No. 19-251

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

Brief for the States of Arizona, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia, and Governor Phil Bryant of the State of Mississippi, as Amici Curiae in Support of Petitioner

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INTEREST OF AMICI CURIAE

Amici curiae, the States of Arizona, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, Tennessee, Texas, Utah, and West Virginia, and Governor Phil Bryant of the State of Mississippi ("Amici States") file this brief in support of Petitioner Americans for Prosperity Foundation (the "Foundation").[1] Like the overwhelming majority of States, Amici States regulate non-profit organizations without requiring them to report the names of their donors. Amici States submit this brief in support of the Foundation because they are committed both to detecting unscrupulous non-profit activity and to protecting citizens' First Amendment right of free association. Forty-seven States and the District of Columbia accomplish these twin goals without requiring non-profit organizations to disclose the identities of their donors. This majority approach effectively prevents the evils of sham charities without jeopardizing the fundamental right of free association.

SUMMARY OF ARGUMENT

This Court has long recognized that privacy in group association is "indispensable to preservation of freedom of association." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Interference with this First Amendment liberty is subject to "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). As part of this test, government demands for member or

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[1] Counsel for Amici States provided timely notice of the intent to file this brief to all parties' counsel of record. *See* Sup. Ct. R. 37.2(a).

donor lists of groups engaged in advocacy must be "narrowly drawn." *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961). As Amici States know from experience, California's blanket policy of compelled disclosure is not necessary to the work of policing non-profit organizations. It therefore cannot survive scrutiny under the First Amendment, and this Court should correct the panel's contrary conclusion.

The district court correctly ruled that, as applied, the California Attorney General unconstitutionally requires the Foundation to submit its unredacted Schedule B. App. 56a. By requiring the Foundation to disclose the identities of its major donors without first establishing any particularized suspicion of wrongdoing, the California Attorney General chilled the associational rights of the Foundation's members. App. 54a–55a. The chilling effect is intuitive, but the lower court bolstered its holding with factual findings specific to the organization in question. As the court explained, "ample evidence" showed that the Foundation's "employees, supporters and donors" severally "face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known." App. 49a. The district court further found that the "Schedule B submission requirement demonstrably played no role in advancing the Attorney General's law enforcement goals . . . ." App. 47a.

A Ninth Circuit panel reversed in an opinion that brushed past the district court's factual findings and ignored the experience of virtually every other State in the Union. The panel held that, even assuming the

Foundation's donors "would face substantial harassment if Schedule B information became public," the mandatory disclosure requirement was "substantially related to an important state interest in policing charitable fraud." App. 7a. In reaching this conclusion, the panel ruled that California's blanket, up-front collection of unredacted Schedule Bs advanced the State's law enforcement interest in combatting fraud—in direct contradiction to the district court's findings on that point. Op. 17a–23a. The panel also held that despite a record of actual disclosure beyond the Attorney General's Office, there was only "slight risk of public disclosure" going forward. Op. 34a–39a. Topping things off, the panel refused to even consider whether the compelled disclosure was narrowly tailored. App. 22a ("[N]arrow tailoring and least-restrictive-means tests . . . do not apply here."). The Ninth Circuit declined to hear this case en banc, despite a five-judge dissent from the denial which criticized the panel's appellate fact finding and refusal to follow this Court's decision in *NAACP v. Alabama*. App. 77a–97a.

The Ninth Circuit erred in holding that the California Attorney General could compel the Foundation to identify its donors without any suspicion of wrongdoing.[2]

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[2] For the same reasons, the panel also errored in holding—in the same decision—that the Thomas More Law Center could be compelled to disclose its Schedule B, which error is the subject of a companion certiorari petition in *Thomas More Law Center v. Becerra*, No. 19-255.

First, the link between the required disclosure of donor information and the California Attorney General's asserted governmental interest is tenuous. Forty-seven States and the District of Columbia have identical governmental interests to those asserted by California, yet they do not require the preemptive disclosure of donor information.

Second, not only do these jurisdictions ably protect their populations from fraud, but they also avoid the risk of unintentional disclosure to the public at large. Presumably even California would agree that avoiding public dissemination of membership rosters is an important state interest. But, as the record in this case proves, the potential for such disclosure is high. As a result, the overwhelming majority of States serve their common interest far better by declining to collect donor information from organizations that have not given them a reason to suspect misconduct.

Finally, California's departure from this consensus undermines the ability of other States to protect the First Amendment liberties of their citizens. Requiring a Schedule B each year from every one of the 60,000+ charitable organizations seeking renewal in California exposes the identity of vast numbers of citizens across the nation. In so doing, California's outlier approach jeopardizes the associational protections in nearly every other State.

ARGUMENT

I. Upfront Disclosure Of Donors To The State Is Not Substantially Related To The California Attorney General's Legitimate Interests.

When disclosure of membership or donor lists would result "in reprisals against and hostility to" members, state-required disclosure is permitted only if (1) the state has a sufficiently compelling interest for requiring disclosure, (2) the means are substantially related to that interest, and (3) the means are narrowly tailored. *NAACP v. Alabama*, 357 U.S. at 462–63; *Gremillion*, 366 U.S. at 296; *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963). The California Attorney General's interest in regulating charitable organizations does not justify the compelled disclosure of the Foundation's donor information. This disclosure is unnecessary, exposes donors to retaliation, and jeopardizes the First Amendment rights of citizens across the nation.

