No. 19-____

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA

Respondent.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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

RULE 29.6 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.

RELATED PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, Petitioners state that the following proceedings are directly related to the action that is the subject of this Petition.

United States District Court (C.D. Cal.):

Ams. for Prosperity Found. v. Harris, No. 14-cv-9448 (Feb. 23, 2015) (order granting preliminary injunction)

Ams. for Prosperity Found. v. Harris, No. 14-cv-9448 (Apr. 21, 2016) (order granting judgment in favor of Plaintiff and entering permanent injunction)

United States Court of Appeals (9th Cir.):

Ams. for Prosperity Found. v. Harris, No. 15-55446 (Dec. 29, 2015) (partially vacating preliminary injunction)

Ams. for Prosperity Found. v. Becerra, Nos. 16-55727 & 16-55786 (Sept. 11, 2018), petition for reh'g denied, Mar. 29, 2019 (reversing judgment for plaintiffs, vacating permanent injunction, and remanding for entry of judgment for Defendant)

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INTRODUCTION

The Ninth Circuit has upheld against First Amendment challenge the California Attorney General's demand that thousands of registered charities annually disclose to the State the individual names and addresses of their major donors. In doing so, the court departed from decades of precedent and held that the Attorney General need not show such a blanket demand is narrowly tailored to advancing the government's purported law-enforcement interests. The decision prompted sharp disagreement on the Ninth Circuit, with five members of that court dissenting from denial of rehearing *en banc*. App. 74a-112a (Ikuta, J., dissenting from the denial of rehearing *en banc*, joined by Callahan, Bea, Bennett, and R. Nelson, JJ.). As the dissenters recognized, the Ninth Circuit's rejection of any narrow tailoring requirement in this context "eviscerates the First Amendment protections long established" by this Court. App. 96a. Because the Ninth Circuit's holding conflicts with this Court's precedents, creates a circuit split, and casts a nationwide chill upon the exercise of freedoms of speech and association, this Court's review is warranted.

"[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, government demands for the names of a charity's supporters are subject to exacting scrutiny. To satisfy such scrutiny, 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'n, 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). "[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." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

In the decision below, however, the Ninth Circuit purported to apply "exacting scrutiny," App. 15a, while jettisoning any requirement that California "narrow[ly] tailor[]" its chosen means to fit its asserted ends, App. 22a. The court sought to justify this holding by citing cases upholding disclosure requirements governing *elections*, where public disclosure of donors is recognized as the "least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley v. Valeo*, 424 U.S. 1, 68 (1976) (per curiam). But there is a categorical distinction between the election context, where compelled public disclosure can be an affirmative good, and the non-election context, where compelled disclosure (even to government itself) is at best a necessary evil. That is why this Court and others in the non-election context have consistently vindicated the "strong associational interest in maintaining the privacy of membership lists," *Gibson*, 372 U.S. at 555-56, by holding unconstitutional governmental demands for disclosure of a group's anonymous supporters.

This case has nothing to do with elections or any claimed interest in public transparency. Petitioner, as a 501(c)(3) charity, is prohibited from undertaking

any election-related advocacy. Even California acknowledges that the donor information at issue should remain *confidential*. Yet ample means exist for California to achieve its claimed law-enforcement interests without forcing thousands of charities to divulge the names and addresses of their top donors. Indeed, California lacks any satisfying explanation for why it is not content to send targeted, individualized requests for such information to the handful of charities it actually investigates each year, or why California cannot, at the very least, put in place genuine, robust confidentiality protections before collecting such information. The court of appeals' decision cannot be squared with well-settled constitutional protection for private association outside the election context or with this Court's and other circuits' precedents reaffirming that protection. To quote one *amicus* submission urging *en banc* review below, "Donor anonymity is too important a First Amendment right to be sold at so cheap a price." Brief of Philanthropy Roundtable et al., ECF No. 107, at 13.[1]

Beyond creating precedential conflict that warrants this Court's review, this case raises issues of exceptional public importance, as evidenced by submissions in the Ninth Circuit from a broad spectrum of concerned *amici* at the panel stage and then in support of *en banc* review—including a coalition of States' Attorneys General, the NAACP Legal Defense and Education Fund, the Council on American Islamic Relations, the Philanthropy Roundtable, and more.

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[1] Unless otherwise indicated, all docket citations refer to Case No. 16-55727 in the proceedings before the Ninth Circuit below.

The grave threat posed by California's blanket demand for donor-identity lists is compounded by the fact that, as the district court found, California has "systematically failed to maintain the[ir] confidentiality." App. 51a. As *amicus* Pacific Legal Foundation observed, "the risk of donor harassment posed by intentional or inadvertent public disclosure makes the impact of California's mandate reverberate nationwide." ECF No. 109 ("PLF Br."), at 6.

This Court should now determine whether government may compel across-the-board identification of donors, where that practice so clearly stands to chill speech, association, and donor contributions around the country. Unless this Court intercedes, the Ninth Circuit has opened the door for the major donors of thousands of charities to be exposed and chilled through California's dragnet. If this Court declines review, the resulting chill will be profound and lasting.

OPINIONS BELOW

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

The court of appeals' prior opinion at the preliminary-injunction stage is reported at 809 F.3d 536 and is reproduced at App. 57a-69a. The district court's preliminary-injunction opinion is unreported and is reproduced at App. 70a-73a.

JURISDICTION

On March 29, 2019, the court of appeals denied Petitioner's timely petition for rehearing *en banc*. On May 28, 2019, Justice Kagan extended the time for filing a petition for a writ of certiorari to August 26, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law … abridging the freedom of speech, … or the right of the people peaceably to assemble." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. The Challenged California Policy

Charities soliciting donations in California must register with the Registry of Charitable Trusts ("Registry") and renew annually by filing certain forms, including their federal tax return, IRS Form 990. Cal. Code Regs., tit. 11, § 301. This registration requirement is enforced by California's Attorney General, who has primary responsibility to supervise charitable organizations operating in California. Cal. Gov. Code § 12598.

Schedule B to federal income tax Form 990, titled the "Schedule of Contributors," has existed and been used by the Internal Revenue Service ("IRS") since 2000. *See* Supplemental Excerpts of Record, ECF No. 23 ("SER"), at 452-59. It requires that most charities list the names, addresses, and donation amounts

of major donors—*i.e.*, individuals who either contributed $5,000 or more in a given tax year or accounted for 2% of all charitable receipts that year. *See, e.g.*, SER480-85.

This donor information is extremely sensitive and strongly protected by federal law. Under 26 U.S.C. § 6104(b), the IRS is forbidden from disclosing the "name or address of any contributor" listed on Schedule B, and under § 6104(c)(3), the IRS generally cannot share a 501(c)(3)'s tax return (including Schedule B) with state regulators (except under narrow, specified circumstances where an entity has been deemed noncompliant). Federal employees who violate these strictures face civil and criminal penalties. *See* 26 U.S.C. §§ 7213, 7431. Charities must publicly disclose most of their tax return, *see* 26 U.S.C. § 6104(d)(1), but they are "not required to publicly disclose their donors." *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014) (plurality opinion); *see* 26 U.S.C. § 6104(d)(3)(A) (exempting charities from having to disclose "the name or address of any contributor"). In short, a charity's Form 990 is public, but its Schedule B is not.

The legislative history surrounding the relevant federal statute explains that Congress explicitly provided for donor privacy "because some donors prefer to give anonymously" and because "requir[ing] public disclosure in these cases might prevent the gifts." S. Rep. No. 91-552, at 53 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2081.

No California law or regulation expressly requires charities to file their Schedule Bs with the California Attorney General in renewing their annual registrations. As a result, for over a decade, thousands of

charities registered and renewed their annual registrations with the Registry without submitting Schedule B donor information. *See* Excerpts of Record, ECF No. 9 ("ER"), at 581-83.

Starting in 2010, however, the Registry began issuing deficiency letters to charities demanding that they submit their Schedule B as part of their annual registration renewal. App. 10a. Between 2010 and 2015, the Registry sent some eight thousand Schedule B deficiency letters to different charities, effectively creating a *de facto* requirement that the tens of thousands of charities registered in California must annually submit to the State their Schedule B in order to renew their registration. ER375-76.

B. The Demonstrated Pattern Of Confidentiality Violations By California

Despite pledging to maintain the confidentiality of Schedule Bs, California has pervasively violated that pledge.

When charities wrote back to California expressing concerns about potential exposure of their donors listed on Schedule Bs, the Assistant Attorney General in charge of the Registry provided express assurances to each that "[t]he Registry has for at least the last 21 years maintained Schedule B for public charities as a confidential document" and that she was "not aware of an inadvertent disclosure in the last 21 years." SER201-06. The Attorney General's Office likewise represented, in staving off a preliminary injunction in *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), and then in opposing a preliminary injunction in this case that "there is no evidence

to suggest that any 'inadvertent disclosure' has occurred." Answering Brief, *Ctr. for Competitive Politics v. Harris*, No. 14-15978, ECF No. 17-1, at 32-33 (9th Cir. July 8, 2014); *see* Appellant's Opening Brief, *Ams. for Prosperity Found. v. Harris*, No. 15-55446, ECF No. 12-1, at 9-10 (9th Cir. May 7, 2015); Appellant's Reply Brief, *Ams. for Prosperity Found. v. Harris*, No. 15-55446, ECF No. 23, at 15 (9th Cir. July 8, 2015). But it turned out that these representations were "inaccurate" when they were submitted, as multiple representatives of the Attorney General acknowledged when cross-examined at trial. ER634, ER1042-46.

In the course of this litigation, Petitioner discovered 1,778 Schedule Bs that the Attorney General's Registry had publicly posted online, and it learned that the Registry had known of for years (but swept under the rug) at least 25-30 other Schedule Bs it had previously posted online. App. 52a; ER816-17. Affected charities include many associated with controversial causes. "For instance, in 2012 Planned Parenthood became aware that a complete Schedule B for Planned Parenthood Affiliates of California, Inc., for the 2009 fiscal year was publicly posted; the document included the names and addresses of hundreds of donors." App. 92a. As the Attorney General's designee recognized when testifying, "posting that kind of information publicly could be very damaging to Planned Parenthood." ER626-27.

Even those lapses were just the tip of the iceberg. During trial, "California's computerized registry of charitable corporations was shown to be an open door for hackers." App. 92a. In particular, Petitioner discovered that "every confidential document in the registry—more than 350,000 confidential documents"

(including Schedule Bs)—were publicly accessible online. App. 92a. A flaw in the Registry's filing protocol permitted any Internet user to obtain "confidential" documents (including but not limited to Schedule Bs) "merely by changing a single digit at the end of the website's URL." App. 92a. Even after recognizing this gaping vulnerability, the Attorney General's office still spent eight days patching the hole. ER936-47.

