No. 19-251

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent does not seriously deny the exceptional nationwide importance of the question presented—whether the First Amendment permits an overbroad donor-disclosure requirement that chills speech and association. Nor could it do so given the extraordinary outpouring of amicus support for the petition from across the political spectrum.[1] As amici explain, anonymity has long facilitated charitable donations, especially to unpopular causes;[2] forced disclosure of donor identities regularly leads to harassment, reprisals, and violence;[3] and these dangers have been magnified by the advent of the Internet.[4]

Instead, Respondent argues that the decision below does not conflict with precedent, raise the question presented or afford a good vehicle for reviewing it. Respondent errs on all three counts.

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[1] Twenty-three amicus briefs were filed in support of the petition and the related petition in No. 19-255. *See* Briefs of Amici Curiae 24 Family Pol'y Orgs.; Am. Ctr. L. & Just.; Am. Target Advert.; Buckeye Inst.; Cato Inst.; Chamber Com.; Council Am.-Islamic Relat.; Free Speech Coal.; Goldwater Inst.; Hisp. Leadership Fund; Inst. Free Speech; Inst. Just.; Jud. Watch; Lib. Just. Ctr.; Nat'l Ass'n Mfrs.; New C.L. All.; Pac. L. Found.; Pac. Res. Inst.; Philanthropy Roundtable; Prop. 8 L. Def. Fund; Pub. Integrity All.; Pub. Interest L. Found.; States of Arizona et al.

[2] *See, e.g.*, Brs. Pac. L. Found. 7-9; Inst. Just. 10-15; Philanthropy Roundtable 14-17.

[3] *See, e.g.*, Brs. Lib. J. Ctr. 11-18; Goldwater Inst. 13-14; Jud. Watch 5-10.

[4] *See, e.g.*, Br. Prop. 8 L. Def. Fund. 6-7.

First, contrary to Respondent's suggestion (BIO 12-21), the decision below conflicts with an unbroken line of precedent invalidating donor-disclosure requirements outside the election context—as the five-judge dissent from denial of *en banc* review makes clear (Pet. App. 77a-97a). Respondent suggests that the Ninth Circuit's "substantial relation" inquiry subsumes any requirement of "narrow tailoring," but that is plainly wrong. Had the Ninth Circuit's watered-down approach to "exacting scrutiny" been applied to other disclosure requirements this Court has invalidated, those cases would have come out the other way. The same is true of the conflicting decisions of sister circuits.[5]

Second, without meaningfully challenging the importance of the question presented in theory, Respondent tries unavailingly (BIO 23-25) to discount this case's importance on its facts. But this case concerns more than a few donors or a single State. California's blunderbuss efforts affect tens of thousands of charities and their donors, and its zeal in ensnaring their confidential information threatens to reduce First Amendment protections to the weakest link in our nationwide chain.

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[5] *See* Br. Council Am.-Islamic Relat. 3 ("Government action that wreaks such associational havoc must be evaluated under exacting scrutiny as defined by the Supreme Court's prior precedents, not the lesser akin-to-rational-basis standard adopted by the Ninth Circuit."); *see also* Br. Pac. Res. Inst. 5-9; Br. Pac. L. Found. 2.

Finally, Respondent fails in its effort to depict this case as a poor vehicle for resolution of the question presented. Respondent offers no factual support for its assurances (BIO 1, 3, 4, 6-7, 10, 21, 22 n.6) that California has now overcome the systematic pattern of violating donor confidentiality so well chronicled in the record below. Nor is Respondent persuasive in trying to trivialize (BIO 21-25 & n.8) the burdens its policy imposes on Petitioner's protected liberties. The voluminous record here provides empirical evidence of chill far surpassing that in other disclosure cases this Court and other circuits have considered.

The petition should be granted.

ARGUMENT

I. RESPONDENT FAILS TO DISPEL THE CONFLICTS CREATED BY THE DECISION BELOW

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

Respondent tries to reconcile the Ninth Circuit's abandonment of narrow tailoring with the precedents of this Court by suggesting (BIO 14) "that the concern with overly broad regulation expressed in *Shelton* [*v. Tucker*, 364 U.S. 479 (1960)] and [*Louisiana ex rel.*] *Gremillion* [*v. NAACP*, 366 U.S. 293 (1961)] is part and parcel of the substantial relation analysis." But the Ninth Circuit could hardly have been clearer in expressly disavowing "the narrow tailoring and least-restrictive-means tests," stating they "do not apply here" and faulting the district court for concluding otherwise. Pet. App. 22a, 47a. In contrast, *Shelton* and *Gremillion*

pointedly impose the "narrow tailoring" requirement *atop* the requirement of a substantial relation to the government's interest, asking whether a disclosure requirement "can be more narrowly achieved," 364 U.S. at 488, and insisting that any disclosure requirement be "narrowly drawn," 366 U.S. at 297 (citation omitted).

