See* Press Release, U.S. Dep't of the Treasury, Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations (July 16, 2018), https://home.treasury.gov/news/press-releases/sm426. Federal law,

attachments, Schedule B, requires 501(c)(3) organizations to report the names and addresses of their largest contributors. Generally, they must report "the names and addresses of all persons who contributed . . . $5,000 or more (in money or other property) during the taxable year." 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). Special rules, however, apply to organizations, such as the Foundation and Law Center, meeting certain support requirements. These organizations need only "provide the name and address of a person who contributed . . . in excess of 2 percent of the total contributions . . . received by the organization during the year." *Id.* § 1.6033-2(a)(2)(iii)(a). An organization with $10 million in receipts, for example, is required to disclose only contributors providing at least $200,000 in financial support. Here, for any year between 2010 and 2015, the Law Center was obligated to report no more than seven contributors on its Schedule B, and the Foundation was required to report no more than 10 contributors – those contributing over $250,000 to the Foundation.

The IRS and the California Attorney General both make certain filings of tax-exempt organizations publicly available but exclude Schedule B information from public inspection. *See* 26 U.S.C. § 6104; Cal Gov't Code § 12590; Cal. Code Regs. tit. 11, § 310. At the outset of this litigation, the Attorney General maintained an informal policy treating Schedule B as a confidential document not available for public inspection on the Registry. *See Americans for Prosperity Found. v. Harris*, 809 F.3d 536, 542 (9th Cir. 2015) (*AFPF I*). In 2016, the Attorney General codified that policy, adopting a regulation that makes Schedule B information confidential and exempts it from public

however, continues to require 501(c)(3) organizations, such as the plaintiffs, to file Schedule B information with the IRS.

inspection except in a judicial or administrative proceeding or in response to a search warrant. *See* Cal. Code Regs. tit. 11, § 310 (July 8, 2016). Under the new regulation:

> Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:
>
> (1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or
>
> (2) In response to a search warrant.

Id. § 310(b). In accordance with this regulation, the Attorney General keeps Schedule Bs in a separate file from other submissions to the Registry and excludes them from public inspection on the Registry website.

B.

Thomas More Law Center is a legal organization founded to "restore and defend America's Judeo-Christian heritage" by "represent[ing] people who promote Roman Catholic values," "marriage and family matters, freedom from government interference in [religion]" and "opposition to the imposition of Sharia law within the United States." Americans for Prosperity Foundation was founded in 1987 as "Citizens for a Sound Economy Educational Foundation," with the mission of "further[ing] free enterprise, free society-type issues." The Foundation hosts conferences, issues policy papers and develops educational programs worldwide to promote the benefits of a free market. It

operates alongside Americans for Prosperity, a 501(c)(4) organization focused on direct issue advocacy.

Charities like the Foundation and the Law Center are overseen by the Charitable Trusts Section of the California Department of Justice, which houses the Registry and a separate investigative and legal enforcement unit (the Investigative Unit). The Registry Unit processes annual registration renewals and maintains both the public-facing website of registered charities and the confidential database used for enforcement. The Investigative Unit analyzes complaints of unlawful charity activity and conducts audits and investigations based on those complaints.

Beginning in 2010, the Registry Unit ramped up its efforts to enforce charities' Schedule B obligations, sending thousands of deficiency letters to charities that had not complied with the Schedule B requirement. Since 2001, both the Law Center and the Foundation had either filed redacted versions of the Schedule B or not filed it with the Attorney General at all. Each plaintiff had, however, annually filed a complete Schedule B with the IRS. In 2012, the Registry Unit informed the Law Center it was deficient in submitting Schedule B information. In 2013, it informed the Foundation of the same deficiency.

C.

In response to the Attorney General's demands, the Law Center and the Foundation separately filed suit, alleging that the Schedule B requirement unconstitutionally burdens their First Amendment right to free association by deterring individuals from financially supporting them. The district court granted both plaintiffs' motions for a preliminary injunction, concluding they had raised serious questions going to the merits of their cases and demonstrated that the

balance of hardships tipped in their favor. *See Americans for Prosperity Found. v. Harris*, No. 2:14-CV-09448-R-FFM, 2015 WL 769778 (C.D. Cal. Feb. 23, 2015). The Attorney General appealed.

While those appeals were pending, we upheld the Schedule B requirement against a facial constitutional challenge brought by the Center for Competitive Politics. *See Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015). Applying exacting scrutiny, we held both that the Schedule B requirement furthers California's compelling interest in enforcing its laws and that the plaintiff had failed to show the requirement places an actual burden on First Amendment rights. *See id.* at 1316–17. We left open the possibility, however, that a future litigant might "show 'a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties' that would warrant relief on an as-applied challenge." *Id.* at 1317 (alteration omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

The Law Center and the Foundation argue they have made such a showing. In considering the appeal from the preliminary injunction in their favor, we disagreed. *See AFPF I*, 809 F.3d at 540. We held that the plaintiffs had shown neither an actual chilling effect on association nor a reasonable probability of harassment at the hands of the state from the Attorney General's demand for nonpublic disclosure of Schedule B forms. *See id.* The Law Center and the Foundation had proffered some evidence that private citizens might retaliate against their contributors if Schedule B information became public, but "[t]he plaintiffs' allegations that technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure of their

Schedule B forms [were] too speculative to support issuance of an injunction." *Id.* at 541.

We nevertheless identified some risk that the Attorney General could be compelled by § 12590 to make Schedule B information available for public inspection in the absence of a "rule[]" or "regulation[]," Cal. Gov't Code § 12590, formalizing the Attorney General's discretionary policy of maintaining Schedule B confidentiality. *See AFPF I*, 809 F.3d at 542. The Attorney General had proposed a regulation to exempt Schedule B forms from the general requirement to make Registry filings "open to public inspection," Cal. Gov't Code § 12590, but the state had not yet adopted the proposed regulation. We held that a narrow injunction precluding public disclosure of Schedule B information would address the risk of public disclosure pending the Attorney General's adoption of the proposed regulation. We therefore vacated the district court's orders precluding the Attorney General from collecting Schedule B information from the plaintiffs and instructed the court to enter new orders preliminarily enjoining the Attorney General only from making Schedule B information *public*. *See AFPF I*, 809 F.3d at 543.[2]

After presiding over a bench trial in each case, the district court held the Schedule B requirement unconstitutional as applied to the Foundation and the Law Center. *See Thomas More Law Ctr. v. Harris*, No. CV 15-3048-R, 2016 WL 6781090 (C.D. Cal. Nov. 16, 2016); *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d

[2] On remand, the district court also prohibited the Attorney General from obtaining relevant discovery from the Foundation's contributors. This was one of several questionable evidentiary rulings the court issued in the plaintiffs' favor.

1049 (C.D. Cal. 2016). The district court first rejected the plaintiffs' facial challenges, holding they were precluded by our opinion in *Center for Competitive Politics*. It then held that the Attorney General had failed to prove the Schedule B requirement was substantially related to a sufficiently important governmental interest, as necessary to withstand exacting scrutiny. The court reasoned that the Attorney General had no need to collect Schedule Bs, because he "has access to the same information from other sources," *Thomas More Law Ctr.*, 2016 WL 6781090, at *2, and had failed to demonstrate the "necessity of Schedule B forms" in investigating charity wrongdoing, *Americans for Prosperity Found.*, 182 F. Supp. 3d at 1053. The court also concluded there was "ample evidence" establishing the plaintiffs' employees and supporters face public hostility, intimidation, harassment and threats "once their support for and affiliation with the organization becomes publicly known." *Id.* at 1055. The court rejected the proposition that the Attorney General's informal confidentiality policy could "effectively avoid inadvertent disclosure" of Schedule B information, citing a "pervasive, recurring pattern of uncontained Schedule B disclosures" by the Registry Unit. *Id.* at 1057. Even after the Attorney General codified the non-disclosure policy, the court concluded that this risk of inadvertent public disclosure remained. *See Thomas More Law Ctr.*, 2016 WL 6781090, at *5.

Having found for the plaintiffs on their First Amendment freedom of association claims, the court entered judgment for the plaintiffs and permanently enjoined the Attorney General from enforcing the Schedule B requirement against them. The Attorney General appealed the judgments. The plaintiffs cross-appealed, challenging the district court's holding that precedent foreclosed a facial attack on the Schedule B requirement. The Law Center also cross-

appealed the district court's adverse rulings on its Fourth Amendment and preemption claims, and the district court's failure to award it attorney's fees.

II.

"In reviewing a judgment following a bench trial, this court reviews the district court's findings of fact for clear error and its legal conclusions de novo." *Dubner v. City & County of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001). "[W]e will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc) (footnote omitted).

III.

We address whether the Attorney General's Schedule B requirement violates the First Amendment right to freedom of association as applied to the plaintiffs. We apply "exacting scrutiny" to disclosure requirements. *See Doe v. Reed*, 561 U.S. 186, 196 (2010). "That standard 'requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010)). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008)).

The plaintiffs contend "[t]he 'substantial relation' element requires, among other things, that the State employ means 'narrowly drawn' to avoid needlessly stifling expressive association." They cite *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) ("[W]hile

public safety, peace, comfort, or convenience can be safeguarded by regulating the time and manner of solicitation, those regulations need to be 'narrowly drawn to prevent the supposed evil.'" (citation omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940))), *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."), and *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456–57 (2014) (plurality opinion) ("Even when the Court is not applying strict scrutiny, we still require 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" (alterations in original) (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989))). We are not persuaded, however, that the standard the plaintiffs advocate is distinguishable from the ordinary "substantial relation" standard that both the Supreme Court and this court have consistently applied in disclosure cases such as *Doe* and *Family PAC v. McKenna*, 685 F.3d 800, 805–06 (9th Cir. 2012). To the extent the plaintiffs ask us to apply the kind of "narrow tailoring" traditionally required in the context of strict scrutiny, or to require the state to choose the least restrictive means of accomplishing its purposes, they are mistaken. *See, e.g.*, *Citizens United v. Schneiderman*, 882 F.3d 374, 381 (2d Cir. 2018) (rejecting the plaintiffs' request "to apply strict scrutiny and to hold that any mandatory disclosure of a member or donor list is unconstitutional absent a compelling government interest and narrowly drawn regulations furthering that interest"); *AFPF I*, 809 F.3d at

541 ("The district court's conclusion that the Attorney General's demand for national donor information may be more intrusive than necessary does not raise serious questions because 'exacting scrutiny is not a least-restrictive-means test.'" (quoting *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 541 (9th Cir. 2015) (en banc))); *Ctr. for Competitive Politics*, 784 F.3d at 1312 ("[The plaintiff's argument] that the Attorney General must have a compelling interest in the disclosure requirement, and that the requirement must be narrowly tailored in order to justify the First Amendment harm it causes[,] . . . is a novel theory, but it is not supported by our case law or by Supreme Court precedent.").