Before witnesses were placed under oath and made to testify in this case, the California Attorney General's Office had never reported any of these known lapses to anyone—not to other state agencies, to affected charities, or to exposed donors. ER765-66. At trial, the officer in charge of the Registry testified that the inadvertent public release of a Schedule B would not even qualify as a "breach" of the office's confidentiality policy, and, further still, that the Registry has been internally interpreting the governing statute to permit a range of deliberate Schedule B disclosures, including in response to public-record requests and academic inquiries. ER1033-34, ER1054-56; Cal. Civ. Code § 1798.24.

Further underscoring the lack of substance behind California's assurances of "confidentiality," the Attorney General has afforded third-party vendors unfettered access to Schedule Bs, without interposing any oversight or instruction. ER928-36. Never once has the Attorney General penalized anyone for any of

these improper disclosures of Schedule Bs. ER813-14.[2]

C. AFPF And Its Donors

Petitioner Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) charity that fundraises nationwide and educates the public about free-market solutions. App. 10a, 41a. It has a sister organization named Americans for Prosperity, which is a 501(c)(4) organization focused on policy and legislative change. App. 10a. The general public, including protestors, does not differentiate between AFPF and Americans for Prosperity. ER202-03. Charles and David Koch have been closely associated with these organizations; they both helped establish AFPF, and David Koch served as chairman of the board. ER230.

Since 2001, AFPF had renewed its registration annually with the Registry without disclosing individual donors on Schedule B, and for over a decade the Registry accepted each renewal. App. 89a-90a. Starting in 2013, however, the Registry began sending Schedule B deficiency letters to AFPF. App. 10a-11a. The final letter prompted this litigation by threatening to suspend AFPF's registration, disallow its tax exemption, and impose fines on any of AFPF's officers personally responsible for the failure to file Schedule B. SER185-86.

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[2] Although the Attorney General adopted, post-trial, a regulation to "codify" the office's approach to confidentiality, that regulation concededly does nothing to *improve* the Attorney General's protocols for handling sensitive information, nor does it establish penalties for breaches. SER490.

AFPF's donors are the organization's lifeblood. ER196. Schedule B donors are especially vital because they are AFPF's largest contributors—each accounts for at least 2% of AFPF's annual revenue. App. 8a. The donors listed on AFPF's Schedule Bs are limited in number (in recent years, they have totaled fewer than a dozen), App. 8a-9a, but their financial contributions are outsized, ER318. Losing even one Schedule B donor could require AFPF to shut down parts of its operation. ER201, ER318.

To protect its donors, AFPF treats all of its donor-identifying information—including Schedule Bs—as strictly confidential. ER195-96. It does so for good reason: as the district court found after a multi-day trial, persons perceived to be affiliated with AFPF face threats, harassment, and violence. App. 49a-50a.

It is undisputed that security threats arise against AFPF on a "regular basis." ER311-12. Those seeking to intimidate and silence AFPF have posted online the names and addresses of its reported supporters—and even the addresses of their children's schools. App. 79a. They have also sent countless threats of death and violence, with some even targeting the supporters' grandchildren. App. 50a. A contractor who worked at AFPF's headquarters wrote online about infiltrating the "belly of the beast" and threatening to slit the throat of AFPF's CEO. App. 88a. A disturbing first-person shooter video game was posted online that had players entering Americans for Prosperity's headquarters to murder employees, who were depicted as zombies. ER447-49; SER550. AFPF itself has been the victim of a serious bomb threat and a cyberattack. ER313-14; ER300.

Sometimes the animosity boils over into physical violence. At a Michigan rally, knife-wielding protestors tore down Americans for Prosperity's heavy tent, which collapsed on supporters, including elderly supporters who could not escape on their own. ER205-07; SER551. At one of AFPF's annual summits in Washington, D.C., protestors physically blocked exits, "tried to push and shove and keep people in the building," and caused a 78-year-old attendee to tumble down the stairs. ER468-70; SER760-63.

Actual, potential, and even perceived donors report that they have been singled out for audits and investigations by government officials as a result of their donations (real or perceived). ER310-13. California officials, including the predecessor Attorney General, have taken aim at the relevant network in an effort to stamp out anonymous giving, which they denigrate as "dark money." ER254-66; SER448-49.

Efforts to identify and publicize AFPF's donors are manifold and unrelenting. Individuals have infiltrated AFPF events to surreptitiously record and then publicize suspected donors. ER266. Media have published donor information even when it is years old: In 2013, for example, the National Journal published decade-old Schedule Bs of AFPF after finding them mistakenly posted on a state government's website. ER199-200; SER554-57.

Given the grave, demonstrated risks they face of violence, harassment, and targeting around the country, AFPF's anonymous donors are deeply concerned about the prospect that their affiliation with AFPF might become public. ER306-08.

D. The District Court Proceedings

In December 2014, AFPF challenged the Attorney General's disclosure demand as unconstitutional. It secured a preliminary injunction, which a panel of the Ninth Circuit (Reinhardt, Fisher, and Nguyen, JJ.) vacated in December 2015 with instructions to enter a new, more limited preliminary injunction that would allow the Attorney General to collect AFPF's Schedule Bs but not publicize them. App. 68a-69a. Despite that ruling, the parties reached a standstill agreement that allowed AFPF to continue to withhold its Schedule Bs until the district court entered its final judgment.

Following a multi-day bench trial in early 2016, the district court (Real, J.) issued a permanent injunction that enjoined the Attorney General's disclosure demand as applied to AFPF. App. 56a.

The district court first found that the Attorney General's sweeping demand for Schedule B disclosures each year from the tens of thousands of registered charities "demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years." App. 47a. As the court noted, "[t]he only logical explanation for why [AFPF's] 'lack of compliance' went unnoticed for over a decade is that the Attorney General does not use the Schedule B in its day-to-day business." App. 45a. Indeed, less than 1% (5 out of 540) of the Attorney General's investigations of charities over the past ten years had even implicated Schedule B, and, even in those five investigations, the investigators were able to obtain the pertinent Schedule B information from other sources. App. 45a. A demand that *thousands* of charities submit confidential donor information *each year* just to

facilitate a mere *five* investigations over *ten years* does not "substantially relate" to a governmental interest—especially when all of the relevant information is available through other channels. App. 45a.

Relatedly, the district court also ruled that the Attorney General's dragnet demand is not narrowly tailored to the asserted law-enforcement interest. App. 45a-48a. In the rare case where a Schedule B might be useful, the Attorney General's investigators can obtain that Schedule B just by following their uniform practice of issuing audit letters or subpoenas to the specific charity or charities being investigated. *See* App. 45a-48a; ER1028. Indeed, the district court found that "[t]he record before the Court lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." App. 47a.

Further still, the district court found that the disclosure demand imperils the anonymity of AFPF's donors because the Attorney General has "systematically failed to maintain the confidentiality of Schedule B forms." App. 51a. As the court found, the Registry had published over "1,778 confidential Schedule Bs" on its website, "including 38 which were discovered the day before this trial." App. 52a. Many of these Schedule Bs (revealing innumerable individual donors) had been publicly available for years. ER850-51. The court concluded that this "pervasive, recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the Attorney General's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry." App. 52a.

Given these failings, and especially given the "ample evidence establishing that [AFPF], its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known," App. 49a, the court issued a permanent injunction that enjoined the Attorney General's demand for Schedule B as applied to AFPF, App. 56a. The court emphasized it was "not prepared to wait until an [AFPF] opponent carries out one of the numerous death threats made against its members." App. 50a.

E. The Ninth Circuit Decision

On appeal and cross-appeal of the final judgment, a panel of the Ninth Circuit vacated the injunction and directed judgment for the Attorney General. App. 1a-40a (Fisher, J., joined by Nguyen and Paez, JJ.).[3] The court held that the district court had legally erred by requiring narrow tailoring of means to ends when applying exacting scrutiny in this context. App. 22a ("[N]arrow tailoring and least-restrictive-means tests … do not apply here."). In jettisoning any requirement of narrow tailoring, the court of appeals relied on cases such as *Doe v. Reed*, 561 U.S. 186 (2010), which apply less exacting scrutiny to disclosure requirements in the electoral context. App. 16a-

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[3] The late Judge Reinhardt, who presided over the first panel (which decided the preliminary-injunction appeal in this case), passed away before oral argument in the appeal from the final judgment. Judge Reinhardt was then replaced by Judge Paez, who had written a related opinion for the court in *Center For Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015) (affirming denial of a request for preliminary injunction to restrain California's demand for Schedule Bs).

17a. The court of appeals' rejection of narrow tailoring was indispensable to its reversal of the district court's ruling, which had expressly found that California could achieve its interests through narrower means that would avoid casting excessive chill upon protected associational activity.

The court of appeals also ruled that the district court had erred in concluding that the submission of Schedule Bs does not advance the governmental interest in policing charitable fraud; that forcing AFPF to provide the Attorney General with its Schedule B would chill contributions to AFPF; and that providing the Schedule B presents a significant risk of public disclosure of donor information in light of the Attorney General's systematic confidentiality lapses. App. 22a-23a, 39a.

Five judges dissented from the Ninth Circuit's denial of rehearing *en banc*. App. 77a-97a. They criticized the panel for committing "crucial legal errors," particularly 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. App. 79a. In the view of the dissenters, the panel's adoption of this lesser scrutiny broke with decisions from multiple sister circuits, App. 84a-85a & n.1, en route to a conclusion that "is contrary to the reasoning and spirit of decades of Supreme Court jurisprudence," App. 96a.

The dissenters also lamented the "equally egregious" "factual errors" made by the panel, which "not only failed to defer to the district court, but also reached factual conclusions that were unsupported by

the record." App. 91a. The panel, according to the dissenters, "violated our standard of review as well as common sense" by rejecting the district court's well-founded factual findings. App. 92a-93a. The dissenters emphasized the panel's lack of warrant for overturning, in particular, the district court's findings that "the state did not have a strong interest in obtaining the Schedule B submissions to further its enforcement goals," App. 93a, and that "the state's promise of confidentiality was illusory" particularly insomuch as "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," App. 78a-79a.[4]

The court of appeals granted AFPF's timely application to stay the mandate pending this Court's disposition of this Petition. Throughout these years of proceedings, AFPF has protected the Schedule Bs at issue against demand for disclosure by the Attorney General, and it continues to do so pending this Court's disposition of the instant petition.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND CREATES A CIRCUIT SPLIT

A. The Ninth Circuit's Holding Conflicts With This Court's Precedents

As this Court has long recognized, the First Amendment guarantees the "right to associate with others in pursuit of a wide variety of political, social,

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[4] Responding to the dissent, the panel judges defended their resolution of the merits. App. 98a-109a.

economic, educational, religious, and cultural ends," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984), as well as the right to support causes anonymously, *see Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166-67 (2002); *Talley v. California*, 362 U.S. 60, 64-65 (1960). The seminal example is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), where the Court struck down the Alabama Attorney General's demand that the NAACP divulge the names of its members. Recognizing that "privacy in group association" is "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs," the Court held in *NAACP v. Alabama* that compelled disclosure of the identities of an expressive group's supporters must satisfy exacting scrutiny in order to pass constitutional muster. *Id.* at 462-63; *see also Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (describing *NAACP v. Alabama* as calling for "exacting scrutiny").[5]

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[5] When describing the level of scrutiny governing a First Amendment challenge, this Court sometimes treats "exacting scrutiny" interchangeably with "strict scrutiny." *Compare, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664-65 (2015) (variously describing as "exacting scrutiny" and "strict scrutiny" a test requiring a speech limitation to be "narrowly tailored to serve a compelling interest"), *with, e.g.*, *Janus v. Am. Fed'n of State, Cty., & Mun. Emps, Council 31*, 138 S. Ct. 2448, 2465 (2018) (applying a version of "exacting" scrutiny that is "a less demanding test than … 'strict' scrutiny"). Here, whether the test set forth by *NAACP v. Alabama* and its progeny is labeled "exacting scrutiny" or "strict scrutiny" is inconsequential to the fundamental point, on which this Court and circuits other than the Ninth align, that the requirement of narrow tailoring is essential to the analysis, as explained *infra*, at 19-21, 23-28. *See* App. 81a ("While the Supreme Court has articulated this three-part test

To satisfy this exacting scrutiny, 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'n*, 372 U.S. 539, 545-46 (1963); *see also Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 98 (1974) (Marshall, J., dissenting) ("The First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure.").

