Nos. 19-251 & 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

XAVIER BECERRA,

Respondent.

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

COMBINED BRIEF IN OPPOSITION

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(*Additional caption listed on inside cover*)

THOMAS MORE LAW CENTER,

Petitioner,

v.

XAVIER BECERRA,

Respondent.

QUESTION PRESENTED

Whether the First Amendment prohibits a State from requiring tax-exempt organizations to submit, on a confidential basis and for regulatory oversight purposes, the same schedule identifying their major donors that they provide to the IRS.

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INTRODUCTION

Federal law requires certain tax-exempt charities to annually report the names of their major donors to the Internal Revenue Service. That information is submitted to the federal government on form Schedule B as part of the charity's annual tax return. California requires charities that operate within the State to file the same Schedule B form with the California Attorney General's Registry of Charitable Trusts for regulatory oversight purposes. The Attorney General's Office is responsible for protecting charitable assets for their intended purposes, and it uses Schedule B information to detect and investigate fraud, self-dealing, and abuse of organizations' special tax-exempt status. Schedule Bs filed with the Registry are confidential and may not be disclosed to the public.

The court of appeals held that California's Schedule B reporting requirement does not violate the First Amendment rights of either petitioner Americans for Prosperity Foundation or petitioner Thomas More Law Center. Applying exacting scrutiny, the court carefully examined both the claimed burden on petitioners' freedom of association and the State's proffered justifications. After reviewing the evidence, the court concluded that neither petitioner had established that the requirement to submit to the State, on a confidential basis, the same limited information they must report to the IRS each year chills contributions. The court also determined that collecting Schedule Bs serves the State's interests in detecting fraud and other abuses and that the alternatives of case-by-case audits or subpoenas would compromise the State's law enforcement interests. The State's confidential reporting requirement thus survived exacting scrutiny.

That conclusion is correct and does not warrant further review. The court of appeals properly followed this Court's precedents by applying exacting scrutiny. Its decision does not create any conflict warranting this Court's review. Indeed, the only case cited by petitioners to address a First Amendment challenge to a similar reporting requirement reached the same result as the court of appeals here.

STATEMENT

1. Under federal and California law, organizations operating for charitable purposes may obtain exemptions from paying federal and state taxes. 26 U.S.C. § 501(c)(3); Cal. Rev. & Tax Code § 23701. To safeguard against abuse of this tax-exempt status and other wrongdoing, federal and state laws require charitable organizations to submit information about their finances to oversight agencies. *See generally* Pet. App. 99a.[1] For example, the Internal Revenue Code requires organizations exempt under Section 501(c)(3) to file with the IRS an annual return reporting their income, expenditures, assets, and liabilities as well as "the total of the contributions and gifts received by [them] during the year[] and the names and addresses of all substantial contributors." 26 U.S.C. § 6033(b). Federal regulations also generally require organizations to report the names and addresses of major donors for each taxable year. Depending on the circumstances of the organization, those regulations mandate the reporting of the names of any person who

[1] This brief responds to the petitions filed by Americans for Prosperity Foundation and the Thomas More Law Center. Citations to the petition and appendix submitted by the Foundation are to "Pet." and "Pet. App." respectively. Citations to the petition and appendix submitted by the Law Center are to "Law Center Pet." and "Law Center Pet. App."

donated $5,000 or more or who contributed more than 2 percent of the organization's total contributions. Pet. App. 8a (discussing 26 C.F.R. § 1.6033-2(a)). Organizations report their major-donor information on a Schedule B form, which they submit to the IRS as an attachment to their Form 990. *See id.* Schedule Bs are confidential and are exempt from public disclosure. 26 U.S.C. § 6104(d)(3)(A).

California requires charitable organizations operating within the State to submit the same information to state regulators for regulatory oversight purposes. In the Supervision of Trustees and Fundraisers for Charitable Purposes Act, the state Legislature required the Attorney General to establish and maintain a register of charitable trusts to register and gather financial information from charitable entities. *See* Cal. Gov't Code § 12584. Charities operating or soliciting in California must register with the Registry of Charitable Trusts and must file periodic financial reports on the assets they hold for charitable purposes. *Id.* §§ 12585, 12586(a); *see also id.* § 12584 (authorizing California Attorney General to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register"). [2] To maintain good standing with the Registry, charitable organizations must file a copy of their annual IRS Form 900 and attached schedules, including their Schedule B. Cal. Code Regs. tit. 11, § 301; Pet. App. 8a; *see also* Cal. Code Regs. tit. 11, § 306(c) (authorizing Attorney General to require additional information deemed necessary "to ascertain whether the [organization] is being properly administered").