In short, we apply the "substantial relation" standard the Supreme Court applied in *Doe*. "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Doe*, 561 U.S. at 196 (quoting *Davis*, 554 U.S. at 744).

A. The Strength of the Governmental Interest

It is clear that the disclosure requirement serves an important governmental interest. In *Center for Competitive Politics*, 784 F.3d at 1311, we recognized the Attorney General's argument that "there is a compelling law enforcement interest in the disclosure of the names of significant donors." *See also id.* at 1317. The Attorney General observed that "such information is necessary to determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices," *id.* at 1311, and we agreed that "[t]he Attorney General has provided justifications for employing a disclosure requirement instead of issuing subpoenas," *id.*

at 1317. In *AFPF I*, we reiterated that "the Attorney General's authority to demand and collect charitable organizations' Schedule B forms . . . furthers California's compelling interest in enforcing its laws." *AFPF I*, 809 F.3d at 538–39.

These conclusions are consistent with those reached by the Second Circuit, which recently upheld New York's Schedule B disclosure requirement against a challenge similar to the one presented here. The attorney general explained that the Schedule B disclosure requirement allows him to carry out "his responsibility to protect the public from fraud and self-dealing among tax-exempt organizations." *Schneiderman*, 882 F.3d at 382. The court agreed with the state that

> knowing the source and amount of large donations can reveal whether a charity is doing business with an entity associated with a major donor. The information in a Schedule B also permits detection of schemes such as the intentional overstatement of the value of noncash donations in order to justify excessive salaries or perquisites for its own executives. Collecting donor information on a regular basis from all organizations facilitates investigative efficiency, and can help the Charities Bureau to obtain a complete picture of the charities' operations and flag suspicious activity simply by using information already available to the IRS. Because fraud is often revealed not by a single smoking gun but by a pattern of suspicious behavior, disclosure of the

> Schedule B can be essential to New York's interest in detecting fraud.

Id. (alterations, citations and internal quotation marks omitted). The Schedule B requirement, therefore, served the state's important "interests in ensuring organizations that receive special tax treatment do not abuse that privilege and . . . in preventing those organizations from using donations for purposes other than those they represent to their donors and the public." *Id.*

The plaintiffs nonetheless question the strength of the state's governmental interest, arguing the Attorney General's need to collect Schedule B information is belied by the evidence that he does not use the information frequently enough to justify collecting it en masse, he is able to investigate charities without Schedule B information and he does not review individual Schedule B forms until he receives a complaint, at which point he has at his disposal tools of subpoena and audit to obtain the Schedule B information he needs. The district court credited these arguments, concluding that Schedule B information is not "necessary" to the Attorney General's investigations because: the Registry, whose sole job it is to collect and maintain complete registration information, does not actively review Schedule B forms as they come in; Schedule Bs have not been used to trigger investigations; and the Attorney General can obtain a Schedule B through subpoenas and audits when a case-specific need arises. *See Americans for Prosperity Found.*, 182 F. Supp. 3d at 1053–54.

We addressed these same arguments, of course, in *Center for Competitive Politics*, 784 F.3d at 1317, where we expressly rejected the proposition that the Schedule B

requirement is insufficiently tailored because the state could achieve its enforcement goals through use of its subpoena power or audit letters. We noted that the state's quick access to Schedule B filings "increases [the Attorney General's] investigative efficiency" and allows him to "flag suspicious activity." *Id.* For example, as the Attorney General argued in that case,

> having significant donor information allows the Attorney General to determine when an organization has inflated its revenue by overestimating the value of "in kind" donations. Knowing the significant donor's identity allows her to determine what the "in kind" donation actually was, as well as its real value. Thus, having the donor's information immediately available allows her to identify suspicious behavior. She also argues that requiring unredacted versions of Form 990 Schedule B increases her investigative efficiency and obviates the need for expensive and burdensome audits.

Id. at 1311.

The evidence at trial confirms our earlier conclusions. Belinda Johns, the senior assistant attorney general who oversaw the Charitable Trusts Section for many years, testified that attempting to obtain a Schedule B from a regulated entity after an investigation began was unsatisfactory. She testified that her office would want "to look at [the] Schedule B . . . the moment we thought there might be an issue with the charity." "[I]f we subpoenaed it or sent a letter to the charity, that would tip them off to our investigation, which would allow them potentially to

dissipate more assets or hide assets or destroy documents, which certainly happened several times; or it just allows more damage to be done to [the] charity if we don't have the whole document at the outset." Rather than having "to wait extra days," she wanted to "take the action that needs to be taken as quickly as possible." She explained that her office relied on Schedule Bs to "tell us whether or not there was an illegal activity occurring." Where such activity was found, she would "go into court immediately and . . . request a [temporary restraining order] from the court to freeze assets."

Johns' successor, Tania Ibanez, testified similarly that "getting a Schedule B through a[n] audit letter is not the best use of my limited resources."

> Because it's time-consuming, and you are tipping the charity off that they are about to be audited. And it's been my experience when the charity knows or when the charity gets the audit letter, it's not the best way of obtaining records. We have been confronted in situations where the charity will fabricate records. Charities have given us incomplete records, nonresponsive records. Charities have destroyed records, and charities have engaged in other dilatory tactics.

Sonja Berndt, a deputy attorney general in the Charitable Trusts Section, confirmed that attempting to obtain Schedule Bs through the auditing process would entail substantial delay.

The district court's other conclusions are equally flawed. Although the state may not routinely use Schedule B information *as it comes in*, the Attorney General offered

ample evidence of the ways his office uses Schedule B information in investigating charities that are alleged to have violated California law. *See* Cal. Corp. Code §§ 5227, 5233, 5236 (providing examples of the role the Attorney General plays in investigating nonprofit organizations that violate California law). Current and former members of the Charitable Trusts Section, for example, testified that they found the Schedule B particularly useful in several investigations over the past few years, and provided examples. They were able to use Schedule B information to trace money used for improper purposes in connection with a charity serving animals after Hurricane Katrina; to identify a charity's founder as its principal contributor, indicating he was using the research charity as a pass-through; to identify self-dealing in that same charity; to track a for-profit corporation's use of a non-profit organization as an improper vessel for gain; and to investigate a cancer charity's gift-in-kind fraud.[3]

In sum, the record demonstrates that the state has a strong interest in the collection of Schedule B information from regulated charities. We agree with the Second Circuit that the disclosure requirement "clearly further[s]" the state's "important government interests" in "preventing fraud and self-dealing in charities . . . by making it easier to police for such fraud." *Schneiderman*, 882 F.3d at 384.

[3] The Foundation points out that the Attorney General identified only five investigations in the past 10 years in which the state has used Schedule B information to investigate a charity. The Attorney General, however, identified an additional five investigations that were still ongoing. The district court did not allow the Attorney General's witnesses to testify about those ongoing investigations, because the Attorney General understandably refused to name the charities under current investigation.

The district court reached a different conclusion, but it did so by applying an erroneous legal standard. The district court required the Attorney General to demonstrate that collection of Schedule B information was "necessary," *Thomas More Law Ctr.*, 2016 WL 6781090, at *2, that it was no "more burdensome than necessary" and that the state could not achieve its ends "by more narrowly tailored means," *id.* at *2–3. Because it was "possible for the Attorney General to monitor charitable organizations without Schedule B," the court concluded the requirement is unconstitutional. *Id.* at *2. The "more burdensome than necessary" test the district court applied, however, is indistinguishable from the narrow tailoring and least-restrictive-means tests that we have repeatedly held do not apply here. The district court's application of this standard, therefore, constituted legal error.

Because the district court applied an erroneous legal standard, it consistently framed the legal inquiry as whether it was *possible* "that the Attorney General could accomplish her goals without the Schedule B." *Id.* at *3. Under the substantial relation test, however, the state was not required to show that it could accomplish its goals *only* by collecting Schedule B information. The state instead properly and persuasively relied on evidence to show that the up-front collection of Schedule B information improves the efficiency and efficacy of the Attorney General's important regulatory efforts. Even if the Attorney General can achieve his goals through other means, nothing in the substantial relation test requires him to forgo the most efficient and effective means of doing so, at least not absent a showing of a significant burden on First Amendment rights. As Steven Bauman, a supervising investigative auditor for the Charitable Trusts Section testified, "We could complete our

investigations if you took away many of the tools that we have. We just wouldn't be as effective or as efficient."

Because the strict necessity test the district court applied is not the law, the district court's analysis does not alter our conclusion that the state has a strong interest in the collection of Schedule B information from regulated charities.

B. The Seriousness of the Actual Burden on First Amendment Rights

Having considered the strength of the governmental interest, we turn to the actual burden on the plaintiffs' First Amendment rights.

The Supreme Court has concluded that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). To assess "the possibility that disclosure will impinge upon protected associational activity," *id.* at 73, we consider "any deterrent effect on the exercise of First Amendment rights," *id.* at 65.

We may examine, for example, the extent to which requiring "disclosure of contributions . . . will deter some individuals who otherwise might contribute," including whether disclosure will "expose contributors to harassment or retaliation." *Id.* at 68. "[T]hat one or two persons refused to make contributions because of the possibility of disclosure" will not establish a significant First Amendment burden. *Id.* at 72. Nor will a showing that "people may 'think twice' about contributing." *Family PAC*, 685 F.3d at 807. "[D]isclosure requirements," however, "can chill donations to an organization by exposing donors to retaliation," *Citizens United*, 558 U.S. at 370, and "[i]n some instances fears of reprisal may deter contributions to the

point where the movement cannot survive," *Buckley*, 424 U.S. at 71. In such cases, the First Amendment burdens are indeed significant.

A party challenging a disclosure requirement, therefore, may succeed by proving "a substantial threat of harassment." *Id.* at 74. As a general matter, "those resisting disclosure can prevail under the First Amendment if they can show 'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe*, 561 U.S. at 200 (alteration omitted) (quoting *Buckley*, 424 U.S. at 74); *see also Citizens United*, 558 U.S. at 370.[4]

Here, the plaintiffs contend requiring them to comply with the Attorney General's Schedule B disclosure requirement will impose a significant First Amendment burden in two related ways. First, they contend requiring them to comply with the Schedule B requirement will deter contributors. Second, they argue disclosure to the Attorney

[4] In making this showing, we agree with the Attorney General that the plaintiffs must show a reasonable probability of threats, harassment or reprisals arising from the Schedule B requirement itself. But this does not mean the plaintiffs cannot rely on evidence showing, for example, that their members have been harassed for other reasons, or evidence that similar organizations have suffered a loss in contributions as a result of Schedule B disclosure. To be sure, the extent to which the plaintiffs' evidence is tied directly to, or is attenuated from, the experience of the plaintiffs themselves and the California Attorney General's Schedule B requirement in particular goes to the weight of that evidence. But the plaintiffs may rely on any evidence that "has any tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401(a).

General will subject their contributors to threats, harassment and reprisals. We consider these contentions in turn.