For decades, a core component of exacting scrutiny has required that any government demand for member or donor lists be "narrowly drawn." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961); *accord Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (holding unconstitutional a sweeping government demand for information about associations of public school teachers because, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); *Roberts v. Pollard*, 393 U.S. 14 (1968), *summarily affirming* 283 F. Supp. 248, 257 (E.D. Ark. 1968) (three-judge court) (absent narrow tailoring, governments could demand "sweeping and indiscriminate identification of all of the members of the group in excess of the State's legitimate need for information"); *see also Roberts*, 468 U.S. at 634

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in various ways, it has made clear that the test affords substantial protection to persons whose associational freedoms are threatened," including by requiring that the government's "means were narrowly tailored").

(O'Connor, J., concurring in part and concurring in the judgment) ("Reasonable, content-neutral state regulation of the time, place, and manner of an organization's relations with its members or with the State can pass constitutional muster, but only if the regulation is 'narrowly drawn' to serve a 'sufficiently strong, subordinating interest' 'without unnecessarily interfering with First Amendment freedoms.'" (quoting *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37 (1980))).

This Court's decisions align around a basic principle: a State can *never* interfere with associational rights unless it uses means "closely drawn to avoid unnecessary abridgement of associational freedoms." *In re Primus*, 436 U.S. 412, 432 (1978) (quoting *Buckley*, 424 U.S. at 25); *see also, e.g.*, *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 680 (2010) ("restrictions" on "associational freedom" are "permitted only if they serve 'compelling state interests' that … cannot be advanced 'through … significantly less restrictive [means]'" (quoting *Roberts*, 468 U.S. at 623)); *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) ("a State may not choose means that unnecessarily restrict constitutionally protected liberty").

More broadly, narrow tailoring is part and parcel of the heightened scrutiny that always attends laws abridging interests protected under the First Amendment. As this Court has explained:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best

> disposition but one whose scope is in proportion to the interest served … that employs not necessarily the least restrictive means but … a means narrowly tailored to achieve the desired objective."

McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (plurality opinion) (quoting *Bd. of Trs. v. Fox*, 492 U.S. 469, 480 (1989)); *see also Janus*, 138 S. Ct. at 2465 ("'exacting' scrutiny," while "less demanding … than … 'strict' scrutiny," looks for "means significantly less restrictive of associational freedoms"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798-801 (1988) (applying "exacting First Amendment scrutiny" to strike down disclosure requirement imposed on charitable fundraisers because it was "not narrowly tailored").

The Ninth Circuit's decision squarely conflicts with this long and settled line of precedent. To uphold the California Attorney General's broad disclosure demand, the court of appeals held that "narrow tailoring and least-restrictive-means tests … do not apply here." App. 22a. As the *en banc* dissenters recognized, however:

> [T]here 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.

App. 84a.

It is no answer to suggest that this case should be governed instead by cases upholding disclosure laws governing *elections*, which do not ask whether a donor disclosure requirement is narrowly tailored to the government's interests. *See, e.g., Doe v. Reed*, 561 U.S. 186, 195-96 (2010); *Citizens United v. FEC*, 558 U.S. 310, 369-70 (2010); *Davis v. FEC*, 554 U.S. 724, 744 (2008). None of these cases "discuss[es] whether disclosure was narrowly tailored to address the government's concern" because "*Buckley* [*v. Valeo*] already held that it is." App. 83a. But this Court "has applied *Buckley*'s test only in cases that involve election-related disclosures"; "outside of the electoral context," in contrast, the Court "has maintained *NAACP v. Alabama*'s standard." App. 83a-84a (collecting cases).

These separate lines of cases reflect the categorical distinction between donations to candidates for electoral office, where compelled public disclosure can be an affirmative good, and donations in the non-election context, where compelled disclosure is, at best, a necessary evil. As the dissent from denial of rehearing *en banc* recognized, the government has a unique interest in "ensuring our election system is free from corruption or its appearance." App. 82a. Furthermore, unlike when citizens associate in private, voting involves the machinery of government, over which states enjoy considerable latitude. As noted in *Doe v. Reed*, "We allow States significant flexibility in implementing their own voting systems." 561 U.S. at 195. Due to the unique interests at play in the electoral context, this Court has held since *Buckley v. Valeo*

that *public* disclosure of *election-related* donors is the "least restrictive means of curbing the evils of campaign ignorance and corruption." 424 U.S. at 68. In other words, *Buckley* "fashioned a per se rule" that "the narrow tailoring prong of the *NAACP v. Alabama* test is satisfied" when a government invokes its venerable interest in compelling disclosure specifically of donors who give money to influence elections. App. 82a.

Outside of the election context, however, this Court has long and consistently vindicated the "strong associational interest in maintaining the privacy of membership lists." *Gibson*, 372 U.S. at 555-56. Indeed, giving law enforcement wide latitude to enforce sweeping demands for donor information simply because law enforcement desires it is tantamount to abdicating *NAACP v. Alabama*.

Accordingly, this Court should grant certiorari "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." App. 97a. The brief of *amicus* NAACP Legal Defense and Education Fund well explained to the merits panel below why exacting scrutiny—*truly* exacting scrutiny—remains no less essential today: "By collecting and aggregating confidential information about an organization's donors or members, the government creates a loaded gun that a future administrat[ion] might decide to fire." ECF No. 45 ("NAACP Br."), at 28.

B. The Ninth Circuit's Holding Creates A Circuit Split

The Ninth Circuit's disavowal of narrow tailoring likewise splits from the holdings of its sister circuits. As the *en banc* dissent below explained, "[u]ntil 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." App. 84a. The First, Second, Third, Fourth, Fifth, Sixth, Tenth, and D.C. Circuits have all agreed, in applying exacting scrutiny outside the election context, that any compelled disclosure of a group's supporters must be narrowly tailored to or the least-restrictive means of achieving the asserted governmental interest.

For example, the Fifth Circuit held in *Familias Unidas v. Briscoe* that compelled disclosure will not be upheld absent narrow tailoring. 619 F.2d 391, 399 (5th Cir. 1980). *Familias Unidas* concerned a Texas statute that authorized county judges to compel membership lists from organizations that interfered with the operation of public schools. *Id.* at 394. When a local judge invoked Texas's disclosure law to order a school-reform group to disclose its members, the group sued in federal court, arguing that the statute violated the First Amendment. *Id.* at 395-97.

The Fifth Circuit held that the statute violated the First Amendment precisely because it was not narrowly tailored. *Id.* at 402. The Fifth Circuit first acknowledged that Texas had a "legitimate and compelling" interest in the "peaceful, undisrupted functioning of its public schools" and that the disclosure

law bore a "relevant correlation" to that interest. *Id.* at 400. Nevertheless, the Fifth Circuit struck down the law as one that "swe[pt] too broadly." *Id.* "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.

The Second Circuit has likewise struck down a compelled disclosure because it was not narrowly tailored. In *Local 1814, International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, a government commission was investigating claims that a local union had coerced its members into contributing to the union's political action committee. 667 F.2d 267, 269-70 (2d Cir. 1981). When the commission issued a subpoena seeking the names of 450 members who had contributed during the relevant period, the union and its political action committee sued to enjoin the subpoena, arguing that the compelled disclosure violated the First Amendment. *Id.* at 270.

The district court agreed that the subpoena was likely to chill the union members' First Amendment rights, while simultaneously recognizing that "disclosure was reasonably related to the compelling state interest in fighting crime." *Id.* To balance these interests, the court ultimately modified the subpoena to authorize disclosure of only 45 of the 450 members. *Id.* While the union appealed the limited disclosure, the commission cross-appealed, arguing that the district court should have authorized the disclosure of all requested members. *Id.* at 269.

The Second Circuit rejected the commission's argument and held the unmodified subpoena unconstitutional. Although the court agreed that the original subpoena related to a compelling state interest, the court held that it nevertheless violated the First Amendment to the extent it was not narrowly tailored:

> Our determination that disclosure is significantly related to the achievement of a compelling governmental interest does not end our inquiry, however, for we must still examine the scope of the proposed action. … [W]e think it is appropriate in determining whether the governmental interest justifies the inevitable chilling effect of some disclosures to assess whether the disclosures will impact a group properly limited in number in light of the governmental objective to be achieved. … [W]e agree with [the district court] that, at this stage, disclosure of all 450 names of these contributors would sweep unnecessarily beyond the Commission's legitimate needs.

Id. at 273-74 (citations omitted).

The Second Circuit's recent decision in *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018), does not disturb its prior holding that compelled disclosures must be narrowly tailored. While the court affirmed the dismissal of a First Amendment challenge to New York's demand for Schedule Bs, it did so on grounds that did not reach the requirement of narrow tailoring. Moreover, it specifically distinguished

the instant case by noting California's "systematic incompetence in keeping donor lists confidential." *Id.* at 384 (citing App. 51a).

The First, Third, Fourth, Sixth, Tenth, and D.C. Circuits have likewise agreed that narrow tailoring is a necessary part of exacting scrutiny in this context.[6] As the Fourth Circuit put it: "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*." *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984) (emphasis added).

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[6] *See 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."); *Trade Waste Mgmt. Ass'n v. Hughey*, 780 F.2d 221, 239 (3rd Cir. 1985) (when scrutinizing compelled disclosure laws of social or political associations, courts must determine "whether the state's ends could be achieved through less intrusive means"); *Humphreys, Hutcheson, & Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985) (upholding a challenged disclosure law only after determining that the law's provisions were "carefully tailored so that first amendment freedoms [were] not needlessly curtailed"); *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."); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984) (to "compel[] disclosure" of a person's associations, the government must establish that the "means chosen to further its compelling interest are those least restrictive of freedom of belief and association").