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[2] *See generally* State of California Department of Justice, Charities, https://oag.ca.gov/charities (last visited Nov. 22, 2019).

Schedule Bs submitted to the Registry are confidential and may not be disclosed to the public. Pet. App. 9a. Before 2016, the Attorney General's Office maintained an informal policy that treated Schedule Bs as confidential. *Id.* In 2016, the Attorney General codified that policy in a regulation providing that "[d]onor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed." Cal. Code Regs. tit. 11, § 310(b). The only exceptions to that requirement are for disclosures in a judicial or administrative enforcement proceeding or in response to a search warrant. *Id.*

Consistent with this confidentiality requirement, the Attorney General maintains Schedule B forms separately from other submissions. Pet. App. 9a-10a. They are not available on the Registry's public website. *Id.* at 10a. Instead, they are maintained in a confidential database used and accessed only by the Charitable Trusts Section of the Attorney General's Office. *See id.* That unit is responsible for evaluating complaints against charities and investigating fraud, self-dealing, diversion or misuse of charitable assets, and other violations of state law. *See id.* at 10a, 20a-21a.

The majority of registered entities routinely submitted their federal Schedule Bs as required. C.A. Dkt. 9-3 (Excerpts of Record 579); C.A. Dkt. 9-4 (ER 757, 774-775).[3] Before 2010, the Registry had not systematically addressed deficient filings because of staffing shortages. C.A. Dkt. 9-3 (ER 580-581); C.A.

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[3] Unless otherwise specified, citations to "C.A. Dkt." are to Ninth Circuit case number 16-55786.

Dkt. 9-4 (ER 757, 796-797). In 2010, the Registry began to notify non-compliant organizations of their deficient filings. *See* Pet. App. 10a. It sent a delinquency letter to the Law Center in 2012 and to the Foundation in 2013. *Id.* at 11a.

2. In response to the delinquency letters, the Foundation and the Law Center filed separate lawsuits against the Attorney General, each alleging that the requirement to submit Schedule Bs to the Registry violated the First Amendment on its face and as applied to them. Pet. App. 11a. The district court initially entered a preliminary injunction against the requirement, which the court of appeals vacated in substantial part. *Id.* at 57a-69a (reversing grant of injunction against collection of Schedule B forms but directing entry of limited injunction prohibiting disclosure to public).

The district court conducted separate bench trials in each case and entered a permanent injunction in favor of each petitioner. Pet. App. 41a-56a; Law Center Pet. App. 51a-67a. The court declined to address petitioners' facial claims, but held that the Attorney General's Schedule B filing requirement was unconstitutional as applied to both the Foundation and the Law Center. Pet. App. 41a; Law Center Pet. App. 51a. It concluded that the requirement was not substantially related to a sufficiently important state interest, because, among other reasons, the Attorney General's interests "can be more narrowly achieved." Pet. App. 47a. In the district court's view, the Attorney General had failed to show "the necessity of Schedule B forms" (*id.* at 44a), and it was "possible for the Attorney General to monitor charitable organizations without Schedule B" (Law Center Pet. App. 54a).

3. The court of appeals vacated the permanent injunctions and reversed the district court's judgments. Pet. App. 40a.

a. The court began by addressing the proper standard of legal scrutiny. It determined that the Schedule B filing requirement is subject to "'exacting scrutiny.'" Pet. App. 15a (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)). That standard "'requires a substantial relation'" between the requirement and "'a sufficiently important governmental interest.'" *Id.*

Petitioners had argued that the "substantial relation element" of this standard requires States to show that their chosen approach is "narrowly drawn to avoid needlessly stifling expressive association." Pet. App. 15a (internal quotation marks omitted). After reviewing the authorities cited by petitioners, the court was "not persuaded … that the standard [petitioners] advocate[d] is distinguishable from the ordinary 'substantial relation' standard that both the Supreme Court and this court have consistently applied." *Id.* at 16a. Under that standard, "'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Id.* at 16a-17a (quoting *Doe*, 561 U.S. at 196). To the extent petitioners urged application of "the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny, or [a requirement that] the state … choose the least restrictive means of accomplishing its purposes, they [were] mistaken." *Id.* at 16a.