1. Evidence That Disclosure Will Deter Contributors

We begin by considering whether disclosure will deter contributors. We first consider evidence presented by the Foundation. We then consider evidence presented by the Law Center.

Christopher Joseph Fink, the Foundation's chief operating officer, testified that prospective contributors' "number one concern is about being disclosed." He testified that "they are afraid to have their information in the hands of state government or a federal government or in the hands of the public." He testified that business owners "are afraid if they are associated with our foundation or with Americans for Prosperity, their businesses would be targeted or audited from the state government." Teresa Oelke, the Foundation's vice president of state operations, described two individuals who, she believed, stopped supporting the Foundation in light of actual or feared retaliation by the IRS. One contributor "did business with the Government," and he and his business associates "did not feel like they could take on the risk of continuing to give to us." Another contributor allegedly stopped giving "because he, his business partner and their business had experienced seven different reviews from government agencies, including individual IRS audits, both personally and their businesses, and their family was not willing to continue enduring the emotional, financial, time stress and the stress that it placed on their business." Oelke testified that, on average, the Foundation and Americans for Prosperity combined lose "roughly three donors a year" due to "their concern that they are going to be disclosed and the threats that they believe that being disclosed lays to either their business, their families or just

their employees." Paul Schervish, an emeritus professor of sociology, testified that, in his opinion, disclosure to the California Attorney General would chill contributions to the Foundation, although he conceded that he had not actually spoken to any of the Foundation's contributors. Foundation President Tim Phillips testified that contributors see the California Attorney General's office as "a powerful partisan office." The Foundation also points to evidence that, in its view, shows that some California officials harbor a negative attitude toward Charles and David Koch.

The Law Center introduced a letter from a contributor who chose to make a $25 contribution anonymously out of fear that ISIS would break into the Law Center's office, obtain a list of contributors and target them. Schervish, the sociology professor, opined that the Law Center's "disclosure of Schedule B to the registry would chill contributions." He acknowledged, however, that he had not spoken with any of the Law Center's existing or prospective contributors, and he could not point to any contributor who had reduced or eliminated his or her support for the Law Center due to the fear of disclosure – a common weakness in the Law Center's evidence.

For example, Thomas Monaghan, the Law Center's co-founder and most well-known contributor, testified that he is not aware of any Law Center contributor who was "harassed in some way because they made a donation." Despite being included "at the top of a list . . . of the most antigay persons in the country" (allegedly because of his financial support for the Law Center), he remains "perfectly willing" to be listed on the Law Center's website as "one of the people who helped to establish" the Law Center. Similarly, the Law Center's president testified that he has never had a conversation with a potential contributor who was unwilling

to contribute to the Law Center because of the public controversy surrounding the Law Center or its disclosure requirements. For years, moreover, the Law Center has *over*-disclosed contributor information on Schedule Bs filed with the IRS. Although by law the Law Center is required to disclose only those contributors furnishing 2 percent or more of the organization's receipts (about five to seven contributors a year), it has instead chosen to disclose all contributors providing $5,000 or more in financial support (about 23 to 60 contributors a year). This voluntary over-disclosure tends to undermine the Law Center's contention that Schedule B disclosure meaningfully deters contributions.

Considered as a whole, the plaintiffs' evidence shows that *some* individuals who have or would support the plaintiffs *may* be deterred from contributing if the plaintiffs are required to submit their Schedule Bs to the Attorney General. The evidence, however, shows at most a modest impact on contributions. Ultimately, neither plaintiff has identified a single individual whose willingness to contribute hinges on whether Schedule B information will be disclosed to the California Attorney General. Although there may be a small group of contributors who are comfortable with disclosure to the IRS, but who would not be comfortable with disclosure to the Attorney General, the evidence does not show that this group exists or, if it does, its magnitude. As the Second Circuit explained:

> While we think it plausible that some donors will find it intolerable for law enforcement officials to know where they have made donations, we see no reason to believe that this risk of speech chilling is more than that which comes with any disclosure regulation.

> In fact, all entities to which these requirements apply already comply with the federal law mandating that they submit the selfsame information to the IRS. Appellants offer nothing to suggest that their donors should more reasonably fear having their identities known to New York's Attorney General than known to the IRS.

Schneiderman, 882 F.3d at 384.

The mere possibility that *some* contributors *may* choose to withhold their support does not establish a substantial burden on First Amendment rights. A plaintiff cannot establish a significant First Amendment burden by showing only "that one or two persons refused to make contributions because of the possibility of disclosure," *Buckley*, 424 U.S. at 72, or that "people may 'think twice' about contributing," *Family PAC*, 685 F.3d at 807. The evidence presented by the plaintiffs here does not show that disclosure to the Attorney General will "actually and meaningfully deter contributors," *id.*, or that disclosure would entail "the likelihood of a substantial restraint upon the exercise by [their contributors] of their right to freedom of association," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).[5] *Cf. Bates. v. City of Little Rock*, 361 U.S. 516, 521 n.5 (1960) (between 100 and 150 members declined to renew their NAACP membership, citing disclosure concerns); *Dole*

[5] "In *NAACP*, the Court was presented . . . with 'an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed those members to economic reprisal, loss of employment, [and] threat of physical coercion,' and it was well known at the time that civil rights activists in Alabama and elsewhere had been beaten and/or killed." *Schneiderman*, 882 F.3d at 385 (second alteration in original) (quoting *NAACP*, 357 U.S. at 462).

v. Serv. Emps. Union, AFL-CIO, Local 280, 950 F.2d 1456, 1460 (9th Cir. 1991) (placing particular weight on two letters explaining that because meeting minutes might be disclosed, union members would no longer attend meetings).

The Schedule B requirement, moreover, is not a sweeping one. It requires the Foundation and the Law Center to disclose only their dozen or so largest contributors, and a number of these contributors are already publicly identified, because they are private foundations which by law must make their expenditures public. As applied to these plaintiffs, therefore, the Schedule B requirement is a far cry from the broad and indiscriminate disclosure laws passed in the 1950s to harass and intimidate members of unpopular organizations. *See, e.g.*, *Gremillion*, 366 U.S. at 295 (invalidating a state law requiring every organization operating in the state "to file with the Secretary of State annually 'a full, complete and true list of the names and addresses of all of the members and officers' in the State"); *Shelton*, 364 U.S. at 480 (invalidating a state law "compel[ing] every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years").

In sum, the plaintiffs have not shown a significant First Amendment burden on the theory that complying with the Attorney General's Schedule B nonpublic disclosure requirement will chill contributions.

2. Evidence That Disclosure to the Attorney General Will Subject Contributors to Threats, Harassment and Reprisals

Alternatively, the plaintiffs seek to establish a First Amendment burden by showing that, if they are required to disclose their Schedule B information to the Attorney General, there is "a reasonable probability that the compelled disclosure of personal information will subject [their contributors] to threats, harassment, or reprisals from either Government officials or private parties." *Doe*, 561 U.S. at 200 (alteration omitted) (quoting *Buckley*, 424 U.S. at 74). This inquiry necessarily entails two questions: (1) what is the risk of public disclosure; and (2), if public disclosure does occur, what is the likelihood that contributors will be subjected to threats, harassment or reprisals? We consider these questions in reverse order.

a. Likelihood of Retaliation

The first question, then, is whether the plaintiffs have shown that contributors are likely to be subjected to threats, harassment or reprisals if Schedule B information were to become public. We again consider the Foundation's evidence first, followed by the Law Center's evidence.

The Foundation's evidence undeniably shows that some individuals publicly associated with the Foundation have been subjected to threats, harassment or economic reprisals. Lucas Hilgemann, the Foundation's chief executive officer, testified that he was harassed and targeted, and his personal information posted online, in connection with his work surrounding union "right to work" issues in Wisconsin. Charles and David Koch have received death threats, and Christopher Fink, the Foundation's chief operating officer, has received death threats for publicly contributing to the

Foundation through his family's private foundation. Art Pope, a member of the Foundation's board of directors, and a contributor through his family foundation, testified that he received a death threat and has been harassed by "a series of articles" that falsely accuse him of "funding global warming deni[al]." His businesses have been boycotted, although we hesitate to attribute those boycotts to Pope's association with the Foundation.[6]

In some cases, moreover, the Foundation's actual or perceived contributors may have faced economic reprisals or other forms of harassment. Teresa Oelke, for instance, cited

> a donor whose business was targeted by an association, a reputable association in that state. A letter was sent to all the school boards in that state encouraging [them] to

[6] Pope says his business, Variety Wholesalers, was boycotted in part because of his affiliation with the Foundation. But Pope was the state budget director of North Carolina and is publicly associated with a large number of organizations and candidates. Despite publicly contributing to the Foundation since 2004, and to the Foundation's predecessor since 1993, he did not receive threats or negative attention until 2010, in connection with his involvement in the North Carolina elections. This same problem plagues much of the plaintiffs' evidence. In many instances, the evidence of harassment pertains to individuals who are publicly identified with a number of controversial activities or organizations, making it difficult to assess the extent to which the alleged harassment was caused by a connection to the Foundation or the Law Center in particular. Most of the individuals who have experienced harassment, moreover, have been more than mere contributors, again making it difficult to isolate the risk of harassment solely from being a large contributor. The plaintiffs have presented little evidence bearing on whether harassment has occurred, or is likely to occur, simply because an individual or entity provided a large financial contribution to the Foundation or the Law Center.

> discontinue awarding this individual's business contracts because of his assumed association with Americans for Prosperity and Americans for Prosperity Foundation. . . . That individual reduced his contributions in half, so from $500,000 annually to 250,000 based on the pressure from his board that remains in place today.

Hilgemann, the Foundation's CEO, suggested that during the "right to work" campaign in Wisconsin in 2012, an opposition group "pulled together a list of suspected donors to the Foundation because of their interactions with groups like ours in the past that had been publicized. [Opponents] boycotted their businesses. They made personal and private threats against them, their families and their business and their employees."[7]

The Law Center, too, has presented some evidence to suggest individuals associated with the Law Center have experienced harassment, although it is less clear to what extent it results solely from that association. The Law Center, for instance, points to: a smattering of critical letters, phone calls and emails it has received over the years; the incident in which Monaghan was placed on a list of "the most antigay persons in the country" after the Law Center became involved in a controversial lawsuit; and threats and

[7] Like much of the plaintiffs' evidence, the harassment allegations recounted by Oelke and Hilgemann are conclusory rather than detailed. Although we understand the plaintiffs' interest in protecting their contributors' identities from disclosure, we cannot imagine why the plaintiffs have not provided more detailed evidence to substantiate and develop their allegations of retaliation – something we are confident they could have accomplished without compromising their contributors' anonymity.

harassment its clients, such as Robert Spencer and Pamela Geller, have received based on their controversial public activities. As noted, however, Monaghan could not recall any situation in which a contributor to the Law Center was harassed, or expressed concerns about being harassed, on account of having contributed to the Law Center.