The Ninth Circuit's decision creates a stark split from these uniform decisions by eschewing any regard for narrow tailoring. The Ninth Circuit has thus injected uncertainty into an area where clear rules are essential—particularly for charitable organizations that operate and fundraise nationally. This Court's intervention is needed to clarify the limits of compelled disclosure laws and ensure uniformity in the standard of review they must answer to under the First Amendment.

II. THIS CASE RAISES EXCEPTIONALLY IMPORTANT FIRST AMENDMENT ISSUES

The Ninth Circuit's decision further warrants review because it threatens grave harm to vital First Amendment interests on a national basis. By its terms, the Ninth Circuit's holding condones compelled disclosures from tens of thousands of charities across the country, merely because they operate and register in California. The resulting chill will be felt nationwide as numerous organizations and their donors grapple with disclosure requirements and the attendant threats to confidentiality. Recognizing as much, dozens of charities from across the political spectrum and nearly a dozen States submitted amicus briefs supporting AFPF's position in the proceedings below.[7]

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[7] *See* ECF No. 26 (Pacific Legal Foundation) (**panel stage**) (supporting AFPF), ECF No. 30 (Electronic Privacy Information Center) (same), ECF No. 31 (Philanthropy Roundtable) (same), ECF No. 36 (Arizona, Alabama, Louisiana, Nevada, Texas, and Wisconsin), ECF No. 37 (American Target Advertising, Inc.) (same), ECF No. 42 (Free Speech Defense and Education Fund, Free Speech Coalition, Citizens United, Citizens United Foundation, National Right to Work Committee, U.S. Constitutional

The factual record established in this case highlights the dramatic consequences of the Ninth Circuit's legal errors. Not only did the Ninth Circuit jettison any need for narrow tailoring in concluding that Schedule B disclosure enhances "investigative efficiency," App. 19a, but it dismissed contrary findings and record proof by effectively demanding deference to self-serving, conclusory statements by state wit-

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Rights Legal Defense Fund, U.S. Justice Foundation, Family Research Council, Western Center for Journalism, Conservative Legal Defense and Education Fund, The Leadership Institute, Public Advocate of the United States, Downsize DC Foundation, DownsizeDC.org, Gun Owners Foundation, Gun Owners of America, 60 Plus, 60 Plus Association, America's Foundation for Law and Liberty, America's Liberty Committee, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Liberty Guard, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, CatholicVote.org, Eberle Communications Group, Inc., ClearWord Communications Group, Davidson & Co., and JFT Consulting, Inc.) (same), ECF No. 43 (Pacific Research Institute, Cato Institute, and Competitive Enterprise Institute) (same), ECF No. 44 (Alliance Defending Freedom) (same), ECF No. 45 (NAACP Legal Defense and Education Fund) (same), ECF No. 46 (Proposition 8 Legal Defense Fund) (same); *see also* ECF No. 107 (Philanthropy Roundtable, Liberty Education Forum, Pacific Research Institute, and Alliance Defending Freedom) (***en banc* stage**) (supporting vacatur of panel decision), ECF No. 108 (Council on American-Islamic Relations) (same), ECF No. 109 (Pacific Legal Foundation) (same), ECF No. 114 (Citizens United, Citizens United Foundation, Free Speech Defense and Education Fund, and Free Speech Coalition) (same), ECF No. 115 (American Target Advertising) (same), ECF No. 118 (Arizona, Alabama, Arkansas, Kansas, Louisiana, Nebraska, Nevada, South Carolina, Texas, and Wisconsin) (same), ECF No. 121 (New Civil Liberties Alliance) (same), ECF No. 122 (Proposition 8 Legal Defense Fund) (same).

nesses, App. 18a-21a. By disregarding copious evidence of First Amendment chill and governmental overreach while deferring to the feeblest of claimed justifications by the government, the Ninth Circuit laid down a precedent that transcends Schedule B and invites States to demand and collect *any* donor list based on law enforcement's say-so.[8] As the *en banc* dissent below explained, "[u]nder 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." App. 96a. And, as *amicus* Pacific Legal Foundation warned, "The panel decision … slams shut the courthouse doors by establishing a nearly insurmountable bar to as-applied challenges to such laws." PLF Br. at 8.

The Ninth Circuit's weakening of exacting scrutiny compromises First Amendment rights and interests across the political spectrum. Any group, and anyone who donates to it, may wind up on the wrong side of a particular government official, in a particular part of the country, at a particular point in time—just as any leak of identifying information may radiate around the country, at the push of a button, thereafter to be permanently etched on the Internet. All expressive

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[8] Although the panel noted that relatively few names appear on Schedule B, App. 8a-9a, the same qualification weighs on both sides of the scales—for Schedule B's utility to law enforcement extends no further than the list is long. Under the panel's approach, therefore, the identities of *all* donors are no less subject to compulsion once the government asserts an interest in accessing complete donor information to facilitate possible investigation.

organizations of every political stripe are threatened by this dynamic. It should be no surprise that a prominent Muslim charity warns that "[s]ubjecting governments to only rational basis review"—as the Ninth Circuit effectively did—"creates a world that permits sweeping associational surveillance." Brief of Council on American-Islamic Relations, ECF No. 108, at 15; *see also* PLF Br. at 8.

Especially problematic is the court's treatment of confidentiality concerns. The record reveals the very real danger posed by California's demand for Schedule B as well as the chill that will be cast upon charities and donors that rationally value privacy in their association. *See supra*, at 7-12. The California Attorney General's assurances of confidentiality have proved unreliable, at best. Indeed, the Attorney General's assurances and representations proved irreconcilable with known breaches, revealed in the court proceedings below, that the Attorney General's office had previously denied occurred.

Upholding the Attorney General's demand under these circumstances plainly chills associational activity protected under the First Amendment. Because Schedule Bs systemically leaked in the past—with no consequences for those responsible—donors have every reason to fear leaks in the future. If the Attorney General's demand nevertheless stands, informed donors who want to safeguard their identities from public disclosure will have good reason to cease or curtail their giving.

Confronting California's record of hollow assurances and uncontrolled leaks, the Ninth Circuit acknowledged that "this history raises a serious concern" about the absence of confidentiality. App. 35a.

But the Ninth Circuit *nonetheless* reversed the district court's relevant findings. App. 38a-40a. The court below was content to accept the Attorney General's latest promises of new safeguards and to "encourage all interested parties to work cooperatively to ensure that Schedule B information in the hands of the Attorney General remains confidential." App. 37a-38a n.11.

As the dissent from the denial of *en banc* rehearing observed, however, "no evidence" supports the claim that California's new safeguards "would obviate future disclosures," and such a claim "is contrary to any real-world experience." App. 93a. Notably, the Attorney General's hollow assurances of confidentiality never would have been debunked absent successful litigation and judicial relief, which would henceforward be foreclosed if the Ninth Circuit's decision stands. Under the decision below, a challenge like this would be doomed at its inception, as no donor or charity would be able to state a valid First Amendment claim in court (as opposed to appealing to the Attorney General's cooperative impulses). That state of the law is no more satisfying than it would have been had this Court decided *NAACP v. Alabama* the opposite way while simply urging the State of Alabama to be fair and work cooperatively with the NAACP.

To the extent that Schedule Bs continue to leak (as they consistently have throughout the period covered by this record), the damage will be irreversible. "[O]nce confidential information enters the public domain, there is no effective way to claw it back." NAACP Br. at 30; *see Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010); *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) (Blackmun, J., in chambers);

see also Maness v. Meyers, 419 U.S. 449, 460 (1975). Such irreversible public disclosure presents a grave risk of threats, harassment, and violence for AFPF's donors and for the donors of thousands of other charities whose Schedule B is unsafe in the California Attorney General's hands.

Moreover, other States will be rendered powerless to protect donors and facilitate anonymous donations to the extent that California is permitted to become a weak link in the chain. Whenever California enables release of confidential information about donors, the release radiates nationwide, thereby nullifying the careful measures other jurisdictions take to protect and encourage anonymous giving.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED

This case affords an excellent opportunity to clarify the framework governing compelled disclosure of group affiliations outside of the election context. AFPF, as a 501(c)(3) charity, is strictly prohibited from undertaking any election-related advocacy. And the Attorney General has disavowed the traditional interest in public disclosure that has been credited in election cases. App. 59a.

Moreover, the proceedings here yielded a rich factual record drawing on days of live witness testimony that make the First Amendment concerns at stake vivid and non-hypothetical. Among AFPF's witnesses at trial were multiple high-level officers who have navigated security threats and efforts to out and to attack donors; a former board member and longstanding public donor whose travails afford a "cautionary tale" for those who might become publicly linked to AFPF;

an academic expert who opined specifically about the value and importance of anonymous giving, and the harms that arise from involuntary disclosure; and a statistical expert, who systematically studied and assessed the incidence of California's known confidentiality breaches. App. 49a-50a; *see* ER193, ER296, ER331-32, ER367-68, ER472, ER503, ER513. Among the Attorney General's witnesses were the senior deputy responsible for supervising the Registry as well as her predecessor; the current and former Registrars; the lead auditor responsible for investigating charities; and an attorney who supposedly used Schedule B for a charitable investigation. App. 20a; ER736-37, ER966-67, ER991-92, ER1012.

When all was said and done, the revelations were dramatic. After presiding over the multi-day bench trial and studying the record, the district court found "ample evidence establishing that [AFPF], its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." App. 49a. It further found that "the Attorney General has systematically failed to maintain the confidentiality of Schedule B forms," App. 51a, and that the Attorney General failed to establish a substantial relationship between the demand for Schedule B and a sufficiently important governmental interest, as well as proper tailoring of means to ends, App. 44a-47a. Underlining that point is agreement by ten States as *amici* that "California's policy of compelled disclosure is not necessary to the work of policing non-profit organizations." ECF No. 118, at 2.

Finally, this case's posture affords the rare opportunity to ensure that the important legal issues raised

will not evade judicial review. Government policies that chill speech often deter challengers; this problem is magnified where anonymity is the very First Amendment interest at issue. Here, however, AFPF has mounted a robust challenge and fended off California's demands for disclosure throughout years of litigation, such that the identities of its anonymous donors remain secure as of this Petition.

Accordingly, AFPF has indisputable standing to challenge the disclosure demands, and its claims are ripe and not moot. Unless reversed, the Ninth Circuit's decision may make it difficult for would-be challengers going forward to demonstrate that a charity and its donors face dangers comparable to those demonstrated on the record here—or that disclosure demands confronted elsewhere in the country appreciably surpass those already incurred and condoned in California. If the decision below stands, subsequent challengers will be hard pressed to secure the relief necessary to ward off a governmental demand for donor identities while a case winds its way to this Court. These potential problems afford additional reason why this Court should use this case to take up and decide the Question Presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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August 26, 2019

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 9/11/2018]

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No. 16-55727
D.C. No. 2:14-cv-09448-R-FFM

———

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff-Appellee,

v.

XAVIER BECERRA, in his Official Capacity as Attorney General of California,

Defendant-Appellant.

———

No. 16-55786
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. 16-56855
D.C. No. 2:15-cv-03048-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. 16-56902
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.