b. Applying exacting scrutiny, the court of appeals began by assessing the State's interests. Pet. App. 17a-23a. It concluded that collecting Schedule B information "serves an important governmental interest." *Id.* at 17a. The confidential reporting of major-

donor information helps to protect the public from fraud and furthers the State's interest in preventing organizations that receive special tax treatment from abusing that privilege. *See id.* at 17a-18a, 21a-22a. Ready access to Schedule Bs allows state investigators to learn if a charity is doing business with its major donors, to detect if an organization is overstating the value of noncash contributions to justify perks or excessive salaries for executives, and to obtain a "'complete picture'" of the charities' operations. *Id.* at 17a-18a (quoting *Citizens United v. Schneiderma*n, 882 F.3d 374, 382 (2d Cir. 2018)). It also facilitates "'investigative efficiency.'" *Id.* at 18a (quoting *Schneiderman*, 882 F.3d at 382). For example, trial testimony demonstrated that Schedule B information allowed state investigators to trace money used for improper purposes, identify self-dealing, and investigate "gift-in-kind" fraud. *Id.* at 21a.

The court then considered whether demanding Schedule B forms on a case-by-case-basis through subpoenas or audit letters would adequately serve the State's interests and concluded that it would not. Pet. App. 18a-21a. The court emphasized the importance of "quick access to Schedule B filings," *id.* at 19a, and pointed to trial testimony indicating that relying on subpoenas or audit letters could delay investigations and allow targeted charities to dissipate assets and destroy evidence, *id.* at 20a-21a. Although the district court had reached a contrary conclusion, the court of appeals noted that the lower court had wrongly applied a "strict necessity" test, "consistently fram[ing] the legal inquiry as whether it was *possible*" for the Attorney General to achieve his law enforcement objectives without the Schedule B. *Id.* at 22a, 23a. Under exacting scrutiny, however, "the state was not required to show that it could accomplish its goals *only*

by collecting Schedule B information." *Id.* at 22a-23a. Even if the Attorney General could achieve his goals through other means, the court of appeals explained, the substantial relation test does not require him "to forgo the most efficient and effective means of doing so," at least in cases in which the challenger has not established a significant burden on its First Amendment rights. *Id.* at 23a.

Next, the court considered the extent of any burden on petitioners' First Amendment rights. Pet. App. 23a-39a. It recognized that information-collection requirements have the potential to "'chill donations to an organization by exposing donors to retaliation, and in some instances fears of reprisal may deter contributions to the point where the movement cannot survive.'" *Id.* at 24a (citations and alterations omitted). In light of that risk, a First Amendment claim may succeed if the plaintiff can show a reasonable probability that compelled disclosure of associational information will subject members or donors to threats, harassment, or reprisals from either government officials or the public. *Id.*

Here, however, the court concluded that petitioners had failed to establish that compliance with the Attorney General's Schedule B reporting requirement would actually and meaningfully deter contributors. Pet. App. 28a. Petitioners offered evidence that "*some* individuals who have or would support [petitioners] *may* be deterred from contributing if [petitioners] are required to submit their Schedule Bs to the Attorney General," but they did not "identif[y] a single individual whose willingness to contribute hinge[d] on whether Schedule B information will be disclosed to the California Attorney General." *Id.* at 27a-28a. Nor did petitioners identify any "group of contributors who

are comfortable with disclosure to the IRS, but who would not be comfortable with disclosure to the Attorney General." *Id.* at 28a.

The court observed that California's Schedule B requirement "is not a sweeping one." Pet. App. 29a. The requirement applies to a small number of petitioners' major donors, a number of whom are already publicly identified under federal rules that require private foundations to disclose their expenditures to the public. *Id.* The Foundation was required to report no more than ten contributors during the 2010 through 2015 tax years and the Law Center no more than seven during the same period. *Id.* at 8a-9a. As applied to petitioners therefore, the State's Schedule B requirement is "a far cry from the broad and indiscriminate disclosure laws" held invalid in other cases. *Id.* at 29a.

The court also concluded that petitioners had failed to establish any serious risk that California's Schedule B requirement would subject donors to threats, reprisals, or harassment. Pet. App. 30a-39a. It recognized that some individuals publicly associated with petitioners have been the target of hostility. *Id.* at 31a-33a. But the record contained scant evidence that the hostility resulted from their contributions to petitioners instead of from their deeper involvement in petitioners' activities or participation in other controversial matters. *Id.* at 31a-32a n.6, 33a-34a. Ultimately, however, the court declined to decide whether public disclosure of petitioners' Schedule B information would create a constitutionally significant risk of retaliation, because the trial evidence did not establish a reasonable probability that public disclosure would actually occur. *Id.* at 34a.