On the one hand, this evidence plainly shows at least the *possibility* that the plaintiffs' Schedule B contributors would face threats, harassment or reprisals if their information were to become public. Such harassment, however, is not a foregone conclusion. In 2013, after acquiring copies of the Foundation's 2001 and 2003 Schedule B filings, the National Journal published an article publicly identifying many of the Foundation's largest contributors.[8] If, as the plaintiffs contend, public disclosure of Schedule B information would subject their contributors to widespread retaliation, we would expect the Foundation to present evidence to show that, following the National Journal's unauthorized Schedule B disclosure, its contributors were harassed or threatened. No such evidence, however, has been presented.

Ultimately, we need not decide whether the plaintiffs have demonstrated a reasonable probability that the compelled disclosure of Schedule B information would subject their contributors to a constitutionally significant level of threats, harassment or reprisals if their Schedule B

[8] The record does not reflect how the National Journal acquired this information. No one has suggested that the California Attorney General's office was the source, nor could it have been, as the Foundation was not reporting its Schedule B contributors to the state in 2001 or 2003.

information were to become public. *See Doe*, 561 U.S. at 200.[9] As we explain next, we are not persuaded that there exists a reasonable probability that the plaintiffs' Schedule B information will become public as a result of disclosure to the Attorney General. Thus, the plaintiffs have not established a reasonable probability of retaliation from compliance with the Attorney General's disclosure requirement.

b. Risk of Public Disclosure

The parties agree that, as a legal matter, public disclosure of Schedule B information is prohibited. California law allows for public inspection of charitable trust records, with the following exception:

> Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:
>
> (1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or

[9] The district court concluded the plaintiffs *have* shown a "reasonable probability" that public disclosure of their Schedule B contributors would subject them to such threats and harassment. Because this constitutes a mixed question of law and fact, however, we review the question de novo. *See In re Cherrett*, 873 F.3d 1060, 1066 (9th Cir. 2017).

(2) In response to a search warrant.

Cal. Code Regs. tit. 11, § 310(b).[10] The plaintiffs argue, however, that their Schedule B information may become public because the Attorney General has a poor track record of shielding the information from the public view.

We agree that, in the past, the Attorney General's office has not maintained Schedule B information as securely as it should have, and we agree with the plaintiffs that this history raises a serious concern. The state's past confidentiality lapses are of two varieties: first, human error when Registry staff miscoded Schedule B forms during uploading; and second, a software vulnerability that failed to block access to the Foundation's expert, James McClave, as he probed the Registry's servers for flaws during this litigation.

We are less concerned with the latter lapse. McClave discovered that by manipulating the hexadecimal ending of the URL corresponding to each file on the Registry website, he could access a file that was confidential and did not correspond to a clickable link on the website. That is, although documents were deemed "confidential," that meant only that they were not *visible* to the public; it did not mean they were not still housed on the public-facing Registry website. By altering the single digit at the end of the URL, McClave was able to access, one at a time, all 350,000 of the Registry's confidential documents. This lapse was a

[10] The plaintiffs suggest California's regulations are not as protective as federal regulations because federal law imposes criminal penalties for unauthorized disclosure of information on tax returns. *See* 26 U.S.C. § 7213. Federal law, however, criminalizes only *willful* unauthorized disclosure; the differences between federal and California law are therefore immaterial to risk of inadvertent public disclosure at issue here.

singularity, stemming from an issue with the Attorney General's third-party security vendor. When it was brought to the Attorney General's attention during trial, the vulnerability was quickly remedied. There is no evidence to suggest that this type of error is likely to recur.

We are more concerned with human error. As part of an iterative search on the public-facing website of the Registry, McClave found approximately 1800 confidential Schedule Bs that had been misclassified as public over several years. The Attorney General promptly removed them from public access, but some had remained on the website since 2012, when the Registry began loading its documents to servers.

Much of this error can be traced to the large amount of paper the Registry Unit processes around the same time each year. The Registry Unit receives over 60,000 registration renewals annually, and 90 percent are filed in hard copy. It processes each by hand before using temporary workers and student workers to scan them into an electronic record system. The volume and tediousness of the work seems to have resulted in some staff occasionally mismarking confidential Schedule Bs as public and then uploading them to the public-facing site.

Recognizing the serious need to protect confidentiality, however, the Registry Unit has implemented stronger protocols to prevent human error. It has implemented "procedural quality checks . . . to sample work as it [is] being performed" and to ensure it is "in accordance with procedures on handling documents and [indexing them] prior to uploading." It has further implemented a system of text-searching batch uploads before they are scanned to the Registry site to ensure none contains Schedule B keywords. At the time of trial in 2016, the Registry Unit had halted batch uploads altogether in favor of loading each document

individually, as it was refining the text-search system. After forms are loaded to the Registry, the Charitable Trusts Section runs an automated weekly script to identify and remove any documents that it had inadvertently misclassified as public. There is also no dispute that the Registry Unit immediately removes any information that an organization identifies as having been misclassified for public access.

Nothing is perfectly secure on the internet in 2018, and the Attorney General's data are no exception, but this factor alone does not establish a significant risk of public disclosure. As the Second Circuit recently explained, "[a]ny form of disclosure-based regulation – indeed, any regulation at all – comes with some risk of abuse. This background risk does not alone present constitutional problems." *Schneiderman*, 882 F.3d at 383.

Although the plaintiffs have shown the state could afford to test its own systems with more regularity, they have not shown its cybersecurity protocols are deficient or substandard as compared to either the industry or the IRS, which maintains the same confidential information.[11] We agree with the Second Circuit that "there is always a risk

[11] Although the plaintiffs contend that the Charitable Trusts Section's protective measures are inadequate because they impose no physical or technical impediments to prevent employees from emailing Schedule Bs externally or printing them in the office, the record does not show that the IRS maintains a more secure internal protocol for its handling of Schedule B information or that the Charitable Trusts Section is failing to meet any particular security standard. Nonetheless, we take seriously the concerns raised here by the plaintiffs and amici, and we encourage all interested parties to work cooperatively to ensure that Schedule B information in the hands of the Attorney General remains confidential.

somebody in the Attorney General's office will let confidential information slip notwithstanding an express prohibition. But if the sheer possibility that a government agent will fail to live up to her duties were enough for us to assume those duties are not binding, hardly any government action would withstand our positively philosophical skepticism." *Id.* at 384.

Although the district court appears to have concluded that there is a high risk of public disclosure notwithstanding the promulgation of § 310 and the Attorney General's adoption of additional security measures, the court appears to have rested this conclusion solely on the state's *past* "inability to ensure confidentiality." *Thomas More Law Ctr.*, 2016 WL 6781090, at *5. In light of the changes the Attorney General has adopted since those breaches occurred, however, the evidence does not support the inference that the Attorney General is likely to inadvertently disclose either the Law Center's or the Foundation's Schedule B in the future. The risk of inadvertent disclosure of *any* Schedule B information in the future is small, and the risk of inadvertent disclosure of *the plaintiffs'* Schedule B information in particular is smaller still. To the extent the district court found otherwise, that finding was clearly erroneous.

Given the slight risk of public disclosure, we cannot say that the plaintiffs have shown "a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals." *See Doe*, 561 U.S. at 200 (alteration omitted) (quoting *Buckley*, 424 U.S. at 74).

In sum, the plaintiffs have not shown that compliance with the Attorney General's Schedule B requirement will impose significant First Amendment burdens. The plaintiffs have not demonstrated that compliance with the state's

disclosure requirement will meaningfully deter contributions. Nor, in light of the low risk of public disclosure, have the plaintiffs shown a reasonable probability of threats, harassment or reprisals. Because the burden on the First Amendment right to association is modest, and the Attorney General's interest in enforcing its laws is important, *Ctr. for Competitive Politics*, 784 F.3d at 1317, "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196 (quoting *Davis*, 554 U.S. at 744). As applied to the plaintiffs, therefore, the Attorney General's Schedule B requirement survives exacting First Amendment scrutiny.

IV.

The plaintiffs' facial challenges also fail. In *AFPF I*, we held that we were "bound by our holding in *Center for Competitive Politics*, 784 F.3d at 1317, that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional." *AFPF I*, 809 F.3d at 538. That holding constitutes the law of the case. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007) ("[T]he general rule [is] that our decisions at the preliminary injunction phase do not constitute the law of the case. Any of our conclusions on pure issues of law, however, are binding." (citations and internal quotation marks omitted)). Even if we were to consider the facial challenges anew, the evidence adduced at these trials does not prove the Schedule B requirement "fails exacting scrutiny in a 'substantial' number of cases, 'judged in relation to [its] plainly legitimate sweep.'" *Ctr. for Competitive Politics*, 784 F.3d at 1315 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

We also reject the Law Center's cross-appeal as to its Fourth Amendment and preemption claims. These claims were not proved at trial. We decline to consider the Law Center's motion for attorney's fees because it was not presented to the district court. Finally, we deny the Law Center's motion for judicial notice and the Attorney General's motion to strike portions of the Law Center's reply brief.

The judgments of the district court are reversed. The permanent injunctions are vacated. The case is remanded for entry of judgments in favor of the Attorney General.

INJUNCTIONS VACATED; JUDGMENTS REVERSED; CASES REMANDED.

The Law Center's motion for judicial notice, filed February 12, 2018 (Dkt. 45, No. 16-56855) is **DENIED**.

The Attorney General's motion to strike, filed February 13, 2018 (Dkt. 47, No. 16-56855), is **DENIED**.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellee*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellant.*	No. 16-55727 D.C. No. 2:14-cv-09448-R-FFM

AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellant*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellee.*	No. 16-55786 D.C. No. 2:14-cv-09448-R-FFM

THOMAS MORE LAW CENTER, *Plaintiff-Appellee*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellant.*	No. 16-56855 D.C. No. 2:15-cv-03048-R-FFM
THOMAS MORE LAW CENTER, *Plaintiff-Appellant*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellee.*	No. 16-56902 D.C. No. 2:15-cv-03048-R-FFM ORDER DENYING PETITIONS FOR REHEARING EN BANC

Filed March 29, 2019

Before: Raymond C. Fisher, Richard A. Paez, and Jacqueline H. Nguyen, Circuit Judges.

Order;
Dissent by Judge Ikuta;
Reply to Dissent by Judges Fisher, Paez, and Nguyen

SUMMARY*

Civil Rights

The panel denied petitions for rehearing en banc on behalf of the court.

In its opinion, the panel held that California Attorney General's Service Form 990, Schedule B requirement, which obligates charities to submit the information they file each year with the Internal Revenue Service pertaining to their largest contributors, survived exacting scrutiny as applied to the plaintiffs because it was substantially related to an important state interest in policing charitable fraud.