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

OPINION

SUMMARY*

Civil Rights

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

Opinion by Judge Fisher

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

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

nonpublic disclosure requirement would chill contributions. The panel further concluded that 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.

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Vienna, Virginia; Joseph W. Miller, Ramona, California; Michael Boos, Washington, D.C.; for Amici Curiae Free Speech Defense and Education Fund, Free Speech Coalition, Citizens United, Citizens United Foundation, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, U.S. Justice Foundation, Family Research Council, Western Center for Journalism, Conservative Legal Defense and Education Fund, The Leadership Institute, Public Advocate of the United States, Downsize DC Foundation, Downsize. Org, Gun Owners Foundation, Gun Owners of America, 60 Plus, 60 Plus Association, America's Foundation for Law and Liberty, America's Liberty Committee, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Liberty Guard, Coalition for a Strong America, The Jesse Helms Center, Americans for Constitutional Liberty, Catholicvote.org, Eberle Communications Group, Inc., Clearword Communications Group, Davidson & Co., and JFT Consulting.

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 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

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

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 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 Govern-

ment 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 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

[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.

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]

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[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

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.

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

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investigations, because the Attorney General understandably refused to name the charities under current investigation.

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]

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[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

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 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

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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).

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 free-

dom 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 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

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[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).

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]

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[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

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 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]

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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.

[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

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 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 retalia-

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retaliation – something we are confident they could have accomplished without compromising their contributors' anonymity.

[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.

tion, 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 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

[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).

> 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.

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

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[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.

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 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

[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

that "there is always a risk 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.

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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.

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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

[Filed 4/21/2016]

Case No. CV 14-9448-R

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff,

v.

KAMALA HARRIS, in her Official Capacity as Attorney General of California,

Defendant.

ORDER FOR JUDGMENT
IN FAVOR OF PLAINTIFF

For the reasons that follow, this Court grants Americans For Prosperity Foundation's ("AFP") motion for a permanent injunction to enjoin the Attorney General of California from demanding its Schedule B form. After conducting a full bench trial, this Court finds the Attorney General's Schedule B disclosure requirement unconstitutional as-applied to AFP.

Plaintiff AFP is a non-profit corporation organized under Internal Revenue Code section 501(c)(3) that funds its activities by raising charitable contributions from donors throughout the country, including in California. California state law requires charitable organizations, such as AFP, to file a copy of its IRS Form 990, including its Schedule B, with the State Registry. *See e.g.*, Cal. Code Regs. tit. 11, § 301. An

organization's Schedule B includes all the names and addresses of every individual nationwide who donated more than $5,000 to the charity during a given tax year. While a nonprofit's federal tax return, IRS Form 990, must be made available to the public, an organization's Schedule B does not. 26 U.S.C. § 6104(b), (d)(3)(A).

Since 2001, AFP has filed its Form 990 as part of its periodic reporting with the Attorney General, without including its Schedule B. For each year from 2001 through 2010, the Attorney General accepted AFP's registration renewal and listed AFP as an active charity in compliance with the law. In a letter dated March 7, 2013, the Attorney General declared AFP's 2011 filing incomplete because it did not include the organization's unredacted Schedule B. In December 2014, AFP brought the present action seeking an order preliminarily enjoining the Attorney General from demanding its Schedule B. Among other claims, AFP argued that the California law requiring disclosure of its Schedule B to the Attorney General was facially unconstitutional. AFP also argued that the disclosure requirement was unconstitutional as-applied to it.

On February 23, 2015, this Court granted AFP's motion for preliminary injunction, finding that the Plaintiff had raised serious questions going to the merits of its case and demonstrated that the balance of hardships sharply favored Plaintiff. That decision was appealed by the Attorney General and remanded by the Ninth Circuit. *Americans for Prosperity Found. v. Harris*, 809 F.3d 536 (9th Cir. 2015). In its remand, the Ninth Circuit held that this Court is bound by its previous decision in *Center for Competitive Politics v. Harris,* 784 F.3d 1307, 1317 (9th Cir. 2015)—that the Attorney General's nonpublic Schedule B disclosure

regime was not facially unconstitutional. *Americans for Prosperity Found.*, 809 F.3d at 538. The Ninth Circuit did, however, instruct this Court to have a trial on the as-applied challenge. *Id*. at 543.

Although AFP argues that this Court is not bound by the Ninth Circuit's prior rulings on its facial challenge since the record before the Court is much denser now than it was then, the "strong medicine" of facial invalidation need not and generally should not be administered when the statute under attack is unconstitutional as-applied to the challenger before the court. *See U.S. v. Stevens*, 559 U.S. 460, 482–83 (2010) (Alito, J., dissenting). Accordingly, the Court focuses solely on AFP's as-applied challenge.

I.

Courts review First Amendment challenges to disclosure requirements under an "exacting scrutiny" standard. *John Doe No. 1 v. Reed*, 561 U.S. 186, 187 (2010); *Citizens United v. FEC*, 558 U.S. 310, 366 (2010). Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." This encompasses a balancing test. In order for a government action to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1*, 561 U.S. at 196.

A. Strength of Governmental Interest

Defendant argues that the state law requiring that all charities file a complete copy of IRS Form 990 Schedule B places no actual burden on First Amendment rights and is substantially related to the Attorney General's compelling interest in enforcing the law and protecting the public. Before the Ninth Circuit, as well

as this Court, the Attorney General has claimed that her use for Schedule B information is compelling since that information reveals not just how much revenue a charity receives, but also who is donating it and how it is being donated. Additionally, the Attorney General claims that such information allows her to determine whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices. The Court finds two issues with this stated purpose. First, over the course of trial, the Attorney General was hard pressed to find a single witness who could corroborate the necessity of Schedule B forms in conjunction with their office's investigations. And second, even assuming arguendo that this information does genuinely assist in the Attorney General's investigations, its disclosure demand of Schedule B is more burdensome than necessary.

i. Sufficiently Important Governmental Interest

Although *Center for Competitive Politics* found that the Attorney General's "disclosure requirement bears a 'substantial relation' to a 'sufficiently important' government interest," this Court, unlike the Ninth Circuit, had the benefit of holding a bench trial in the matter and was left unconvinced that the Attorney General actually needs Schedule B forms to effectively conduct its investigations. 784 F.3d at 1317 (quoting *Citizens United*, 558 U.S. at 366). As a threshold matter, the record is undisputed that AFP has been registered with the Attorney General since 2001 and has never included a Schedule B with its annual filings. For each year from 2001 through 2010, the Attorney General accepted AFP's annual registration and listed the foundation as an active charity in compliance with the law. It was not until 2013 that the Attorney General

first notified AFP that its 2011 filing was incomplete because of the lack of Schedule B. The only logical explanation for why AFP's 'lack of compliance' went unnoticed for over a decade is that the Attorney General does not use the Schedule B in its day-to-day business. In fact, such an admission was made by David Eller, the Registrar for the Registry of Charitable Trusts in the Department of Justice. (Eller Test. 3/3/16 Vol. II, p. 75:16–20). As for the investigative unit of the Charitable Trusts Section, trial testimony confirmed that auditors and attorneys seldom use Schedule B when auditing or investigating charities. Steven Bauman, a supervising investigative auditor for the Attorney General, testified that out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section, only five instances involved the use of a Schedule B. (Bauman Test. 3/4/16, p. 22:4–23:25). In fact, as to those five investigations identified, the Attorney General's investigators could not recall whether they had unredacted Schedule Bs on file before initiating the investigation. And even in instances where a Schedule B was relied on, the relevant information it contained could have been obtained from other sources. (Bauman Test. 3/4/16, p. 31:8–32:10).

ii. Narrowly Tailored

The Attorney General argues that exacting scrutiny does not require the least restrictive means. This contention is supported by the Ninth Circuit's previous review in this case. *Americans for Prosperity Found.*, 809 F.3d at 541. However, the court only references *Chula Vista Citizens for Jobs & Fair Competition v. Norris* for such a position. 782 F.3d 520, 541 (9th Cir. 2015). In *Chula Vista*, association members alleged that the city's elector and petition-proponent disclosure requirements for ballot initiatives violated their

First Amendment rights to freedom of speech and association. The Ninth Circuit upheld these disclosure requirements after weighing the government's interests in the integrity of the electoral process and the public's informational interest against the relatively small burden imposed on the association members' First Amendment rights. *Id*. at 538.

In the context of elections and campaign finance disclosure laws, which have been the majority of cases in recent years applying exacting scrutiny, unique considerations apply that specifically shape and define the application of exacting scrutiny. *See Ctr. for Competitive Politics*, 784 F.3d at 1312 n.2 ("most of the cases in which we and the Supreme Court have applied exacting scrutiny arise in the electoral context"); *e.g.*, *Citizens United*, 558 U.S. 310; *John Doe No. 1*, 561 U.S. 186; *Davis v. FEC*, 554 U.S. 724 (2008); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Family PAC v. McKenna*, 685 F.3d 800 (9th Cir. 2012); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010). There are such substantial governmental interests in "provid-[ing] the electorate with information" about the sources of election-related spending, in "deter[ring] actual corruption," in "avoid[ing] the appearance of corruption," and in "gathering the data necessary to detect violations of . . . contribution limits," that the Supreme Court has held that campaign-finance disclosure requirements are *per se* "the least restrictive means" of achieving the government's interests. *Buckley*, 424 U.S. at 66–68. Because disclosure requirements are inherently the least restrictive means of achieving the state's aims in the electoral context, the Ninth Circuit has held that in cases challenging mandatory disclosures in the electoral context "exacting scrutiny is not a least-restrictive-means test." *Chula Vista*, 782 F.3d at 541. That holding is properly limited to the electoral

context. In the context of associational rights, however, "even though the governmental purpose [may] 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." *Louisiana v. NAACP*, 366 U.S. 293, 296 (1961).

Here, like in *NAACP*, even assuming the Attorney General presented a sufficiently important governmental interest, its interests can be more narrowly achieved as evidenced by the testimony of the Attorney General's own attorneys. During trial, the Attorney General's investigators testified that they have successfully completed their investigations without using Schedule Bs, even in instances where they knew Schedule Bs were missing. For example, Mr. Bauman testified that he has reviewed Form 990s in connection with audits that did not include Schedule Bs. (Bauman Test. 3/4/16, p. 27:12–14). Specifically, he admitted that he successfully audited those charities and found wrongdoing without the use of Schedule Bs. (*Id*. at 27:18–23). In fact, Mr. Bauman admitted that he successfully audited charities for years before the Schedule B even existed. (Bauman Dep., TX-731, p. 49:2–15). It is clear that the Attorney General's purported Schedule B submission requirement demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years. The record before the Court lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts. If heightened scrutiny means anything, it at least requires the Government to convincingly show that its demands are substantially related to a compelling interest, including by being narrowly tailored to achieve that interest. While this Court cannot find such a dis-

closure requirement facially invalid, it is prepared to find it unconstitutional as-applied to AFP, especially in light of the requirement's burdens on AFP's First Amendment rights.