Although confidentiality lapses had occurred in the past, both as a result of technological vulnerabilities and human error, the court recognized that the State had addressed those problems. Pet. App. 35a-38a. As to technological vulnerabilities, the Foundation's expert had identified a technical flaw that allowed him to manipulate a digit in the URL and obtain access, one at a time, to the Registry's confidential documents. *Id.* at 35a-36a. The lapse "was a singularity," stemmed from an issue with a third-party security vendor, and was quickly remedied when brought to state officials' attention. *Id.* at 36a. No evidence suggested that this type of error was likely to recur. *Id.* As to human error, the Foundation's expert identified a number of Schedule Bs that had been misclassified as public over several years. *Id.* The court explained, however, that the Registry had since implemented new protocols and quality controls to prevent this type of error. *Id.* at 36a-37a. "In light of the changes the Attorney General has adopted," the court determined, "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." *Id.* at 38a. To the extent the district court found otherwise, that finding was clearly erroneous because it did not take into account the new safeguards. *Id.*

Based on its assessment of the State's interests and the modest burden on petitioners' First Amendment rights, the court of appeals held that California's Schedule B requirement survives exacting scrutiny. Pet. App. 7a, 39a. The court of appeals reversed the district court's judgments and vacated the permanent injunctions. *Id.* at 40a. Over a dissent, it denied both the Foundation's and the Law Center's petitions for rehearing en banc. *Id.* at 74a-77a; *see also id.* at 77a-

97a (dissent), 98a-109a (response to dissent). Petitioners filed unopposed motions to stay the mandate, which the court of appeals granted, leaving in place the district court's injunctions against collection of petitioners' Schedule Bs pending proceedings in this Court. C.A. Dkts. 133, 134; C.A. No. 16-56855 Dkts. 70, 72.[4]

ARGUMENT

Petitioners principally contend that the court of appeals misapplied this Court's precedents and departed from other circuit decisions when it applied exacting scrutiny to California's Schedule B requirement. To the contrary, the decision below applied the same legal standard this Court has long used to analyze First Amendment claims involving reporting and disclosure requirements. And the court of appeals' application of

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[4] Consistent with the district court's injunction, the Attorney General has not taken any enforcement action concerning the Foundation's failure to submit its Schedule B. The Attorney General's Office is aware that, in April 2019, after the court of appeals' ruling, the California Franchise Tax Board revoked the Foundation's status as a tax-exempt entity. *See* California Franchise Tax Board, Revoked Exempt Organizations List, *available at* https://www.ftb.ca.gov/file/business/types/charities-nonprofits/revoked-entity-list.html) (last visited Nov. 23, 2019). The Foundation's powers, rights, and privileges as an out-of-state corporation transacting business within California were also forfeited. *See* California Secretary of State Business Search, *available at* https://businesssearch.sos.ca.gov/CBS/Detail ("Status: FTB Forfeited") (last visited Nov. 25, 2019) (capitalization omitted). The reason for the Franchise Tax Board's revocation is not a matter of public record. The Attorney General informs the Court of this development because it is possible that the Foundation's current lack of status in California, which appears to have persisted for several months, could limit the practical effect of any relief that could be ordered in this case. *Cf.* S. Ct. R. 15.2.

exacting scrutiny does not implicate any circuit conflict warranting this Court's review. The only case cited by petitioners to consider the constitutionality of a similar reporting requirement reached the same conclusion as the court of appeals below.

1. The court of appeals applied the proper standard of scrutiny to California's Schedule B reporting requirement. *See* Pet. 17-23; Law Center Pet. 21-23.

a. For more than sixty years, this Court has held that information-disclosure requirements are subject to "exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (*per curiam*) (discussing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)). That standard requires precisely what the decision below held: "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *See, e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted); *Citizens United v. FEC*, 558 U.S. 310, 366-367 (2010) (same); *Buckley*, 424 U.S. at 65 (requiring "relevant correlation or substantial relation between the governmental interest and the information required to be disclosed") (footnotes and internal quotation marks omitted).