A. Forty-Seven States And The District of Columbia Effectively Regulate Charities Without Preemptive Donor Disclosures.

The district court found that the California Attorney General failed to prove that his office "actually needs Schedule B forms to effectively conduct its investigations." App. 44a. To the contrary, the California Attorney General "virtually never" uses Schedule Bs, and even when the office does so, it could easily obtain the relevant information through a more targeted approach. App. 44a–47a, 55a. Indeed, the record lacks even one instance in which a generalized,

pre-investigative collection of a Schedule B aided the California Attorney General's enforcement efforts. App. 47a. These findings are consistent with the law and practice in virtually every other State.

The blanket and preemptive disclosure of significant donors is not appropriately correlated to California's valid law enforcement interests. All 50 state attorneys general possess a law enforcement interest in preventing non-profits from defrauding their citizens. Yet, besides California, only two other States—Hawaii and New York—require disclosure of the unredacted Schedule Bs containing donors' names and addresses. *See* Pl.'s Br., at ADD-35 to ADD-43, *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018) (No. 16-55727) (50-State Survey on Schedule B Submission Requirements in Connection with Charitable Registration Filings); *see also* Hawaii Charity Financial Report Guide (Jul. 2019), https://ag.hawaii.gov/tax/files/2018/06/Hawaii-Charity-Annual-Transmittal-Guide-7.10.19.pdf; N.Y. Form CHAR500 (2018), https://www.charitiesnys.com/pdfs/CHAR500_2018.pdf. Not only do 47 States and the District of Columbia not require annual submission of unredacted Schedule Bs, but 11 of those States do not require *any* registration to raise funds in their jurisdictions. In 2013, Arizona joined Delaware, Idaho, Indiana, Iowa, Montana, Nebraska, South Dakota, Texas, Vermont, and Wyoming in adopting a general non-registration standard.

Amici States' lack of donor disclosure requirements has not prevented them from exercising oversight of non-profits that solicit donations within their

jurisdictions and investigating, prosecuting, and deterring fraudulent activities.

For instance, all 50 States joined in a civil enforcement action in Arizona against four sham cancer charities and the individuals who ran them. Collectively the sham non-profits raised more than $187 million from donors across the United States. The California Attorney General claimed at trial that this very case was one where the Schedule B had been part of the investigation. The evidence tells a different story. The Schedule B used by a California Attorney General's office attorney was obtained by a targeted subpoena rather than during the generally applicable annual disclosure filing. ER1756. Indeed, the fact that Arizona does not even require charities to register before soliciting donations within the State proved no obstacle to Arizona's vigorous pursuit of this matter.

Other States' prosecution of fraudulent solicitors is important because it proves that California's donor disclosure requirement is not narrowly tailored to a compelling state interest. This is consistent with the district court's finding that, even assuming a "sufficiently important governmental interest," "the testimony of the Attorney General's own attorneys" indicated that there was a more narrow way to achieve that interest. App. 47a. The record demonstrates that requiring submission of unredacted Schedule Bs does nothing to increase the State's investigative efficiency. *Id.* The disclosure rule is all cost with little, if any, benefit.

In reversing the district court's holding, the panel disregarded the record below and implicitly concluded that the 48 similarly situated jurisdictions not mandating disclosure of donor information either lack California's law enforcement interests or inadequately regulate non-profit organizations. To the contrary, Amici States share California's law enforcement concerns and diligently regulate non-profits. They have simply pursued their law enforcement interests through traditional methods like compliance audits and subpoenaing donor information after developing a particularized suspicion of wrongdoing. These methods are available to California as well, and widespread experience proves that they work.

B. Required Nonpublic Disclosure Creates The Potential For Public Disclosure.

California's dragnet disclosure requirement puts membership lists at risk of public disclosure, thereby chilling associational rights. By collecting donor information in advance of any law enforcement need, the California Attorney General's Office creates a risk of unintentional disclosure to the public. Ironically, California highlighted this potential difficulty by posting more than a thousand unredacted Schedule Bs online, thereby publicizing the names and addresses of thousands of donors. App. 51a–52a. Separately, California's registry made more than 350,000 confidential documents—including Schedule Bs—accessible to anyone who is clever with a web browser. App. 92a. The district court was clear-voiced in finding that "[t]he 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.

The panel reached a different conclusion. Despite acknowledging that "in the past, the [California] Attorney General's office has not maintained Schedule B information as securely as it should have," App. 35a, the panel concluded that there is now no "significant risk of public disclosure," App. 37a.

While not all States that collect donors' names and addresses from unredacted Schedule Bs will be as careless with that information as California has been, the potential for a breach of security always exists. This danger helps explain why the overwhelming majority of States pursue their law enforcement interest without demanding that every charity surrender a list of this sensitive information. A State cannot inadvertently disclose the identity of a donor who wishes to remain anonymous if the State never has that information in the first place.

C. California Impairs The Ability Of Other States To Protect Their Citizens.

"In the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 218 (2014) (plurality opinion). But, every year, California requires over 60,000 charitable organizations to turn over their Schedule Bs containing highly sensitive donor information. App. 51a. The burdens of this approach are not confined just to California, but are felt across the nation.

As set forth above, 48 jurisdictions in the United States respect the associational rights of their citizens by not requiring disclosure of Schedule Bs without a particularized need. But, if a resident in any one of these jurisdictions makes a donation to a charitable organization that registers in California, their identity is put at risk. California thereby undermines the First Amendment protections provided in nearly every other State. This is just one more reason why California's infringement on associational rights is grossly disproportionate to the interest served. *See McCutcheon*, 572 U.S. at 218 (narrow tailoring requires a fit that is "'in proportion to the interest served'"). It also underscores the urgent need for this Court to grant review so that California's outlier approach does not undermine the First Amendment protections provided in 48 jurisdictions across the United States.

CONCLUSION

The California disclosure requirement is unnecessary, exposes donors to retaliation, and jeopardizes the First Amendment rights of citizens across the nation. The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted.

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