B. Actual Burden on First Amendment Rights

Setting aside the Attorney General's failure to establish a substantial relationship between her demand for AFP's Schedule B and a compelling governmental interest, AFP would independently prevail on its as-applied challenge because it has proven that disclosing its Schedule B to the Attorney General would create a burden on its First Amendment rights. While the Ninth Circuit in *Center for Competitive Politics* foreclosed any facial challenge to the Schedule B requirement, it specifically left open the possibility that a party could show "'a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisal from either Government officials or private parties' that would warrant relief on an as-applied challenge." 784 F.3d at 1317 (quoting *McConnell v. FEC*, 540 U.S. 93, 199 (2003)). As the Supreme Court has held, unfounded speculation, conclusory statements, fear, and uncertainty untethered to the requirement at issue are insufficient. *Buckley*, 424 U.S. at 64, 69, 71–72. However, "[a] strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought would make the task even more difficult." *Id*. at 74. Examples of the type of evidence sufficient to succeed on an as-applied challenge include past or present harassment of members due to their associational ties, or of harassment directed against the organization itself, or a pattern of threats or specific manifestations of public hostility. *Id*. This Court

is more than satisfied that such a showing was made at trial.

During the course of trial, the Court heard ample evidence establishing that AFP, its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known. For example, Lucas Hilgemann, Chief Executive Officer of AFP, testified that in 2013, the security staff of AFP alerted him that a technology contractor working inside AFP headquarters posted online that he was "inside the belly of the beast" and that he could easily walk into Mr. Hilgemann's office and slit his throat. (Hilgemann Test. 2/23/16 Vol. I, p. 57:2–14). That individual was also found in AFP's parking garage, taking pictures of employees' license places. (*Id*. at 57:15–23). Another witness and major donor, Art Pope, testified about an AFP event in Washington D.C. in 2011. Mr. Pope testified that after protestors attempted to enter the building and disrupt the event, they began to push and shove AFP guests to keep them inside of the building. (Pope Test. 2/24/16 Vol. II, p. 47:7–15). Mr. Pope attempted to help a woman in a wheelchair exit the building; however the protestors had blocked their path. (Pope Test. 2/25/16 Vol. I, p. 21:20–22:12). Once they finally exited the building, they still had to go through a hostile crowd that was shouting, yelling and pushing. (Id. at 22:22–23:2). At another event in Wisconsin, after speaking to a crowd of AFP supporters, Mr. Hilgemann was threatened by a protestor who used multiple slurs and spit in Mr. Hilgemann's face. (Hilgemann Test. 2/23/16 Vol. I, p. 48:12–49:15). Again, at another event in Michigan where an AFP tent was set up, several hundred protestors surrounded the tent and used knives and box-cutters to cut at the ropes of tent, eventually causing the large

tent to collapse with AFP supporters still inside. (*Id*. at 50:16–51:25).

The Court also heard from Mark Holden, General Counsel for Koch Industries, who testified that Charles and David Koch, two of AFP's most high-profile associates, have faced threats, attacks, and harassment, including death threats. (Holden Test. 2/23/16 Vol. II, p. 30:17–35:13). Not only have these threats been made to the Koch brothers because of their ties with AFP, but death threats have also been made against their families, including their grandchildren. (*Id*. at 31:3–10). Mr. Pope has faced similar death threats due to his affiliation with AFP and has even encountered boycotts of his nationwide stores, Variety Wholesalers. (Pope Test. 2/24/16 Vol. II, p. 22:8–15, 29:5–17). In December 2013, about 130 protestors picketed in front of his stores, in part, because of his affiliation with AFP. (*Id*. 32:24–33:2). As a result of these boycotts, threats, and exposure, Mr. Pope testified that he considered stopping funding or providing support to AFP. (*Id*. at 50:1–3).

The Court can keep listing all the examples of threats and harassment presented at trial; however, in light of these threats, protests, boycotts, reprisals, and harassment directed at those individuals publically associated with AFP, the Court finds that AFP supporters have been subjected to abuses that warrant relief on an as-applied challenge. And although the Attorney General correctly points out that such abuses are not as violent or pervasive as those encountered in *NAACP v. Alabama* or other cases from that era, this Court is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members.

II.

A final argument to consider by the Attorney General is that its office is only seeking disclosure of AFP's Schedule B for *nonpublic* use and therefore there is no potential for public targeting of private donors; however, the Attorney General's inability to keep confidential Schedule Bs private is of serious concern. In its previous order remanding this case, the Ninth Circuit found that "plaintiffs [] have raised serious questions as to whether the Attorney General's current policy actually prevents public disclosure." *Americans for Prosperity Found.*, 809 F.3d at 542. As made abundantly clear during trial, the Attorney General has systematically failed to maintain the confidentiality of Schedule B forms.

Pursuant to the Attorney General's purported confidentiality policy, Schedule Bs should never be accessible through its Registry's public website. The Attorney General's Registry receives more than 60,000 renewal filings each year, 90% of which are paper filings. Once the Registry receives these filings, it is supposed to scan and then electronically store the documents, separately tagging confidential documents such as Schedule Bs. Kevis Foley, former Registrar, testified at her deposition that separating out Schedule Bs and other confidential materials from public filings is "very tedious, very boring work" and that "there is room for errors to be made." (Foley Dep. TX-734, p. 174:8–21). While human error can sometimes be unavoidable, the amount of careless mistakes made by the Attorney General's Registry is shocking.

During the course of this litigation, AFP conducted a search of the Attorney General's public website and discovered over 1,400 publically available Schedule Bs. (TX-56). Within 24 hours, all of those confidential

documents were removed from the Registry's website. (TX-736, p. 107:12–15). Just one example of the Attorney General's inadvertent disclosures was the Schedule B for Planned Parenthood Affiliates of California. The Attorney General was made aware that the Registry had publically posted Planned Parenthood's confidential Schedule B, which included all the names and addresses of hundreds of donors. (TX-131). An investigator for the Attorney General admitted that "posting that kind of information publically could be very damaging to Planned Parenthood . . ." (Johns Test. 2/25/16 Vol. II, p. 41:18–21). All told, AFP identified 1,778 confidential Schedule Bs that the Attorney General had publically posted on the Registry's website, including 38 which were discovered the day before this trial. (McClave Test. 2/24/16 Vol. I, p. 27:6–32:17). The pervasive, recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the Attorney General's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry.

The Attorney General has continuously maintained that the Registry is underfunded, understaffed, and underequipped when it comes to the policy surrounding Schedule Bs. The current Registrar effectively acknowledges that the Registry's approach to maintaining the supposed confidentiality of Schedule Bs have been indefensible. Not only did he admit that information has been improperly classified, which would make it available to the public, but he also conceded that the Registry has more work to do before it can get a handle on maintaining confidentiality. (Eller Test. 3/3/16 Vol. II, p. 95:7–11).

While the Attorney General will have this Court believe that proper procedures are now in place to

prevent negligent disclosures of Schedule Bs, the Court is unconvinced. Once a confidential Schedule B has been publically disseminated via the internet, there is no way to meaningfully restore confidentiality. Given the extensive disclosures of Schedule Bs, even after explicit promises to keep them confidential, the Attorney General's current approach to confidentiality obviously and profoundly risks disclosure of any Schedule B the Registry may obtain from AFP. Accordingly, the Court finds against the Attorney General on the alternative grounds that her current confidentiality policy cannot effectively avoid inadvertent disclosure.

III.

Because AFP has prevailed on its First Amendment as-applied challenge, it is entitled to declaratory and injunctive relief. Equitable relief has long been recognized as appropriate to prevent government officials from acting unconstitutionally. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010) (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)). Injunctive relief is particularly appropriate to prevent state officials from violating the First Amendment by compelling the disclosure of the names of an organization's supporters. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio),* 459 U.S. 87, 101–02 (1982); *Louisiana v. NAACP*, 366 U.S. at 297.

A "plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Specifically, the plaintiff "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;

(3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id*. Each of these factors weighs in favor of an injunction here.

AFP has suffered irreparable harm. The Attorney General's requirement that AFP submit its Schedule B chills the exercise of its donor's First Amendment freedoms to speak anonymously and to engage in expressive association. Among other things, plaintiffs have demonstrated that the Schedule B disclosure requirement places donors in fear of exercising their First Amendment right to support AFP's expressive activity; the effect then is to diminish the amount of expressive and associational activity by AFP. Moreover, if AFP refuses to comply with the Attorney General's Schedule B submission requirement, the Attorney General has threatened to cancel its charitable registration, which would preclude it from exercising its First Amendment right to solicit funds in California. Any "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *accord, e.g.*, *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013); *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012); *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011). In particular, the government causes "irreparable injury" when, as here, it places individuals "in fear of exercising their constitutionally protected rights of free expression, assembly, and association." *Allee v. Medrano*, 416 U.S. 802, 814–15 (1974).

Additionally, AFP's irreparable First Amendment injuries cannot adequately be compensated by damages or any other remedy available at law. Unlike a monetary injury, violations of the First Amendment "cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009).

The balance of hardships also favors granting an injunction. Once AFP's donor information is disclosed, it cannot be clawed back. Thus, if the Attorney General is allowed to compel AFP to disclose its Schedule B, the ensuing intimidation and harassment of AFP's donors, and resulting chilling effect on First Amendment rights, cannot be undone. *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). By contrast, the Attorney General has offered no evidence that she will suffer injury if AFP does not produce its Schedule B. The Attorney General does not review Schedule Bs upon collection and virtually never uses them to investigate wrongdoing. Indeed, the Attorney General has gone without AFP's Schedule Bs for over a decade, yet she has demonstrated no harm from not possessing it. Balancing the disclosure requirement's burden on First Amendment interests against any negligible burden that an injunction might impose, it is clear that the balance of hardships supports enjoining the Attorney General.

Finally, the public interest favors an injunction. As the Ninth Circuit has "consistently recognized," there is a "significant public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d at 683 (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)); *accord, e.g.*, *Thalheimer*, 645 F.3d at 1129; *Klein*, 584 F.3d at 1208. In sum, the four-factor test establishes that injunctive

relief is appropriate to bar the Attorney General from demanding Schedule Bs from AFP as part of their annual registration renewal. *Brown*, 492 U.S. at 101–02; *Louisiana v. NAACP*, 366 U.S. at 297.

IT IS HEREBY ORDERED that the Attorney General is Permanently Enjoined from Requiring AFP to File with the Registry a Periodic Written Report Containing a Copy of its Schedule B to IRS Form 990. AFP Shall No Longer Be Considered Deficient or Delinquent in its Reporting Requirement because it Does Not File its Confidential Schedule B with the Attorney General. Each Party Shall Bear its Own Costs.

Dated: April 21, 2016.

/s/ Manuel L. Real
HON. MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 12/29/2015]

No. 15-55446
D.C. No. 2:14-cv-09448-R-FFM

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff-Appellee,

v.

KAMALA D. HARRIS, Attorney General, in her Official Capacity as Attorney General of California,

Defendant-Appellant.