This is not a matter of semantics or "language" (BIO 16), but of bedrock First Amendment principle. This Court does not engage in free-form balancing where free speech and association are at stake, getting out a scale and weighing the government interest against the First Amendment burden. Rather, decisions from *Shelton* and *Gremillion* to the present have *presumed* that protected speech and association are burdened by donor-disclosure requirements and have required that such burden be minimized—specifically, by insisting government show it could not achieve its ends through narrower means.

Contrary to Respondent's suggestion, the two separate requirements serve different functions. The "substantial relation" requirement ensures that membership disclosure will advance a government interest. *See Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 546-58 (1963) (state failed to demonstrate substantial relationship to justify inquiring into NAACP's membership); *Bates v. Little Rock*, 361 U.S. 516, 524-27 (1960) (same). The "narrow tailoring" requirement, by contrast, asks whether government could achieve its purpose less invasively.

Shelton highlights the difference. There, Arkansas compelled its teachers to file affidavits

listing every organization they belonged to or regularly supported within the preceding five years. 364 U.S. at 480. The Court began by recognizing that the statute satisfied the substantial-relationship requirement: Unlike in *NAACP v. Alabama* and *Bates v. Little Rock*, "there can be no question of the relevance of a State's inquiry into the fitness and competence of its teachers." *Id.* at 485. Still, the Court *separately* asked whether the statute was narrowly tailored: The governmental "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488. Ultimately, the "unlimited and indiscriminate sweep of the statute" led the Court to strike it down. *Id.* at 490. This Court reiterated *Shelton*'s holding in *Gremillion*. 366 U.S. at 296-97. And, in *Roberts v. Pollard*, the Court summarily affirmed a three-judge court (one that included then-Judge Blackmun), which likewise enforced the narrow tailoring requirement as separate and distinct. 393 U.S. 14 (1968), *summarily aff'g* 283 F. Supp. 248, 257 (E.D. Ark. 1968). The Ninth Circuit's disavowal of narrow tailoring cannot be reconciled with *Shelton*, *Gremillion*, and *Pollard*. *See* Pet. App. 90a-91a, 94a-95a.

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

Respondent similarly fails (BIO 16-21) to reconcile the Ninth Circuit's decision with those of sister circuits. Contrary to Respondent's contention (BIO 16), other courts of appeals hold that a governmental disclosure demand outside the election context must employ narrowly tailored or least restrictive means. *See* Pet. 24-27 & n.6 (collecting

cases). Had AFPF's lawsuit arisen in one of *those* circuits, a different legal standard would apply, requiring that the State's demand be narrowly tailored to its asserted interest.

Nor do other circuits treat narrow tailoring as subsumed in the substantial-relation inquiry rather than as a standalone requirement. For example, in *Familias Unidas*, the Fifth Circuit held that, even though a statute had the requisite "relevant correlation to the legitimate object of peaceful operation of the schools," 619 F.2d 391, 400 (5th Cir. 1980), it was nonetheless unconstitutional due to a lack of narrow tailoring, *id.* at 400-02.

Respondent fares no better in seeking (BIO 16-17) to distinguish these cases as concerned with "different types of disclosure requirements." This Court has long applied the same test to the different types of disclosure requirements challenged in cases as disparate as *NAACP v. Alabama*, *Bates*, *Shelton*, *Gremillion*, *Pollard*, and *Gibson*. The First Amendment does not mandate different inquiries for donor-disclosure demands under Schedule B, the Louisiana Revised Statutes (*Gremillion*), and the Texas Education Code (*Familias Unidas*).[6]

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[6] Notably, Respondent ignores the conflict the decision below poses with *Trade Waste Management* and *Wilson v. Stocker*. See Pet. 27 n.6. And Respondent's purported reconciliation (BIO 19-21) with *Master Printers*, *Humphreys*, *Pleasant*, and *Clark* lacks substance. Factual differences between those cases and this one by no means change the legal standard operative in the Fourth, Sixth, Tenth, and D.C. Circuits, demanding narrow tailoring.