Dissenting from the denial of rehearing en banc, Judge Ikuta, joined by Judges Callahan, Bea, Bennett and R. Nelson, stated that the panel's reversal of the district court's decision was based on appellate factfinding and was contrary to the reasoning and spirit of decades of Supreme Court jurisprudence, which affords substantial protections to persons whose associational freedoms are threatened. Judge Ikuta wrote that under the panel's analysis, the government can put the First Amendment associational rights of members and contributors at risk for a list of names it does not need, so long as it promises to do better in the future to avoid public disclosure of the names. Judge Ikuta wrote that given the inability of governments to keep data secure, the panel's standard puts anyone with controversial views at risk.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Responding to the dissent from the denial of rehearing en banc, Judge Fisher, Paez and Nguyen stated that the panel's decision to apply exacting scrutiny was consistent with Supreme Court precedent, Ninth Circuit precedent, and out-of-circuit precedent. The panel noted that the two circuits that have addressed the issue both have held that exacting, rather than strict scrutiny apply and that the nonpublic Schedule B reporting requirements satisfy the First Amendment because they allow state and federal regulators to protect the public from charitable fraud without subjecting major contributors to the threats, harassment or reprisals that could flow from public disclosure.

ORDER

Judge Paez and Judge Nguyen have voted to deny the petitions for rehearing en banc and Judge Fisher has so recommended.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing en banc (Nos. 16-55727 and 16-55786, filed September 25, 2018 - Dkt. 106; and Nos. 16-56855 and 16-56902, filed September 26, 2018 - Dkt. 67) are **DENIED**.

IKUTA, Circuit Judge, with whom CALLAHAN, BEA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from denial of rehearing en banc:

Controversial groups often face threats, public hostility, and economic reprisals if the government compels the organization to disclose its membership and contributor lists. The Supreme Court has long recognized this danger and held that such compelled disclosures can violate the First Amendment right to association. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

For this reason, the Supreme Court has given significant protection to individuals who may be victimized by compelled disclosure of their affiliations. Where government action subjects persons to harassment and threats of bodily harm, economic reprisal, or "other manifestations of public hostility," *NAACP v. Alabama*, 357 U.S. at 462, the government must demonstrate a compelling interest, *id.* at 463; *Bates v. Little Rock*, 361 U.S. 516, 524 (1960), there must be a substantial relationship between the information sought and the compelling state interest, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963), and the state regulation must "be narrowly drawn to prevent the supposed evil," *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (internal quotation marks omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

This robust protection of First Amendment free association rights was desperately needed here. In this case, California demanded that organizations that were highly controversial due to their conservative positions disclose most of their donors, even though, as the district court found, the state did not really need this information to accomplish its

goals. Although the state is required to keep donor names private, the district court found that the state's promise of confidentiality was illusory; the state's database was vulnerable to hacking and scores of donor names were repeatedly released to the public, even up to the week before trial. *See Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016). Moreover, as the district court found, supporters whose affiliation had previously been disclosed experienced harassment and abuse. *See id.* at 1055–56. Their names and addresses, and even the addresses of their children's schools, were posted online along with threats of violence. Some donors' businesses were boycotted. In one incident, a rally of the plaintiff's supporters was stormed by assailants wielding knives and box cutters, who tore down the rally's tent while the plaintiff's supporters struggled to avoid being trapped beneath it. In light of the powerful evidence at trial, the district court held the organizations and their donors were entitled to First Amendment protection under the principles of *NAACP v. Alabama*. *See id.* at 1055.

The panel's reversal of the district court's decision was based on appellate factfinding and crucial legal errors. First, the panel ignored the district court's factfinding, holding against all evidence that the donors' names would not be made public and that the donors would not be harassed. *See Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1017, 1019 (9th Cir. 2018) ("*AFPF II*"). Second, the panel declined to apply *NAACP v. Alabama*, even though the facts squarely called for it. *See id.* at 1008–09. Instead, the panel applied a lower form of scrutiny adopted by the Supreme Court for the unique electoral context. *See Buckley v. Valeo*, 424 U.S. 1, 64, 68 (1976). The panel's approach will ensure that individuals affiliated with controversial organizations

effectively have little or no protection from compelled disclosure. We should have taken this case en banc to correct this error and bring our case law in line with Supreme Court jurisprudence.

I

The Supreme Court has established a clear test for cases like this one. While the Court has modified the test to fit different contexts, it has not wavered from the principle that the First Amendment affords organizations and individuals substantial protection when the government tries to force disclosure of ties that could impact their freedom of association.

A

The Supreme Court decisions protecting against forced disclosures that threaten individuals' freedom of association arose in a series of cases involving the NAACP. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449; *Bates*, 361 U.S. 516; *Gremillion*, 366 U.S. 293; *Gibson*, 372 U.S. 539. The Court considered numerous attempts by states to compel disclosure of NAACP membership information at a time when those members faced a well-known risk of "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP v. Alabama*, 357 U.S. at 462; *see also Gremillion*, 366 U.S. at 295–96; *Bates*, 361 U.S. at 523–24.

In this broader context, the Court recognized that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as more direct

restrictions on speech. *NAACP v. Alabama*, 357 U.S. at 462. "[F]reedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States . . . not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates*, 361 U.S. at 523 (citations omitted).

Because state disclosure requirements can abridge First Amendment associational rights, the Court held such requirements were subject to heightened scrutiny. Once a plaintiff carries the burden of showing that a state-required disclosure may result "in reprisals against and hostility to the members," *Gremillion*, 366 U.S. at 296, the state has to show: (1) a sufficiently compelling interest for requiring disclosure, *see NAACP v. Alabama*, 357 U.S. at 462–63; (2) that the means were substantially related to that interest, *Gibson*, 372 U.S. at 549; and (3) that the means were narrowly tailored, *Gremillion*, 366 U.S. at 296. While the Supreme Court has articulated this three-part test in various ways, it has made clear that the test affords substantial protection to persons whose associational freedoms are threatened.

B

The Court modified the *NAACP v. Alabama* test for application in the electoral context. *See Buckley*, 424 U.S. at 64, 68. *Buckley* recognized the importance of applying "[t]he strict test established by *NAACP v. Alabama* . . . because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," but it adjusted the test for government action that affects elections when the plaintiffs could not establish that

disclosure would subject them to threats or harassment. *Id.* at 66. It makes sense to adapt the *NAACP v. Alabama* test for the electoral context, where the government's interest is uniquely important. Influence in elections may result in influence in government decisionmaking and the use of political power; therefore, the government's crucial interest in avoiding the potential for corruption and hidden leverage outweighs incidental infringement on First Amendment rights. *Id.* at 66–68, 71. The interests served by disclosure outside the electoral context, such as policing types of charitable fraud, pale in comparison to the crucial importance of ensuring our election system is free from corruption or its appearance.

Given the unique electoral context, *Buckley* held that, for the first prong, the governmental interest must be "sufficiently important to outweigh the possibility of infringement" of First Amendment rights; the government did not need to show a compelling government interest. *Id.* at 66. For the second prong, it still held there must be a "substantial relation between the governmental interest and the information required to be disclosed." *Id.* at 64 (footnote and internal quotation marks omitted) (quoting *Gibson*, 372 U.S. at 547).

As to the third prong of the test, *Buckley* fashioned a per se rule: it deemed the disclosure requirement to be "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. *Buckley* based this conclusion on its recognition that Congress always has a substantial interest in combating voter ignorance by providing the electorate with information about the sources and recipients of funds used in political campaigns in order to deter actual corruption and avoid the

appearance of corruption, and in gathering data necessary to detect violations of separate political contribution limits. *Id.* at 66–68. Because, "in most applications," disclosure is "the least restrictive means of curbing the evils of campaign ignorance and corruption," the narrow tailoring prong of the *NAACP v. Alabama* test is satisfied. *Id.* at 68.

Recognizing the distinction between elections and other justifications for disclosure, the Supreme Court has applied *Buckley*'s test only in cases that involve election-related disclosures, a context in which the Supreme Court has already established that disclosure is the least restrictive means of reaching Congress's goals. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186, 196–97 (2010); *Citizens United v. FEC*, 558 U.S. 310, 369–70 (2010). These cases did not discuss whether disclosure was narrowly tailored to address the government's concern; *Buckley* already held that it is. For example, *Doe v. Reed* recognized the government's interest in "preserving the integrity of the electoral process" and "promoting transparency and accountability in the electoral process," and thus there was no need to discuss narrow tailoring. 561 U.S. at 197–98. The Court likewise did not focus on the narrow tailoring requirement in *Citizens United*, noting *Buckley*'s holdings that "disclosure could be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending," and that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." 558 U.S. at 367, 369 (quoting *Buckley*, 424 U.S. at 66).

The Court's limited application of the *Buckley* test, confined to cases in the electoral context in which the government's aim is to serve goals like "transparency and accountability," has not displaced the stringent standard set

out in *NAACP v. Alabama*. Indeed, the *NAACP v. Alabama* standard was likely not triggered in the election cases, given that they did not involve evidence that compelled disclosure would give rise to public hostility to the plaintiff's members or donors. The Court has maintained *NAACP v. Alabama*'s standard outside of the electoral context, thus reasserting the validity of that standard after *Buckley*. *See, e.g.*, *In re Primus*, 436 U.S. 412, 432 (1978) (holding that where a state seeks to infringe upon a party's First Amendment freedom of association, the state must justify that infringement with "a subordinating interest which is compelling" and must use means that are "closely drawn to avoid unnecessary abridgment of associational freedoms") (first quoting *Bates*, 361 U.S. at 524; then quoting *Buckley*, 424 U.S. at 25); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that infringement of the right to associate "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"). Thus, there is no doubt that the *NAACP v. Alabama* test—requiring a compelling government interest, a substantial relation between the sought disclosure and that interest, and narrow tailoring so the disclosure does not infringe on First Amendment rights more than necessary—remains applicable for cases arising outside of the electoral context, where a plaintiff needs its crucial protection against forced disclosures that threaten critical associational rights.

C

Until recently, the circuit courts, including the Ninth Circuit, have agreed that *NAACP v. Alabama* is still good law, and they have applied it when considering state action

that has the effect of burdening individuals' First Amendment rights by requiring disclosure of associational information.[1] In *Familias Unidas v. Briscoe*, for instance, the Fifth Circuit struck down a Texas statute that empowered a county judge to compel public disclosure of the names of organizations that interfered with the operation of public schools. 619 F.2d 391, 394 (5th Cir. 1980). In that case, the judge had compelled disclosure of the names of Mexican-American students and adults who were members of a group seeking reform of the Hondo public schools. The Fifth Circuit recognized that the Supreme Court had upheld compulsory disclosures of membership lists only when the underlying state interest is compelling and legitimate, and the disclosure requirement is

[1] *See, e.g.*, *United States v. Comley*, 890 F.2d 539, 543–44 (1st Cir. 1989) ("Once [a prima facie showing of First Amendment infringement] is made, the burden then shifts to the government to show both a compelling need for the material sought and that there is no significantly less restrictive alternative for obtaining the information."); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987) ("The law must be substantially related to a compelling governmental interest, and must be narrowly drawn so as to be the least restrictive means of protecting that interest."); *Humphreys, Hutcheson, & Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985) (upholding the challenged provisions in part because they "are carefully tailored so that first amendment freedoms are not needlessly curtailed"); *Clark v. Library of Cong.*, 750 F.2d 89, 94 (D.C. Cir. 1984) ("[T]he government must demonstrate that the means chosen to further its compelling interest are those least restrictive of freedom of belief and association."); *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984) ("To survive the 'exacting scrutiny' required by the Supreme Court, . . . the government must show that the disclosure and reporting requirements are justified by a compelling government interest, and that the legislation is narrowly tailored to serve that interest."); *see also Perry v. Schwarzenegger*, 591 F.3d 1147, 1159–61 (9th Cir. 2010); *Dole v. Serv. Emps. Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1461 (9th Cir. 1991); *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 350 (9th Cir. 1988).

"drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than is absolutely necessary." *Id.* at 399 (citing *Buckley*, 424 U.S. at 68).

Our cases have likewise remained faithful to *NAACP v. Alabama*. For example, *Brock v. Local 375, Plumbers International Union of America* recognized that once a plaintiff shows that disclosure will result in "harassment, membership withdrawal, or discouragement of new members," or otherwise chill associational rights, heightened scrutiny applies: the government must demonstrate that the information sought "is rationally related to a compelling governmental interest," and that the disclosure requirement is the least restrictive means of obtaining that information. 860 F.2d 346, 350 (9th Cir. 1988) (citing *Buckley*, 424 U.S. at 64, 68; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). We reaffirmed this approach in *Perry v. Schwarzenegger*, where we emphasized that "[i]nfringements on [the freedom to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 591 F.3d 1147, 1159 (9th Cir. 2010) (quoting *Roberts*, 468 U.S. at 623).[2]

In recent years, a few outliers have emerged and broken from the uniform application of *NAACP v. Alabama* when considering challenges to government-required disclosure. We applied *Buckley*, rather than *NAACP v. Alabama*, in two

[2] Although these cases cite both to *Buckley* and to cases setting out the *NAACP v. Alabama* test, *see, e.g.*, *Brock*, 860 F.2d at 350, they remain faithful to the principles of *NAACP v. Alabama* by applying its heightened scrutiny and requiring narrow tailoring.

cases involving state disclosure requirements outside the electoral context. *See Ams. for Prosperity Found. v. Harris*, 809 F.3d 536, 538–39 (9th Cir. 2015) (per curiam) ("*AFPF I*"); *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312–14 (9th Cir. 2015) ("*CCP*"). The Second Circuit has also recently applied *Buckley*'s test—without a narrow tailoring requirement—to a challenge to a government disclosure requirement outside of the electoral context. *See Citizens United v. Schneiderman*, 882 F.3d 374, 382, 385 (2d Cir. 2018). But none of these outliers offered a convincing rationale for extending *Buckley* outside of the electoral context. Equally important, none addressed a situation in which a plaintiff showed a reasonable probability of threats or hostility in the event of disclosure, *see Schneiderman*, 882 F.3d at 385; *AFPF I*, 809 F.3d at 541; *CCP*, 784 F.3d at 1314, which is a threshold requirement for the application of *NAACP v. Alabama*'s test. Accordingly, these cases do not bear on whether *NAACP v. Alabama*'s standard must be applied when a plaintiff does make such a showing, regardless whether the application of *Buckley* is appropriate outside of the electoral context.

II

The facts of this case make clear that the Foundation is entitled to First Amendment protection under *NAACP v. Alabama* and that California's disclosure requirement cannot be constitutionally applied to the Foundation.

The Americans for Prosperity Foundation is a conservative organization dedicated to "educating and

training citizens to be advocates for freedom."[3] It develops educational programs to "share knowledge and tools that encourage participants to apply the principles of a free and open society in their daily lives."[4]

People publicly affiliated with the Foundation have often faced harassment, hostility, and violence, as shown by the evidence adduced at trial in this case. For example, supporters have received threatening messages and packages, had their addresses and children's school addresses posted online in an effort to intimidate them, and received death threats. One blogger posted a message stating he contemplated assassinating a Foundation supporter: "I'm a trained killer, you know, courtesy of U.S. taxpayers, and it would be easy as pie to . . . take [him] out." In the same vein, a consultant working for the Foundation posted threats of physical violence against Foundation employees. On a different blog site, a person claiming that he worked at the Foundation posted that he was "inside the belly of the beast," and could "easily walk in and slit [the Foundation CEO's] throat."

Foundation supporters have also been subjected to violence, not just threats. For instance, at a rally in Michigan, several hundred protestors wielding knives and box cutters surrounded the Foundation's tent and sawed at the tent ropes until they were severed. Foundation supporters were caught under the tent when it collapsed, including elderly supporters

[3] Ams. for Prosperity Found., http://americansforprosperityfoundation.org (last visited March 11, 2019).

[4] *Id.*

who could not get out on their own. At least one supporter was punched by the protestors.

Opponents of the Foundation have also targeted its supporters with economic reprisal. For instance, after an article published by *Mother Jones* magazine in February 2013 revealed donor information, protesters called for boycotts of the businesses run by six individuals mentioned in the article. Similarly, Art Pope, who served on the Foundation's board of directors, suffered boycotts of his business.

Given this history of harassment, the Foundation was reluctant to make information about its donors public. This concern became acute in 2010, when California suddenly decided to enforce a long dormant disclosure law.

California law requires any entity that wishes to register as a charitable organization to submit a multitude of tax forms to the state. *See* Cal. Code Regs. tit. 11, § 301. Among other requirements, California requires charitable organizations to file a confidential federal tax form, Schedule B to IRS Form 990, which contains the names and addresses of any donors who meet certain criteria. *See id.*; 26 U.S.C. § 6033(b); 26 C.F.R. § 1.6033-2(a)(2)(iii)(a). Under its regulations, California may release Schedule B only in response to a search warrant or as needed in an enforcement proceeding brought against a charity by the Attorney General. *See* Cal. Code Regs. tit. 11, § 310(b). But as discussed below, the state's confidential information is so vulnerable to hacks and inadvertent disclosure that Schedule B information is effectively available for the taking.

In light of the Foundation's confidentiality concerns, from 2001 to 2010, it registered as a charity in California without

submitting the donor information its Schedule B contains.[5] Over that entire period, California did not request the Foundation's Schedule B or list the Foundation's registration as a charity as deficient in any way. *See AFPF II*, 903 F.3d at 1006–07.

In 2010, California suddenly increased its efforts to collect charities' Schedule Bs, and in 2013 the state notified the Foundation that its registration was deficient because it had not submitted Schedule B donor information. *See id.* at 1006. In an effort to protect its donors from likely threats and hostility as backlash for their affiliation with the Foundation, it filed suit seeking to enjoin California from enforcing this requirement against it.

After a multi-day trial, the district court ruled that the First Amendment protects the Foundation from forced disclosure of its donor information,[6] and it entered a permanent injunction against California's enforcement of the Schedule B requirement as applied to the Foundation. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1059.

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[5] The Foundation's Schedule B includes the names and addresses of any person who donated more than 2 percent of the Foundation's annual contributions. *See* 26 C.F.R. § 1.6033-2(a)(2)(iii)(a).

[6] The district court initially entered a preliminary injunction against California's enforcement against the Foundation. *See AFPF II*, 903 F.3d at 1006. A panel of our court reversed in part on the ground that the Foundation had not shown evidence of past hostility toward Foundation donors or a reasonable probability of future hostility. *See AFPF I*, 809 F.3d at 539–41. On remand, the Foundation presented evidence of both. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d 1049.

III

The panel reversed, holding that California's interest in Schedule B information was "sufficiently important" and that there was a substantial relation between the requirement and the state's interest. *AFPF II*, 903 F.3d at 1008 (quoting *Doe*, 561 U.S. at 196). In reaching this conclusion, the panel made crucial factual and legal errors.

The panel's legal error is evident. Although this case arose outside of the election context, and the Foundation established that its members might be exposed to harassment and abuse if their identities were made public, the panel mistakenly applied *Buckley*'s "exacting scrutiny" and rejected the Foundation's argument that a narrow tailoring requirement applied in this context. *See AFPF II*, 903 F.3d at 1008–09.

The panel's factual errors are equally egregious. As a general rule, appellate courts may not override the facts found by a district court unless they are clearly erroneous. In our circuit, "we will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). Here, the panel not only failed to defer to the district court, but reached factual conclusions that were unsupported by the record.

First, the district court held that disclosure of the Schedule B information to the state could result in the names of the Foundation's donors being released to the public. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1057. The district court squarely rejected the state's argument that no

donor information disclosed to the state would be *publicly* disclosed because it would remain confidential on the state's servers. *See id.* The evidence produced at trial in this case provided overwhelming support for the court's findings. There was ample evidence of human error in the operation of the state's system. State employees were shown to have an established history of disclosing confidential information inadvertently, usually by incorrectly uploading confidential documents to the state website such that they were publicly posted. Such mistakes resulted in the public posting of around 1,800 confidential Schedule Bs, left clickable for anyone who stumbled upon them. *AFPF II*, 903 F.3d at 1018. And the public did find them. For instance, in 2012 Planned Parenthood become aware that a complete Schedule B for Planned Parenthood Affiliates of California, Inc., for the 2009 fiscal year was publicly posted; the document included the names and addresses of hundreds of donors.

There was also substantial evidence that California's computerized registry of charitable corporations was shown to be an open door for hackers. In preparation for trial, the plaintiff asked its expert to test the security of the registry. He was readily able to access every confidential document in the registry—more than 350,000 confidential documents—merely by changing a single digit at the end of the website's URL. *See AFPF II*, 903 F.3d at 1018. When the plaintiff alerted California to this vulnerability, its experts tried to fix this hole in its system. Yet when the expert used the exact same method the week before trial to test the registry, he was able to find 40 more Schedule Bs that should have been confidential.

In rejecting the district court's factual conclusions, the panel violated our standard of review as well as common

sense. The panel concluded that in the future, all Schedule B information would be kept confidential. It reasoned that because the state technician was able to fix the security vulnerability exposed by the Foundation's expert, "[t]here is no evidence to suggest that this type of error is likely to recur." *Id.* at 1018. The panel did not address the fact that even a week before trial, the state could not prevent a second disclosure based on the same security vulnerability. Further, the panel claimed that despite the state's long history of inadvertent disclosure of Schedule B information through human error, the state's new efforts to correct human errors through additional "procedural quality checks" and "a system of text-searching batch uploads before they are scanned to the Registry site to ensure none contains Schedule B keywords" would obviate future disclosures. *Id.* But no evidence supports this claim, and it is contrary to any real-world experience.