No. 15-55911
D.C. No. 2:15-cv-03048-R-FFM

THOMAS MORE LAW CENTER,

Plaintiff-Appellee,

v.

KAMALA D. HARRIS, Attorney General, in her Official Capacity,

Defendant-Appellant.

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

Argued and Submitted December 9, 2015
Pasadena, California

OPINION

Before: Stephen Reinhardt, Raymond C. Fisher and Jacqueline H. Nguyen, Circuit Judges.

PER CURIAM:

Nonprofit organizations Americans for Prosperity Foundation and Thomas More Law Center challenge the Attorney General of California's collection of Internal Revenue Service (IRS) Form 990 Schedule B, which contains identifying information for their major donors. They argue the nonpublic disclosure requirement is unconstitutional as applied to them because it impermissibly burdens First Amendment rights to free speech and association by deterring individuals from financially supporting them. The district court entered preliminary injunctions preventing the Attorney General from demanding the plaintiffs' Schedule B forms pending a trial on the merits. We have jurisdiction under 28 U.S.C. § 1292, and we vacate the injunctions with instructions to enter new orders preliminarily enjoining the Attorney General from publicly disclosing, but not from collecting, the plaintiffs' Schedule B forms.

I.

California's Supervision of Trustees and Fundraisers for Charitable Purposes Act (Charitable Purposes Act) requires the Attorney General to maintain a Registry of Charitable Trusts and authorizes her 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. An organization must maintain membership

in the Registry to solicit tax-deductible donations from California residents, *see id.* § 12585, and as one condition of membership, the Attorney General requires each organization to annually submit the complete IRS Form 990 Schedule B, *see* Cal. Code Regs. tit. 11, § 301. Schedule B, which a charitable organization files with the IRS, lists the names and addresses of persons who have given $5,000 or more to the organization during the preceding year.

The Attorney General's Schedule B disclosure requirement seeks only *nonpublic* disclosure of these forms, and she seeks them solely to assist her in enforcing charitable organization laws and ensuring that charities in the Registry are not engaging in unfair business practices. *See Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1311 (9th Cir. 2015). The Attorney General does not assert any state interest in *public* disclosure of Schedule B forms. To the contrary, her longstanding policy of treating Schedule B forms as confidential, as well as her proposed regulation formalizing that policy, confirm that the state has no interest in public disclosure.[1] This regime is readily distinguishable from state requirements mandating public disclosure – such as those often found in the regulation of elections – that are intended to inform the public and promote transparency. *See, e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010); *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976); *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012).

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[1] We take judicial notice of the Attorney General's proposed regulation. *See* California Regulatory Notice Register, 50-Z Cal. Regulatory Notice Register 2280-84 (Dec. 11, 2015), http://www.oal.ca.gov/res/docs/pdf/notice/50z-2015.pdf; *see also Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004).

We are 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. Compelled disclosure requirements are evaluated under exacting scrutiny, which requires the strength of the governmental interest to reflect the seriousness of the actual burden on a plaintiff's First Amendment rights. *See id.* at 1312. In that case, brought as a facial challenge, we held the Attorney General's authority to demand and collect charitable organizations' Schedule B forms falls within "her general subpoena power" and furthers California's compelling interest in enforcing its laws. *Id.* at 1317. Applying exacting scrutiny, we rejected the facial challenge to the disclosure requirement because the plaintiff failed to show it placed an actual burden on First Amendment rights. *See id.* at 1314-15, 1317. 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 and internal quotation marks omitted).

The plaintiffs here, two charitable organizations engaged in advocacy some may consider controversial, argue they have made such a showing. They contend disclosure to the state will infringe First Amendment rights by deterring donors from associating with and financially supporting them, and therefore that the Attorney General should be enjoined from collecting their Schedule B forms, even for nonpublic use in enforcing the law.

The district court preliminarily enjoined the Attorney General from demanding and enforcing her demand

for IRS Form 990 Schedule B from the plaintiffs.[2] The Attorney General has appealed these orders.

II.

We review the district court's grant of a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law de novo. *See id.* at 1311. Reversal for clear error is warranted when the district court's factual determination is illogical, implausible or lacks support in inferences that may be drawn from facts in the record. *See United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). A court may grant a preliminary injunction when a party shows "serious questions" going to the merits of its claim, a balance of hardships that tips sharply in its favor, a likelihood of irreparable harm and that an injunction is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

The plaintiffs argue the Attorney General must be enjoined from demanding and collecting their Schedule B forms on two theories. First, they argue *confidential disclosure* to her office itself chills protected conduct or would lead to persecution and harassment of their donors by the state or the public. Second, they argue that, notwithstanding her voluntary policy against disclosing Schedule B forms to the public, the Attorney General may change her policy or be compelled to release the forms under California law, and that the resulting *public disclosure* will lead to harassment of

[2] The district court's orders expressly enjoin only the collection of the plaintiffs' Schedule B forms, but, in doing so, necessarily prevent the Attorney General from disclosing those forms to the public.

their donors by members of the public, chilling protected conduct. We address these theories in turn.

A. The District Court Abused its Discretion by Enjoining the Attorney General from Collecting the Plaintiffs' Schedule B Forms for Law Enforcement Use.

Neither plaintiff has shown anything more than "broad allegations or subjective fears" that *confidential* disclosure to the Attorney General will chill participation or result in harassment of its donors by the state or the public. *Dole v. Serv. Emps. Union, Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (quoting *McLaughlin v. Serv. Emps. Union, Local 280*, 880 F.2d 170, 175 (9th Cir. 1989)) (internal quotation mark omitted). The district court abused its discretion by enjoining the Attorney General from demanding the plaintiffs' Schedule B forms given the absence of evidence showing confidential disclosure would cause actual harm. *See Ctr. for Competitive Politics*, 784 F.3d at 1316 ("[N]o case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury."); *see also Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) (explaining that an overbroad injunction is an abuse of discretion). To the extent the district court found actual chilling or a reasonable probability of harassment from confidential disclosure to the Attorney General, those findings are clearly erroneous.

First, the plaintiffs have not shown the demand for nonpublic disclosure of their Schedule B forms to the Attorney General has *actually chilled* protected conduct or would be likely to do so. *See Ctr. for Competitive Politics*, 784 F.3d at 1314 (finding no "actual burden" on First Amendment rights). Notably, neither plaintiff

has alleged that annual disclosure of Schedule B forms to the IRS had any chilling effect. Americans for Prosperity Foundation proffered a declaration from its vice president for development asserting its donors "worry that disclosure to the Attorney General will lead to their own persecution at the hands of state officials."[3] The declaration, however, does not show that any donor has declined, or would decline, to support the Foundation as a result of this worry. No evidence supports the district court's conclusion that donors have expressed "their unwillingness to continue to participate if such limited disclosure [to the Attorney General] is made."

Thomas More Law Center's evidence similarly fails to show its donors have been or would be chilled from contributing by the Attorney General's mere collection of Schedule B forms. The declaration from its president and chief counsel states only that donors "would be deterred" from donating if exposed to the type of harassment the Law Center incurs for its *public activities*, but says nothing to suggest donors have been or would be deterred by confidential disclosure of their identifying information to the Attorney General.

Second, the plaintiffs have not shown a "reasonable probability" of harassment at the hands of the state if the Attorney General is permitted to collect their Schedule B forms for nonpublic use. *See Brown v.*

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[3] Although much of the plaintiffs' evidence includes hearsay, the district court did not abuse its discretion by considering it at the preliminary injunction stage. *See Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013) ("Due to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings.").

Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 99-101 (1982) (detailing "a past history of government harassment," including "massive" FBI surveillance and a concerted effort to interfere with an organization's political activities); *Ctr. for Competitive Politics*, 784 F.3d at 1316. Americans for Prosperity Foundation has offered no evidence that it has been subjected to government harassment or hostility. It relies on an October 24, 2013 press release from the California Fair Political Practices Commission that, in announcing a settlement with two nonprofit organizations accused of violating campaign finance laws, inaccurately characterized those organizations as part of Charles and David Koch's network of "dark money" nonprofit corporations. This error was later corrected, but Americans for Prosperity Foundation argues that because Charles and David Koch are closely associated with the Foundation, the release demonstrates the type of past government harassment sufficient to support its challenge. This single, isolated incident, directed not against the Foundation but against prominent public figures, falls far short of "suggest[ing] that [government] hostility toward" Americans for Prosperity Foundation "is ingrained and likely to continue." *Brown*, 459 U.S. at 101.

Similarly, Thomas More Law Center has produced no evidence of state harassment or targeting beyond its bare and unsubstantiated allegation that enforcement of the Schedule B disclosure requirement is politically motivated. The district court concluded the Center raised serious questions on the merits by "pos[ing] questions . . . whether the groups [the Attorney General] is demanding donor information from are being particularly selected for such inquiries." But here, as in *Center for Competitive Politics*, there is "no indication in the record that the Attorney General's

disclosure requirement was adopted or is enforced in order to harass members of the registry in general or [the plaintiffs] in particular." *Ctr. for Competitive Politics*, 784 F.3d at 1313.

Nor have the plaintiffs shown a "reasonable probability," *id.* at 1317, of harassment by members of the public due to disclosure to the Attorney General for nonpublic use. The plaintiffs' allegations that technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure of their Schedule B forms are too speculative to support issuance of an injunction.

The district court also erred in concluding an injunction was warranted because there were serious questions about the Attorney General's right to collect Schedule B information as to non-California donors. 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." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 541 (9th Cir. 2015) (en banc). The government "need only ensure that its means are substantially related" to a sufficiently important interest. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010); *see also Ctr. for Competitive Politics*, 784 F.3d at 1312.

In sum, the plaintiffs have failed to demonstrate any actual burden on First Amendment rights flowing from the Attorney General's demand for and collection of their Schedule B forms for nonpublic use. As we have held, compelled nonpublic disclosure of Schedule B forms to the Attorney General is not itself First Amendment injury. *See Ctr. for Competitive Politics*, 784 F.3d at 1314. Without showing actual harm, the

plaintiffs cannot enjoin the Attorney General from enforcing the disclosure requirement.[4] *See id.*

B. The District Court Did Not Abuse its Discretion by Enjoining Public Disclosure of the Plaintiffs' Schedule B Forms.

The plaintiffs have raised serious questions, however, as to whether Schedule B forms collected by the state could be available for public inspection under California law, notwithstanding the Attorney General's good faith policy to the contrary. We are not convinced the evidence offered by either plaintiff sufficiently establishes that such public disclosure would result in First Amendment harm. Nevertheless, under our narrow and deferential review at this stage in the proceedings, and given the Attorney General's own position that Schedule B forms should not be publicly disclosed, we need not hold that the district court abused its discretion to the extent it preliminarily enjoined public disclosure pending trial.