Respondent further misplaces reliance (BIO 16-17) on the Second Circuit's decision in *Citizens United v. Schneiderman*, 882 F.3d 374 (2018). To begin with, that decision did not abrogate *Local 1814, International Longshoremen's Association v. Waterfront Commission*, which held that "the scope of the proposed action" must be reviewed separate and apart from any logical relationship to a governmental interest, 667 F.2d 267, 273 (2d Cir. 1981) (citing *Shelton*, 364 U.S. at 488). Instead, *Citizens United* affirmed dismissal of the complaint there on the premise that disclosure did not "seriously … burden the First Amendment rights of non-profit organizations in New York," without deciding the role narrow tailoring should otherwise play. 882 F.3d at 382-84. Moreover, the Second Circuit expressly distinguished the record in this case as containing far more concrete evidence of harms from disclosure and thus presenting "a more difficult question." 882 F.3d at 384 (citing Pet. App. 51a-53a). The Second Circuit thus has not aligned itself with the decision below.[7]

II. RESPONDENT FAILS TO DISPEL THE EXCEPTIONAL IMPORTANCE OF THE QUESTION PRESENTED

The remarkable outpouring of support for the petition by a diverse array of groups joining no fewer than 23 amicus briefs—including one filed by thirteen States and the Governor of a fourteenth—

[7] Even if the Second Circuit and the Ninth Circuit were aligned or neighboring, that would not obviate the split with other circuits on narrow tailoring.

confirms the nationwide importance of the question presented. Amici vividly illustrate the profound chilling effect California's donor-disclosure regime has on freedoms of speech and association.[8] Respondent barely acknowledges amici's concerns except to say in a footnote (BIO 22 n.6) that they are misplaced because California has supposedly turned a corner and will never resume secretly breaching donor confidentiality. That assertion is belied by the record (Pet. 8-10, 31-32; Pet. App. 51a-53a), and in any event fails to dispel the importance of assessing the constitutionality of dragnet compulsion that *risks* such repeated breaches.

Nor can Respondent diminish the importance of this case by suggesting (BIO 23) that collection of *the Foundation's* own Schedule Bs will jeopardize only "seven to ten names." The First Amendment contains no *de minimis* exception making irrelevant the demonstrated danger (Pet. 11) to the Foundation's top donors and the lifeblood of its operations.[9] Nor does the First Amendment require

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[8] *See, e.g.*, Brs. Cato Inst. 19 ("[C]haritable giving will be chilled nationwide as charities are forced to either stop fundraising in California—giving up nearly 40 million potential donors—or disclose their Schedule B donor lists…."); Philanthropy Roundtable 5-17; Hisp. Leadership Fund 1.

[9] The trial record is replete (Pet. App. 49a-50a) with evidence of death threats, harassment, and violent assault against those publicly identified with the Foundation, ER200-13, 313-18, 340-45, 429-51, 472; of the profound concerns the Foundation's donors have about revelation of donor identities, ER513, 521-28; and of the departure of donors who cite concerns about possible loss of confidentiality, ER309-11, 334-35. Such evidence belies Respondent's suggestion (BIO 21) that

that threats escalate into realized reprisal and violence before courts intervene. The district court followed precedent by declining "to wait until a [Foundation] opponent carries out one of the numerous death threats made against its members." Pet. App. 50a.[10]

Moreover, Respondent's math exercise ignores the broader burdens imposed on countless charitable donors by the State's sweeping demand for Schedule B from *tens of thousands* of charities each year, despite using only *five Schedule Bs over ten years* for 540 investigations (*i.e.*, fewer than 1%). Pet. App. 54a, ER984. If the constitutional equation reduces to mathematics, it should suffice to note that the number of Schedule Bs the State has actually used for investigative purposes is a miniscule fraction of

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there can be no First Amendment burden unless a particular donor steps forward to testify that his "willingness to donate depended on whether [Respondent] collected the organization's Schedule B."

[10] In *Pollard*, for example, the court struck down a disclosure requirement even absent "evidence … that any individuals have as yet been subjected to reprisals on account of the contributions in question." 283 F. Supp. at 258, *aff'd*, 393 U.S. 14; *see also, e.g.*, *Local 1814*, 667 F.2d at 271-72 (granting relief despite "absence of any showing that disclosure of contributors' identities would lead to economic or physical harassment or other manifestation of public hostility against rank-and-file members"); *Community-Service Broad. Mid-Am., Inc. v. FCC*, 593 F.2d 1102, 1118-19 (D.C. Cir. 1978) (*en banc*) (similar). And the chill from compelled disclosure need not be "as serious as that involved in cases such as *NAACP v. Alabama*" to warrant relief. *Perry v. Schwarzenegger*, 591 F.3d 1147, 1164 (9th Cir. 2010).

the more than 1,778 Schedule Bs its Registry has improperly published on its website (Pet. App. 52a).