The "exacting scrutiny" standard applies to all government requirements regarding the reporting or disclosure of associational information, whether or not they relate to campaigns or elections. The foundational decisions setting forth this standard did not involve campaign regulation. In *NAACP*, for example, Alabama's demand for a list of all NAACP members was invalid because the information had no "substantial bearing" on the State's purported regulatory interests. 357 U.S. at 464; *see also id.* at 463 (State failed to demonstrate an interest "sufficient to justify" the demand). Likewise, in *Bates v. City of Little Rock*, 361

U.S. 516 (1960), the Court held unconstitutional a local government effort to obtain NAACP membership rolls where there was "no relevant correlation" between the demanded disclosures and the government's interests. *Id.* at 525. *Bates* explained that "[w]hen it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Id.*; *see also Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963) (State must "convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest"). These decisions make clear that exacting scrutiny is not limited to the electoral context.

b. Petitioners argue that the decision below is contrary to *Shelton v. Tucker*, 364 U.S. 479 (1960), *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), and other decisions they say apply a narrow tailoring requirement. *See, e.g.*, Pet. 19-21. In *Shelton*, the Court explained that "even though [a] 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." 364 U.S. at 488 (footnote omitted). In *Gremillion*, the Court concluded that when a demand for associational information encroaches on First Amendment interests, it "must be highly selective." 366 U.S. at 296; *see also id.* at 297 (regulation of protected activity must be "'narrowly drawn to prevent the supposed evil'").

Contrary to petitioners' view, the decision below took due account of these precedents. The court of appeals explained that the concern with overly broad regulation expressed in *Shelton* and *Gremillion* is part and parcel of the substantial relation analysis. *See* Pet. App. 15a-16a (requirement that State use means narrowly drawn to avoid needlessly stifling expressive association not "distinguishable from the ordinary 'substantial relation' standard").

In particular, the court of appeals emphasized that exacting scrutiny requires the government's interest to be proportionate to the interference with associational interests. Pet. App. 15a-17a ("strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights") (internal quotation marks omitted). It recognized that the availability of more narrow alternatives and the breadth of the State's chosen approach are both relevant to the inquiry. *See id.* at 19a-23a, 29a. And it acknowledged that in circumstances in which an information-reporting requirement seriously interferes with associational rights, the State bears a correspondingly higher burden of choosing more closely tailored means to achieve its objectives. *Id.* at 23a ("substantial relation test" does not require State to forgo most effective and efficient means, even if alternatives available, absent showing of significant burden on First Amendment rights); *see also id.* at 103a (response to dissent from denial of rehearing) ("where the burden that a disclosure requirement places on First Amendment rights is great, the interest and the fit must be as well").

The court of appeals was correct, moreover, when it declined to apply "the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny,"

and rejected the argument that "the state [must] choose the least restrictive means of accomplishing its purposes." Pet. App. 16a; *see* Pet. 21; Law Center Pet. 21-23 (arguing that strict scrutiny applies). As explained above, this Court has repeatedly held that information-reporting requirements are subject to exacting scrutiny, not strict scrutiny. Exacting scrutiny requires the State to demonstrate that the challenged requirement is substantially related to the interests being served and that the State is not regulating in an unjustifiably broad way. It does not require the State to demonstrate that it has selected the least restrictive alternative to further its objectives—a point that the Foundation itself appears to concede. Pet. 20-21 (arguing that State must select "'not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective'") (quoting *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion)) (alteration omitted).

Finally, petitioners' assertion that this Court's decisions reflect a "categorical distinction" between election and non-election cases cannot be reconciled with this Court's decision in *Buckley*. *See* Pet. 22; Law Center Pet. 23-25. *Buckley* expressly adopted the framework applied in *NAACP* and other cases from outside of the election context. *See Buckley*, 424 U.S. at 64-65 & 64 nn.73-75.[5] Petitioners also err in arguing that

[5] The Law Center (at 24) misreads *Buckley*'s statement that "*NAACP v. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative." *Buckley*, 424 U.S. at 70. The Law Center argues that this statement reflects *Buckley*'s rejection of the standard of scrutiny established in *NAACP*. In fact, the Court was distinguishing the result in *NAACP* based on the very different factual records in the two

disclosure requirements are a less restrictive approach only with respect to campaign regulation. *See* Pet. 22-23; Law Center Pet. 24. The same is true in other contexts in which the government chooses a reporting requirement to serve important public objectives instead of directly regulating speech or associational activities themselves.