This court's earlier dictum that "it appears doubtful" the Attorney General would be compelled to make Schedule B information publicly available focused on the California Public Records Act (CPRA). *See Ctr. for Competitive Politics*, 784 F.3d at 1316 n.9. CPRA allows the public to request certain records except those, as relevant here, "the disclosure of which is exempted or prohibited pursuant to federal or state

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[4] Even had the plaintiffs shown some First Amendment harm from the disclosure requirement, they would not necessarily have raised serious questions entitling them to an injunction. Under exacting scrutiny, they would have to demonstrate serious questions as to whether the state's "compelling interest" in enforcing the law reflected the "actual burden" on their First Amendment rights. *Ctr. for Competitive Politics*, 784 F.3d at 1312, 1314.

law." *See* Cal. Gov't Code § 6254(k). The Attorney General argues that because 26 U.S.C. § 6103 and 26 U.S.C. § 6104 prevent *the IRS* from disclosing Schedule B forms to the public, she too is prohibited from disclosing Schedule B forms "pursuant to federal . . . law." But § 6103 prevents disclosure of return information filed directly with the IRS; it does not prevent state officials from publicly disclosing return information collected by the state directly from taxpayers. *See Stokwitz v. United States*, 831 F.2d 893, 894 (9th Cir. 1987). The same is likely true of § 6104. *See Ctr. for Competitive Politics*, 784 F.3d at 1319. It is therefore unclear whether the Attorney General could avoid disclosing Schedule B forms under Government Code § 6254(k) based on § 6103 or § 6104.

Even if the Attorney General is not required to publicly disclose Schedule B forms under CPRA, *Center for Competitive Politics* did not address the independent public inspection requirement under the Charitable Purposes Act, which provides that filings in the Registry of Charitable Trusts "shall be open to public inspection" subject to "reasonable *rules* and *regulations* adopted by the Attorney General." Cal. Gov't Code § 12590 (emphasis added). Although the Attorney General has proposed a regulation limiting public inspection of Schedule B forms, no such rule or regulation is currently in force. The Charitable Purposes Act might require public inspection under these circumstances.

The plaintiffs therefore have raised serious questions as to whether the Attorney General's current policy actually prevents public disclosure. Because the Attorney General agrees with the plaintiffs that Schedule B information should not be publicly disclosed, and because she is in the process of promulgating

a regulation prohibiting such public disclosure, a preliminary injunction prohibiting public disclosure of donor information promotes, rather than undermines, the state's policy. It serves the interests of the state by allowing it to resist efforts to compel public disclosure pending formal adoption of a regulation to accomplish the plaintiffs' and the state's shared objective of preventing disclosure to the public. As a preliminary injunction of this nature would further the state's public policy as well as allay the concerns of the plaintiffs, there is no harm in allowing that aspect of the injunction that serves to prevent public disclosure to remain in effect on a temporary basis.

In the absence of harm to the state, the plaintiffs or the public from a modified injunction, we decline to use our appellate authority to hold that the district court abused its discretion with respect to that part of the injunction that helps enforce the state's public policy.

III.

An injunction properly tailored to the plaintiffs' concerns would address the risk of public disclosure by enjoining the Attorney General and her agents from making Schedule B information public, pending a decision on the merits of the plaintiffs' as-applied challenges. The plaintiffs have not, however, shown they are entitled to an injunction preventing the Attorney General from demanding their Schedule B forms, enforcing that demand, and using the forms to enforce California law.

We therefore vacate the district court's orders granting preliminary injunctions and instruct the district court to enter new orders preliminarily enjoining the Attorney General only from making Schedule B information public. The injunctions may not preclude the

Attorney General from obtaining and using Schedule B forms for enforcement purposes. The district court shall permit the parties to address whether the injunctions should include exceptions to the bar against public disclosure, such as those enumerated in the Attorney General's proposed regulation. Each party shall bear its own costs on appeal.

ORDERS VACATED.

Counsel

Kamala D. Harris, Attorney General of California, Douglas J. Woods, Senior Assistant Attorney General, Sacramento, California; Tamar Pachter, Supervising Deputy Attorney General, Emmanuelle S. Soichet, Deputy Attorney General, Alexandra Robert Gordon (argued), Deputy Attorney General, San Francisco, California; Kim L. Nguyen (argued), Deputy Attorney General, Los Angeles, California, for defendant-appellant.

Harold A. Barza and Carolyn Homer Thomas, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, California; Derek L. Shaffer (argued), William A. Burck, Jonathan G. Cooper and Crystal R. Nwaneri, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, D.C., for plaintiff-appellee Americans for Prosperity Foundation.

Louis H. Castoria (argued) and Sheila M. Pham, Kaufman Dolowich & Voluck, LLP, San Francisco, California, for plaintiff-appellee Thomas More Law Center.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

[Filed 2/23/2015]

Case No. 2:14-cv-09448-R-FFM

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff,

vs.

KAMALA HARRIS, in her Official Capacity as Attorney General of California,

Defendant.

ORDER GRANTING MOTION FOR A PRELIMINARY INJUNCTION

Plaintiff Americans for Prosperity Foundation ("Foundation") has applied for a preliminary injunction order to prevent Defendant Kamala Harris, in her Official Capacity as Attorney General of California, from demanding, or from taking any action to implement or enforce her demand for, the names and addresses of the Foundation's donors, particularly as contained in Schedule B to IRS Form 990.

The current request is almost identical to one made in another case in this Circuit, *Center for Competitive Politics v. Harris*, No. 14-15978 (9th Cir.) (hereinafter referred to as the "*CCP*" case). The district court in that case denied preliminary injunctive relief on the basis that a prima facie showing of a First Amendment

violation had not been attempted. *CCP*, 2014 WL 2002244, at *6 (E.D. Cal. May 14, 2014). However, on January 6, 2015, the Ninth Circuit effectively reversed the district court's denial by issuing an injunction pending appeal in *CCP*. That injunction prohibits the Attorney General from taking "any action against the Center for Competitive Politics for failure to file an unredacted IRS Form 990 Schedule B pending further order of this court." *CCP*, No. 14-5978, Dkt. 34 (9th Cir. Jan. 6, 2015). The Ninth Circuit issued such injunction following the Attorney General's letter to that plaintiff threatening to fine the Center's employees and suspend its registration if it did not hand over its Schedule B. An almost identical letter was sent to Plaintiff in this case.

"A preliminary injunction should be issued upon a clear showing of either (1) probable success on the merits and possible irreparable injury or (2) sufficiently serious questions going to the merits to make them fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *City of Angoon v. Marsh*, 749 F.2d 1413, 1415 (9th Cir. 1984). "These are not really entirely separate tests, but are merely extremes of a single continuum. *Id.* (relying on *Lopez v. Heckler*, 725 F.2d 1489, 1498 (9th Cir. 1984)). Because the four factor test for evaluating a preliminary injunction pending appeal appears to be identical to that for a preliminary injunction and no prima facie showing is necessary, the Ninth Circuit's issuance of injunctive relief in the CCP case is instructive. *See Humane Soc'y of U.S. v. Gutierrez*, 523 F. 3d 990, 991 (9th Cir. 2008) ("In deciding whether to issue a stay pending appeal, the court considers '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'").

Once any necessary prima facie showing is made, the burden shifts and a defendant must demonstrate the existence of both a "compelling" state interest exists and "a substantial relationship between the information sought and [that] overriding and compelling state interest." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 92 (1982). Plaintiff has raised serious questions going to the merits and demonstrated that the balance of hardships sharply favor Plaintiff.

Plaintiff has sufficiently questioned the nature of Defendant's interest, noting it pertains to national donor information and that Defendant lacks express statutory authority to access such information. Moreover, even if such interest was compelling, Plaintiff has offered numerous, less intrusive alternatives which could satisfy Defendant's oversight and law enforcement goals. "The fact that . . . alternatives 'could advance the Government's asserted interest in a manner less intrusive to . . . First Amendment rights' indicate[s] that [a] law [i]s 'more extensive than necessary.'" *Thompson v. Western States Med. Ctr.*, 533 U.S. 357, 357 (2002) (relying on *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980)).

Finally, the balance of the hardships sharply favors Plaintiff because Defendant has not suffered harm from not possessing Plaintiff's Schedule B for the last decade. The hardship Plaintiff would face from disclosure, however, is far greater and likely irreparable. When, as here, an ordinance infringes on First Amendment rights of those "seeking to express their views"

the "balance of equities and the public interest . . . tip sharply in favor of enjoining the ordinance." *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009).

Accordingly, having considered the application and supporting papers, and following a hearing on February 17, 2015:

IT IS HEREBY ORDERED that the Attorney General is preliminarily enjoined from demanding, and/or from taking any action to implement or to enforce her demand for, a copy of the Foundation's Schedule B to IRS Form 990 or any other document that would disclose the names and addresses of the Foundation's donors, until this Court issues a final judgment.

IT IS SO ORDERED.

DATED: February 23, 2015

By /s/ Manuel L. Real
Hon. Manuel L. Real
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Filed 3/29/2019]

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No. 16-55727
D.C. No. 2:14-cv-09448-R-FFM

———

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff-Appellee,

v.

XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California,

Defendant-Appellant.

———

No. 16-55786
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. 16-56855
D.C. No. 2:15-cv-03048-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. 16-56902
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.

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

ORDER DENYING PETITIONS FOR REHEARING EN BANC

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 fact-finding 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,

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

the panel's standard puts anyone with controversial views at risk.

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 fact-finding, 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*

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[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

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 "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).

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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).

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 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

[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.

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]

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

[4] *Id.*

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 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.

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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).

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.

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

[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.

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 assump-

tion 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 nonprofit 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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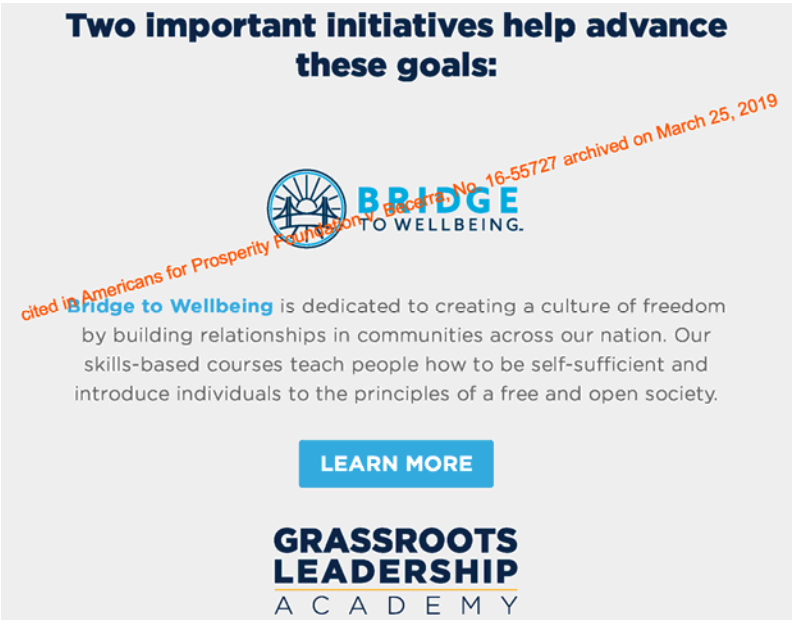

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