Second, the district court found that the state did not have a strong interest in obtaining the Schedule B submissions to further its enforcement goals. Instead, it held that California's up-front Schedule B submission requirement "demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years." *Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1055. Indeed, California could not point to "even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." *Id.* The panel rejected this well-supported finding based solely on the conclusory, blanket assertions made by state witnesses that up-front disclosure of donor names increases "investigative efficiency." *AFPF II*, 903 F.3d at 1010. Yet the Supreme Court has made clear that a state's "mere assertion" that there

was a substantial relationship between the disclosure requirement and the state's goals is not enough to establish such a relationship. *See Bates*, 361 U.S. at 525; *Gibson*, 372 U.S. at 554–55. And the record does not otherwise support the panel's conclusion.

Finally, the district court found ample evidence that Foundation supporters would likely be subject to threats or hostility should their affiliations be disclosed. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1055–56. But based on its unsupported assumption that public disclosure would not occur, the panel felt justified in disregarding this well-supported conclusion. *AFPF II*, 903 F.3d at 1017.

Given the panel's erroneous factual determinations that there would be no public disclosure of Foundation donors and that California's disclosure requirement was substantially related to its enforcement goals, and its mistaken legal decision that no narrow tailoring was required, it is not surprising that the panel easily arrived at the conclusion that the donors were not entitled to any protection of their First Amendment rights.

IV

But contrary to the panel, the full protection of *NAACP v. Alabama* was warranted in this case, because the Foundation's donors may be exposed to harassment and abuse if their identities are disclosed, and the special considerations regarding government-required disclosures for elections are not present. *See, e.g.*, *Primus*, 436 U.S. at 432; *Brock*, 860 F.2d at 350. Had the panel properly recognized *NAACP v. Alabama*'s applicability, it would have considered (1) whether California presented a compelling interest that is

(2) substantially related to the disclosure requirement, and (3) whether the requirement was narrowly tailored to the articulated interest. *See* 357 U.S. at 462–63; *Gibson*, 372 U.S. at 546; *Gremillion*, 366 U.S. at 297.

Applying the correct test, it is clear that California failed to show that its Schedule B disclosure requirement is "substantially related" to any interest in policing charitable fraud. A state's "mere assertion" that there was a substantial relationship between the disclosure requirement and the state's goals is not enough to establish such a relationship, *see Bates*, 361 U.S. at 525; *Gibson*, 372 U.S. at 554–55, and the district court's well-supported factual findings establish that the Schedule Bs are rarely used to detect fraud or to enhance enforcement efforts.

Nor is California's disclosure requirement narrowly tailored; rather, the means "broadly stifle fundamental personal liberties" and "the end can be more narrowly achieved." *Gremillion*, 366 U.S. at 296 (quoting *Shelton*, 364 U.S. at 488). The state requires blanket Schedule B disclosure from every registered charity when few are ever investigated, and less restrictive and more tailored means for the Attorney General to obtain the desired information are readily available. In particular, the Registry can obtain an organization's Schedule B through a subpoena or a request in an audit letter once an investigation is underway without any harm to the government's interest in policing charitable fraud. Moreover, the state failed to provide any example of an investigation obscured by a charity's evasive activity after receipt of an audit letter or subpoena requesting a Schedule B, although state witnesses made assertions to that effect. *See AFPF II*, 903 F.3d at 1010–11. The panel's erroneous application of *Buckley* led it to ignore this requirement

completely, and it demanded no explanation from California for why such a sweeping disclosure requirement—imposed before the state has any reason to investigate a charity—is justified given equally effective, less restrictive means exist. *See id.* at 1011–12.

Accordingly, under the proper application of the test to the facts found by the district court, the Foundation was entitled to First Amendment protection of its donor lists. Because California failed to show a substantial relation between its articulated interest and its disclosure requirement, and because it failed to show that the requirement was narrowly tailored, California's Schedule B disclosure requirement fails the test provided by *NAACP v. Alabama*, and it should have been struck down as applied to the Foundation.

The panel's contrary conclusion eviscerates the First Amendment protections long-established by the Supreme Court. By applying *Buckley* where *NAACP v. Alabama*'s higher standard should have been triggered, the panel lowered the bar governments must surmount to force disclosure of sensitive associational ties. Under the panel's standard, a state's self-serving assertions about efficient law enforcement are enough to justify disclosures notwithstanding the threats, hostility, and economic reprisals against socially disfavored groups that may ensue. And by rejecting the district court's factual findings that disclosed donor lists will become public and expose individuals to real threats of harm, the panel imposes a next-to-impossible evidentiary burden on plaintiffs seeking protection of their associational rights. Indeed, if the Foundation's evidence is not enough to show that California cannot adequately secure its information, no plaintiff will be able to overcome a state's empty assurances. "The possibility

of prevailing in an as-applied challenge provides adequate protection for First Amendment rights only if . . . the showing necessary to obtain the exemption is not overly burdensome." *Doe*, 561 U.S. at 203 (Alito, J., concurring).

V

In short, the panel's conclusion is contrary to the reasoning and spirit of decades of Supreme Court jurisprudence. Under the panel's analysis, the government can put the First Amendment associational rights of members and contributors at risk for a list of names it does not need, so long as it promises to do better in the future to avoid public disclosure of the names. Given the inability of governments to keep data secure, this standard puts anyone with controversial views at risk. We should have reheard this case en banc to reaffirm the vitality of *NAACP v. Alabama*'s protective doctrine, and to clarify that *Buckley*'s watered-down standard has no place outside of the electoral context.

The First Amendment freedom to associate is vital to a functioning civil society. For groups with "dissident beliefs," it is fragile. The Supreme Court has recognized this time and time again, but the panel decision strips these groups of First Amendment protection. I dissent from our decision not to correct this error.

FISHER, PAEZ and NGUYEN, Circuit Judges, responding to the dissent from the denial of rehearing en banc:

The State of California, like the federal government, requires tax-exempt § 501(c)(3) organizations to file annual returns with regulators charged with protecting the public against charitable fraud. Among other things, these organizations are required to report the names and addresses of their largest contributors on IRS Form 990, Schedule B. The information is provided to regulators, who use it to prevent charitable fraud, but it is *not* made public. Both circuits to consider the question have concluded that First Amendment challenges to these requirements are subject to exacting, rather than strict, scrutiny, and both circuits have held that these requirements satisfy exacting scrutiny. *See Ams. for Prosperity Found. v. Becerra* (*AFPF II*), 903 F.3d 1000 (9th Cir. 2018); *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018); *Ams. for Prosperity Found. v. Harris* (*AFPF I*), 809 F.3d 536 (9th Cir. 2015); *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir.), *cert. denied*, 136 S. Ct. 480 (2015). As these courts have recognized, requiring the *nonpublic* disclosure of Schedule B information comports with the freedom of association protected by the First Amendment because it allows state and federal regulators to protect the public from fraud without exposing contributors to the threats, harassment or reprisals that might follow *public* disclosure.

I

Organizations operated exclusively for religious, charitable, scientific or educational purposes are eligible for an exemption from federal and state taxes under § 501(c)(3) of the Internal Revenue Code and § 23701 of the California

Revenue & Tax Code. Organizations avail themselves of this status to avoid taxes and collect tax-deductible contributions.

Because this favored tax treatment presents opportunities for self-dealing, fraud and abuse, organizations availing themselves of § 501(c)(3) status are subject to federal and state oversight. Congress has required every organization exempt from taxation under § 503(c)(3) to file an annual information return (Form 990 series) with the Internal Revenue Service, setting forth detailed information on its income, expenditures, assets and liabilities, including, as relevant here, "the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors." 26 U.S.C. § 6033(b)(5). Organizations such as plaintiffs Americans for Prosperity Foundation and Thomas More Law Center are required to report the name and address of any person who contributed the greater of $5,000 or 2 percent of the organization's total contributions for the year. *See* 26 C.F.R. § 1.6033-2(a)(2)(iii)(a). An organization with $10 million in annual revenue, for example, must report contributors who have given in excess of $200,000 for the year. Between 2010 and 2015, the Thomas More Law Center was required to report no more than seven contributors; Americans for Prosperity Foundation was required to report no more than 10 contributors – those contributing over $250,000. Organizations report this information on IRS Form 990, Schedule B.

This information is reported not only to the IRS but also to state regulators. California's Supervision of Trustees and Charitable Trusts Act requires the Attorney General to maintain a registry of charitable organizations and authorizes the Attorney General to obtain "whatever information, copies

of instruments, reports, and records are needed" for the registry's "establishment and maintenance." Cal. Gov't Code § 12584. To solicit tax-deductible contributions from California residents, an organization must maintain membership in the registry, *see id.* § 12585, and as one condition of registry membership, charities must submit a complete copy of the IRS Form 990 they already file with the IRS, including Schedule B, *see* Cal. Code Regs. tit. 11, § 301.

This contributor information is *not* made public. *See* 26 U.S.C. § 6104(d)(1)(A)(i), (3)(A); Cal. Gov't Code § 12590; Cal. Code Regs. tit. 11, § 310. The California Attorney General keeps Schedule Bs in a separate file from other submissions to the registry and excludes them from public inspection on the registry website. *See AFPF II*, 903 F.3d at 1005. Only information that does not identify a contributor is available for public inspection.

II

Some § 501(c)(3) organizations object to the Schedule B reporting requirement. They argue that by submitting their Schedule B information to regulators, they expose their major contributors to threats, harassment and reprisals – from those regulators and from the public – which in turn discourages contributions. They argue, therefore, that this requirement violates the freedom of association protected by the First Amendment.

The two federal appellate courts to have addressed the issue, ours and the Second Circuit, have rejected these claims. *See AFPF II*, 903 F.3d 1000; *Schneiderman*, 882 F.3d 374; *AFPF I*, 809 F.3d 536; *Ctr. for Competitive Politics*, 784 F.3d 1307. These courts have agreed that exacting rather than

strict scrutiny applies, *see AFPF II*, 903 F.3d at 1008; *Schneiderman*, 882 F.3d at 381–82; *AFPF I*, 809 F.3d at 541; *Ctr. for Competitive Politics*, 784 F.3d at 1312, and that the Schedule B requirement survives exacting scrutiny, because the requirement serves an important governmental interest in preventing charitable fraud without imposing a substantial burden on the exercise of First Amendment rights.

The dissent from the denial of rehearing en banc challenges these decisions, arguing that a form of strict scrutiny applies and that California's Schedule B requirement is unconstitutional. In our view, the dissent's arguments are not well taken.

III

The bulk of the dissent is devoted to the argument that we erred by applying exacting scrutiny. According to the dissent, First Amendment challenges to disclosure requirements are subject to two different tests:

1. In the electoral context, "exacting scrutiny" applies. This "standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (citations and internal quotation marks omitted).

2. Outside the electoral context, "heightened scrutiny" applies. This standard requires (1) a "compelling interest," (2) "a substantial relationship between the

> information sought and the compelling state interest" and (3) narrow tailoring. Dissent at 5. The dissent refers to this strict-scrutiny-like test as "heightened scrutiny" or the "*NAACP v. Alabama* test."

This case does not arise in the electoral context. Hence, according to the dissent, we should have applied the dissent's proposed "heightened scrutiny" test rather than exacting scrutiny. Had we done so, the dissent says, we would have invalidated California's Schedule B requirement.