2. The court of appeals' adoption of exacting scrutiny also does not implicate any circuit conflict warranting this Court's review. The only case cited by petitioners to consider the constitutionality of a similar reporting requirement reached the same conclusion as the court of appeals here. The other cases cited in the petitions involved different sorts of disclosure requirements and were decided at least thirty years ago. Although the cases use different language to describe the applicable standard of scrutiny, in substance their analysis is either broadly similar to the decision below or differs in ways that do not warrant certiorari.

a. The Second Circuit addressed the constitutionality of a state Schedule B reporting requirement in *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018). It declined to apply strict scrutiny and rejected the argument that exacting scrutiny is limited to the election context. *See id.* at 382-384. Reviewing the reporting requirement under exacting scrutiny, the court examined whether there was "a 'substantial re-

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cases. *See Buckley*, 424 U.S. at 69 (NAACP made uncontroverted showing that revelation of members' identities led to threats and public hostility); *id.* at 71-72 (*Buckley* challengers did not "tender[] record evidence of the sort proffered" in *NAACP*; "[a]t best" they presented testimony that one or two individuals declined to contribute because of disclosure requirement).

lation between the disclosure requirement and a sufficiently important governmental interest' where 'the strength of the governmental interest' is commensurate with 'the seriousness of the actual burden on First Amendment rights.'" *Id.* at 382. It held that the State's interests in preventing fraud and self-dealing were important and substantially related to the State's decision to require submission of the Schedule B on a confidential basis. *Id.* at 382-384. The court of appeals here reached precisely the same conclusions.

The Foundation suggests that *Schneiderman* diverges from the decision below because, as the Foundation sees it, the Second Circuit ruled "on grounds that did not reach the requirement of narrow tailoring." Pet. 26. But *Schneiderman* expressly recognized and rejected plaintiffs' argument that a state Schedule B requirement is unconstitutional "absent a compelling government interest and narrowly drawn regulations furthering that interest." 882 F.3d at 381; *see also id.* ("the law is not as [plaintiffs] characterize it").

b. Petitioners point to no other authorities involving a similar reporting requirement, but instead rely on several circuit cases from the 1980s that reviewed different types of disclosure requirements. *See* Pet. 24-27; Law Center Pet. 33-35. Contrary to petitioners' claims, these decisions do not reflect a "stark split" (Pet. 28), do not subject all non-election disclosure requirements to "strict scrutiny" (Law Center Pet. 32), and do not otherwise warrant this Court's review.

To begin with, the Second Circuit's decision in *Local 1814, International Longshoremen's Association, AFL-CIO v. Waterfront Commission of New York Harbor*, 667 F.2d 267 (2d Cir. 1981), is not meaningfully

different from the decision below. *See* Pet. 25-26. *Local 1814* addressed a First Amendment challenge to a subpoena seeking the names of workers who had authorized payroll deductions for union political activities. 667 F.2d at 269. The court determined that, under "exacting scrutiny," a "[c]ompelled disclosure is not permitted unless it is substantially related to a compelling governmental interest." *Id.* at 270-271 (citing, *inter alia*, *Buckley*, 424 U.S. at 64). The court explained that the constitutionality of the demanded disclosure "depends on an assessment of the weight of the asserted governmental interest and the degree of impairment of protected rights." *Id.* at 272; *see also id.* at 274 (evaluating "balance" of government's interest and impairment of associational rights). And it rejected proffered alternatives that would not be "equally effective" in satisfying the state interest. *Id.* at 274 n.1. The decision below likewise applied these standards to California's Schedule B requirement. *See* Pet. App. 14a-15a, 17a-23a, 39a.

As the Foundation points out (at 26), the Second Circuit also reasoned that courts must "examine the scope of the proposed action." *Local 1814*, 667 F.2d at 273 (discussing *Shelton*, 364 U.S. at 488). Although the decision below did not phrase the standard of scrutiny in precisely those terms, in substance it engaged in a similar analysis when it explained the limited reach of California's Schedule B requirement. Pet. App. 29a (requirement is "not a sweeping one" and is a "far cry from … broad and indiscriminate disclosure laws" held invalid elsewhere).

The Fifth Circuit's decision in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), also used an analysis that is broadly similar to that in the decision

below. Applying "exacting scrutiny," the court reasoned that a state mandate to publicly disclose members' identities had to be "substantially related to a legitimate and compelling underlying state interest" and "drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than is absolutely necessary." *Id.* at 399 (internal quotation marks omitted). In applying this standard, the court held the state law invalid because it swept "too broadly" by subjecting to public recrimination members who had nothing to do with the purpose of the law. *Id.* at 400-401. As just explained, the decision below similarly considered whether California's requirement is "a sweeping one." Pet. App. 29a.