Finally, the nationwide importance of the question presented is underscored by the fact that other States find no need for Schedule Bs in order to police charities, as the amicus brief of thirteen States and one governor emphasizes. States Br. 5-8. Although Respondent dismisses (BIO 23-24) other States' experiences, they buttress the conclusion that Respondent lacks valid justification for demanding tens of thousands of Schedule Bs each year, only to use a handful. Whether amassing troves of data about donor identities serves any interest in administrative efficiency that can justify the resulting chill is a question whose answer should not differ across state borders. States Br. 4, 8-10.

III. RESPONDENT'S SUGGESTION OF VEHICLE PROBLEMS IS ILLUSORY

Unable to dispel the exceptional importance of the question presented, Respondent tries to suggest this case is a poor vehicle for resolving it. The suggestion lacks merit.

First, Respondent errs in downplaying (BIO 21-22) the proof below that the forced collection of Schedule Bs chills charitable speech and association. The district court made unassailable findings that Respondent's Schedule B requirement "places donors in fear of exercising their First Amendment right to support [AFPF's] expressive activity," which in turn "diminish[es] the amount of expressive and associational activity by [AFPF]." Pet. App. 54a. The record also supports the same conclusion for other groups, especially those promoting controversial causes. ER519-21, 626-27; SER1030-

31. As the district court further found, this threatened chill was exacerbated by Respondent's "pervasive, recurring pattern of uncontained Schedule B disclosures," which deters donors who now know better than to trust in Respondent's hollow assurances of "confidentiality," especially because Respondent's pattern of uncontained Schedule B disclosures "persisted even during this trial." Pet. App. 52a. Tellingly, Respondent does not deny that his office's prior confidentiality assurances have proven false. *See* Pet. 7-10, 31-32. And Respondent's insistence (BIO 21) that California's repeated "lapses of confidentiality protections" are now a thing of the past has no record support in this case; all Respondent cites regarding these supposed new safeguards are unsupported assertions by the panel.[11]

Second, Respondent errs in suggesting (BIO 1, 21-22) that any issue with California's practices is obviated by the IRS's collection of Schedule B. Unlike the IRS, California officials published some 1,800 Schedule Bs and exposed tens of thousands more through a gaping website vulnerability, thereby

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[11] The district court found that the State had "more work to do before it [could] get a handle on maintaining confidentiality." Pet. App. 52a, 92a-93a. And the "confidentiality" regulation Respondent adopted post-trial merely codified preexisting policy without substantive change. *See* Pet. 10 n.2; *see also* Pet. 8-9. To the extent Respondent relies on supposedly new facts post-dating AFPF's trial, he should make his record in the trial court via Federal Rule of Civil Procedure 60(b), not via unsubstantiated, untested appellate submissions. *Cf. Horne v. Flores*, 557 U.S. 433, 447-48 (2009).

revealing the names and addresses of countless donors. Pet. App. 51a-52a, 91a-92a. Moreover, whereas the IRS imposes strict protocols to protect Schedule Bs, Respondent has not followed suit. ER691-92, 696-99, 873. If confidentiality is ever breached, federal law imposes civil and criminal penalties. *See* 26 U.S.C. §§ 6104(b), 7213, 7431. California, by contrast, imposes no penalties whatsoever. Indeed, Respondent has never disciplined any of the employees responsible for leaking Schedule Bs, nor has it ever notified any affected charity or donor. ER627-31, 765, 1049. The IRS also has express statutory authorization to collect Schedule B and a distinct interest in using it to verify charitable contributions for federal tax purposes. *See* 26 U.S.C. § 6033(b)(5). Respondent, by contrast, lacks legal authority to demand Schedule B *en masse*, *see* Pet. 6-7, does not use Schedule B for tax purposes, *see* ER697, and does not have any other creditable interest in Schedule Bs, *see* Pet. App. 44a-45a, 93a-95a.

Third, Respondent passingly references (BIO 11 n.4) the extra-record fact that the California Franchise Tax Board recently revoked AFPF's tax-exempt status. The State does not thereby suggest mootness, nor could it, considering that AFPF's officers are facing personal fines unless they turn over the Schedule Bs specifically at issue here for 2011-2013, SER185-86, and that registration is essential for AFPF to solicit and operate in California, irrespective of whether it maintains tax-exempt status there. Strikingly, the revocation happened on April 2, the same day Petitioner moved to stay the mandate below pending the instant petition (following extensive consultations with

Respondent). To the extent this development matters at all for present purposes, it only compounds concerns—grounded in this record—that AFPF may be singled out for disfavored treatment by California officials. ER259-60, 330; SER1073-74; Br. Pac. Res. Inst. 14-16; Br. Free Speech Coal. 25-27.

In sum, this case presents an ideal vehicle to answer the question presented and thereby resolve an important jurisprudential split that otherwise calls into doubt First Amendment protections for charities and donors throughout the United States.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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