We respectfully disagree with the dissent's contention that First Amendment challenges to disclosure requirements are subject to two different tests. In our view, there is only a single test – exacting scrutiny – that applies both within and without the electoral context. This test originated in *NAACP v. Alabama*, 357 U.S. 449 (1958), and the other Civil Rights Era cases – *Bates v. City of Little Rock*, 361 U.S. 516 (1960), *Shelton v. Tucker*, 364 U.S. 479 (1960), *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) – and has been applied more recently in *Buckley v. Valeo*, 424 U.S. 1 (1976), *Doe* and other cases arising in the electoral context. As *Doe* explains, the exacting scrutiny test:

> requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.

561 U.S. at 196 (citations and internal quotation marks omitted).

Whereas strict scrutiny requires a compelling interest and narrow tailoring in every case, the interest and tailoring required under exacting scrutiny varies from case to case, depending on the actual burden on First Amendment rights at stake: the governmental interest must be "*sufficiently* important" to justify the "*actual burden* on First Amendment rights" in the case at hand. *Id.* (emphasis added). Thus, where the burden that a disclosure requirement places on First Amendment rights is great, the interest and the fit must be as well. *See, e.g.*, *Buckley*, 424 U.S. at 25 ("Even a *significant* interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (emphasis added) (internal quotation marks omitted)); *Gibson*, 372 U.S. at 546 ("Where there is a *significant* encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (emphasis added) (quoting *Bates*, 361 U.S. at 524)); *Gremillion*, 366 U.S. at 296 ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that *broadly* stifle fundamental personal liberties when the end can be more narrowly achieved." (emphasis added) (quoting *Shelton*, 364 U.S. at 488)); *Shelton*, 364 U.S. at 488 (same); *Bates*, 361 U.S. at 524 ("Where there is a *significant* encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (emphasis added) (citing *NAACP v. Alabama*, 357 U.S. 449)); *see also* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. Rev. 207, 210 (2016). But where, as

here, the actual burden is slight, a weaker interest and a looser fit will suffice.

The dissent's contention that there are two different tests is based on the premise that *NAACP v. Alabama* applied something other than exacting scrutiny. We are not persuaded. First, the Supreme Court has already told us that *NAACP v. Alabama* applied exacting scrutiny: "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Buckley*, 424 U.S. at 64. Second, there is simply no way to read *NAACP v. Alabama* as applying anything other than the exacting scrutiny test described in *Doe*. The only question the Court decided in *NAACP v. Alabama* was whether the state had "demonstrated an interest in obtaining the disclosures it seeks from petitioner which is *sufficient to justify the deterrent effect* which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." *NAACP v. Alabama*, 357 U.S. at 463 (emphasis added). The disclosure requirement failed solely because "Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *Id.* at 466. There is no light between the test applied in *NAACP v. Alabama* and the one described in *Doe*.

In sum, we properly applied exacting scrutiny.

IV

The dissent also challenges our conclusion that California's Schedule B requirement survives exacting scrutiny. As noted, a disclosure requirement withstands

scrutiny under this test if the strength of the governmental interest reflects the seriousness of the actual burden on First Amendment rights. *See Doe*, 561 U.S. at 196. Here, the state's strong interest in collecting Schedule B information justifies the modest burden that nonpublic disclosure places on the exercise of First Amendment rights.

A. *Strength of the Governmental Interest*

With respect to the state's interest in collecting Schedule B information, the evidence was undisputed that the state uses Schedule B information to investigate charitable fraud. *See AFPF II*, 903 F.3d at 1011. "Current and former members of the Charitable Trusts Section, for example, testified that they found the Schedule B particularly useful in several investigations over the past few years, and provided examples. They were able to use Schedule B information to trace money used for improper purposes in connection with a charity serving animals after Hurricane Katrina; to identify a charity's founder as its principal contributor, indicating he was using the research charity as a pass-through; to identify self-dealing in that same charity; to track a for-profit corporation's use of a non-profit organization as an improper vessel for gain; and to investigate a cancer charity's gift-in-kind fraud." *Id.* Circuits have consistently recognized the strength of this interest. *See, e.g.*, *Schneiderman*, 882 F.3d at 384; *Ctr. for Competitive Politics*, 784 F.3d at 1311, 1317.

The evidence also was undisputed that up-front collection of Schedule B information provides the only effective means of obtaining the information. State regulators testified that attempting to obtain a Schedule B from a regulated entity *after* an investigation begins is ineffective "[b]ecause it's time-consuming, and you are tipping the charity off that they

are about to be audited." *AFPF II*, 903 F.3d at 1010. Using a subpoena or audit letter "would tip them off to our investigation, which would allow them potentially to dissipate more assets or hide assets or destroy documents, which certainly happened several times; or it just allows more damage to be done to [the] charity." *Id.*; *accord Ctr. for Competitive Politics*, 784 F.3d at 1317.

Although the district court questioned the strength of the governmental interest, it did so by applying an erroneous legal standard, requiring the state to establish that up-front collection of Schedule B information was the least restrictive means of obtaining the information, *see Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1053–55 (C.D. Cal. 2016), and that it would be impossible for the state to regulate charitable organizations without collecting Schedule B information, *see Thomas More Law Ctr. v. Harris*, No. CV 15-3048-R, 2016 WL 6781090, at *2 (C.D. Cal. Nov. 16, 2016). By applying the wrong legal standard, the district court abused its discretion, *see United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc), and disregarded a previous ruling by this court in this very case, *see AFPF I*, 809 F.3d at 541 (rejecting a least restrictive means test).

B. *Actual Burden on First Amendment Rights*

To determine the actual burden on First Amendment rights, we looked at two questions: (1) the likelihood that the plaintiffs' Schedule B contributors would face threats, harassment or reprisals *if* their Schedule B information were made public and (2) the likelihood that the information would become public. *See AFPF II*, 903 F.3d at 1015.

We ultimately declined to reach any conclusion with respect to the first question. *See id.* at 1017. The evidence on that question was mixed. Neither plaintiff, for example, identified a single contributor who would withhold financial support based on the plaintiffs' compliance with California's Schedule B disclosure requirement. *See id.* at 1014. The Thomas More Law Center, moreover, has consistently *over*-reported contributor information on its Schedule B filings, undermining its contention that reporting deters contributions. *See id.* Furthermore, many of the plaintiffs' Schedule B contributors are already publicly known. Private foundations, for example, are required by law to publicly disclose their contributions to the plaintiffs. *See id.* at 1015. Other Schedule B contributors – such as Charles and David Koch – are already publicly identified with the plaintiffs. In addition, although the evidence showed that individuals who are associated with the plaintiffs, such as the Koch brothers, have faced threats or harassment based on their controversial activities, the plaintiffs "presented little evidence bearing on whether harassment has occurred, or is likely to occur, simply because an individual or entity provided a large financial contribution to the Foundation or the Law Center." *Id.* at 1016 & n.6. In 2013, the National Journal published copies of the Foundation's Schedule Bs, but the Foundation presented no evidence that contributors suffered retaliation as a result. *See id.* at 1017.

Ultimately, because California, like the federal government and other states, requires only the *nonpublic* disclosure of Schedule B information, we did not need to decide whether, *in the event of public disclosure of the Schedule B information*, the plaintiffs' Schedule B contributors were likely to encounter threats, harassment or reprisals. *See id.* at 1017. We acknowledged the risk of

inadvertent public disclosure based on past confidentiality lapses by the state. *See id.* at 1018. We explained, however, that "[t]he state's past confidentiality lapses [were] of two varieties: first, human error when Registry staff miscoded Schedule B forms during uploading; and second, a software vulnerability that failed to block access to a plaintiff's expert as he probed the Registry's servers for flaws during this litigation." *Id.* at 1018. We explained that the software problem stemmed from a third-party vendor, had been "quickly remedied" and was not "likely to recur." *Id.* With respect to the problem of human error, we explained that

> the Registry Unit has implemented stronger protocols to prevent human error. It has implemented "procedural quality checks . . . to sample work as it [is] being performed" and to ensure it is "in accordance with procedures on handling documents and [indexing them] prior to uploading." It has further implemented a system of text-searching batch uploads before they are scanned to the Registry site to ensure none contains Schedule B keywords. At the time of trial in 2016, the Registry Unit had halted batch uploads altogether in favor of loading each document individually, as it was refining the text-search system. After forms are loaded to the Registry, the Charitable Trusts Section runs an automated weekly script to identify and remove any documents that it had inadvertently misclassified as public. There is also no dispute that the Registry Unit immediately removes any information that an

> organization identifies as having been misclassified for public access.

Id. There was no evidence that these "cybersecurity protocols are deficient or substandard as compared to either the industry or the IRS, which maintains the same confidential information." *Id.* at 1019.

We also emphasized that we were addressing an *as-applied* challenge. *See id.* The key question, therefore, was not whether there was a "risk of inadvertent disclosure of *any* Schedule B information in the future," but rather whether there was a significant "risk of inadvertent disclosure of *the plaintiffs'* Schedule B information in particular." *Id.* There can be no question that this risk – which the district court failed to consider – is exceedingly small, so the plaintiffs did not show "a reasonable probability that the compelled disclosure of [their major] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. The state's interest in obtaining the plaintiffs' Schedule B information therefore was sufficient under *Doe* to justify the modest burden on First Amendment rights. *See AFPF II*, 903 F.3d at 1019.

V

Our colleagues sensibly declined to rehear this case en banc. Our decision to apply exacting scrutiny is consistent with Supreme Court precedent, *see Doe*, 561 U.S. at 196; *Buckley*, 424 U.S. at 64, *NAACP v. Alabama*, 357 U.S. at 463, Ninth Circuit precedent, *see Ctr. for Competitive Politics*, 784 F.3d at 1312–13, and out-of-circuit precedent, *see Schneiderman*, 882 F.3d at 381–82. Likewise, our conclusion

that the Schedule B reporting requirement survives exacting scrutiny is consistent with both Ninth Circuit and out-of-circuit precedent. *See Schneiderman*, 882 F.3d at 383–85; *Ctr. for Competitive Politics*, 784 F.3d at 1312–17. Although only two circuits have addressed the issue, they have uniformly held that nonpublic Schedule B reporting requirements satisfy the First Amendment because they allow state and federal regulators to protect the public from charitable fraud *without* subjecting major contributors to the threats, harassment or reprisals that could flow from public disclosure.

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AMERICANS FOR PROSPERITY FOUNDATION

App. No. ____

In The

Supreme Court of the United States

Americans for Prosperity Foundation,

Petitioner,

v.

Xavier Becerra,
in his official capacity as the Attorney General of California,

Respondent.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Americans for Prosperity Foundation is a nonprofit corporation organized under the laws of Delaware. It has no parent corporation and no publicly held company owns 10% or more of its stock.

Derek L. Shaffer

May 28, 2019