The Law Center is incorrect, moreover, in arguing that the outcome in this case would be different under the analysis applied in *Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984), and *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985). *See* Law Center Pet. 33-35. In those cases, the courts applied "'exacting scrutiny'" to a federal statute mandating public disclosure of associational information, and they recited the relevant standard, in part, as requiring the statute to be "justified by a compelling government interest" and "narrowly tailored to serve that interest." *Master Printers*, 751 F.2d at 705 (footnote omitted); *see also Humphreys*, 755 F.2d at 1220-1221. Both courts upheld the challenged statute because it was not overly broad. *See Master Printers*, 751 F.2d at 708 (challenged provision not "overkill," in part because law could not "be effective" using a narrower approach); *Humphreys*, 755 F.2d at 1222 (provision not "overly broad" because it served government's interests). As explained more fully below, California's Schedule B is likewise limited,

and alternatives would not be effective in achieving the State's law enforcement interests. *Infra* at 23-25.

In *United States v. Comley*, 890 F.2d 539 (1st Cir. 1989), the First Circuit concluded that when a subpoena target demonstrates that an information demand will chill First Amendment rights, "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." *Id.* at 544. Here, the court of appeals recognized that, when a measure significantly interferes with First Amendment interests, the State is required to pursue its goals more narrowly. *See* Pet. App. 23a; *see also id.* at 103a (where burden on First Amendment rights "is great, the interest and the fit must be as well"). To the extent that *Comley* is read as articulating a more stringent standard of scrutiny than the decision below, the Ninth Circuit itself has embraced a similar standard in the subpoena-enforcement context. *See Brock v. Local 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 349-350 (9th Cir. 1988) (when subpoena burdens First Amendment rights, court determines if "the government's disclosure requirements are the least restrictive means of obtaining the desired information") (internal quotation marks omitted).

The remaining cases discussed by the Law Center are not relevant. *See* Law Center Pet. 34-35. *Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989), involved an organizational insider covertly providing confidential information to law enforcement officers. In *Clark v. Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984), the court addressed a constitutional challenge to a sweeping FBI investigation into the political beliefs, vacation activities, religious affiliations, and sexual

orientation of a book reshelver at the Library of Congress. Such intrusive governmental action is not analogous to requiring entities enjoying tax-exempt status to provide to state regulators, on a confidential basis, the same limited information they are already obligated to report to the IRS.

3. Finally, review in this case is unwarranted because the court of appeals correctly rejected petitioners' First Amendment claims. At trial, neither petitioner demonstrated that submitting its federal Schedule B form to the Registry materially burdened its associational interests. Both petitioners asserted that their donors would face backlash if their identities were made known to the public, but the evidence established no significant risk of public disclosure. Pet. App. 38a. Petitioners emphasize evidence of past lapses of confidentiality protections. *E.g.*, Pet. 31; Law Center Pet. 30-32. But their arguments substantially ignore the significant new safeguards adopted by the Attorney General's Office that make it unlikely that any Schedule B information, much less that of either petitioner, would be inadvertently divulged to the public. Pet. App. 38a; *see also id.* at 36a-37a (implementation of quality control procedures, text-searching, and running of weekly automated script to prevent public posting of Schedule Bs).

Petitioners likewise failed to demonstrate that providing major-donor information to the Registry would deter contributions. At trial, they could not identify a single individual whose willingness to donate depended on whether the Attorney General collected the organization's Schedule B. Pet. App. 27a-28a. In addition, the Law Center over-disclosed its donors' names to the IRS for years. *Id.* at 27a. And the Law Center appears to concede that no constitutional

barrier prevents the IRS from requiring charitable entities to supply a Schedule B as part of their federal tax return. Law Center Pet. 20; *see also* Philanthropy Roundtable Br. 19 (recognizing federal government's interest in collecting Schedule Bs to "protect charities against self-dealing" and "ensure that charitable grants support genuinely charitable organizations"). This admission substantially undermines any claim that providing Schedule B forms to state regulators on a confidential basis has any constitutionally cognizable deterrent effect.[6]

California's interest in policing charitable fraud and self-dealing is more than sufficient to justify any minimal burden on associational interests. States have vital interests in enforcing their laws and protecting the public from fraud. *See* Pet. App. 17a (recognizing "California's compelling interest in enforcing its laws") (internal quotation marks omitted). The testimony at trial established that Schedule B information allows the Attorney General to determine whether charitable entities are misusing charitable assets or otherwise violating the law. *Id.* at 17a-23a. By identifying the donor, the amount of the contribution, and the type of donation received (cash or in-kind), the form provides information that can indicate misappropriation or misuse of charitable funds and

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[6] Certain amici express concern that hostility and retaliation will follow the public revelation of a donor's affiliation with a controversial cause, particularly in times of deep public polarization. *See, e.g.*, Proposition 8 Legal Defense Fund Br. 8-18. These concerns are misplaced in the present context, because major-donor information is collected for use only by the Attorney General, and public disclosure of Schedule Bs is prohibited by law.

help state investigators determine whether the organization and its donors are engaging in self-dealing. *Id.*; *see also* C.A. Dkt. 9-3 (ER 574-575, 577-579); C.A. Dkt. 9-4 (ER 715-718); C.A. Dkt. 9-5 (ER 1011-1014, 1058-1061).[7]

In addition, California's Schedule B reporting requirement is focused and limited. The requirement does not prevent anyone from speaking or joining any organization. It imposes no restrictions on the amount donors can contribute. The required Schedule B form, moreover, contains the identities of only major donors—in petitioners' cases, up to seven to ten names. Pet. App. 8a-9a. The information collected extends no further than what organizations already must report to the IRS. And California law prohibits the public disclosure of Schedule B forms. California's requirement is "not a sweeping one." *Id.* at 29a.

The alternatives proffered by petitioners are inadequate. *See* Pet. 3; Law Center Pet. 29. Limiting regulators to issuing subpoenas or audit letters on a case-by-case basis would compromise investigations and allow the dissipation of assets. Pet. App. 18a-23a. The fact that other States choose not to collect federal

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[7] Although the record evidence is sufficient to establish the strength of the State's interest, it is nonetheless incomplete. The district court excluded evidence of additional uses of Schedule B for law enforcement purposes—including testimony from members of the Charitable Trusts Section of the Attorney General's Office regarding specific uses of Schedule B in ongoing matters—when the witnesses "understandably refused to name the charities under current investigation." Pet. App. 21a-22a n.3; *see also* C.A. Dkt. 9-5 (ER 973-975) (refusing on hearsay grounds to allow witness to testify to uses of Schedule B in investigations he had supervised); *cf.* Pet. App. 13a n.2 (noting "several questionable evidentiary rulings the [district] court issued in [petitioners'] favor").

Schedule B forms is likewise not relevant. *See* Arizona *et al.* Br. 5-6. Each State has distinct law enforcement interests, and the First Amendment does not require a one-size-fits-all approach. The California Attorney General is responsible for overseeing over 100,000 charities, and the record in this case demonstrated that relying on other tools such as subpoenas or audit letters would compromise the State's ability to effectively protect the public from misuse and dissipation of charitable assets. Pet. App. 20a-23a; C.A. Dkt. 9-5 (ER 996).

There is no comparison, moreover, between California's Schedule B requirement and the information demands this Court has held to be unconstitutional. *See* Pet. 18-19 (citing cases); Law Center Pet. 21-22 (same). In those cases, state officials sought to broadly compel disclosure of membership information, including to the public, in the face of evidence that threats, violence, or economic reprisals would result. For example, in *NAACP v. Alabama*, the Court held that Alabama could not compel the NAACP to disclose a list of rank-and-file members, where it was "uncontroverted" that revelation of NAACP members' identities exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. Similarly, in *Bates*, the Court held unconstitutional a local government effort to compel the public disclosure of NAACP membership rolls, where the evidence showed that a drop in membership renewals, harassment, and threats of bodily harm would follow. 361 U.S. at 521-522.[8]

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[8] *See also Gremillion*, 366 U.S. at 297 (rejecting Louisiana's demand for all NAACP members' names and addresses); *Shelton*,

In contrast, a Schedule B form includes the identities of only major donors, and is provided to state regulators on a confidential basis. The trial evidence did not establish that this nonpublic reporting requirement would deter affiliations with petitioners and their causes. The court of appeals' decision to sustain California's Schedule B requirement does not warrant any further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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364 U.S. at 486, 490 (invalidating compelled disclosure of all organizational affiliations of all public school teachers, a law of "unlimited and indiscriminate sweep," where disclosure to superiors would create "constant and heavy" pressure to avoid certain associational affiliations); *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 99-101 (1987) (invalidating application of law requiring public disclosure of party supporters amid evidence of threats, government surveillance, and loss of employment of party members).