Nos. 19-251, 19-255

In The Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

XAVIER BECERRA, Attorney General of California,

Respondent.

THOMAS MORE LAW CENTER,

Petitioner,

v.

XAVIER BECERRA, Attorney General of California,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice is a nonprofit, public-interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and by restoring constitutional limits on the power of government. As part of that mission, the Institute litigates free-speech cases nationwide to defend the free exchange of a wide array of ideas, including speech about political issues.

The Institute exists thanks to the generosity of its donors, some of whom expect the Institute to protect their privacy from unnecessary disclosure. The Institute is filing this *amicus* brief in support of Petitioners because this case offers an important opportunity for the Court to address the government's aggressive intrusion into charitable solicitation and the courts' inappropriate and unjustified application of campaign-finance law to peaceful speech and association unrelated to an election.

SUMMARY OF THE ARGUMENT

Respondent Attorney General of California has commanded that private organizations turn over lists of their supporters to the government as a condition of its engaging in charitable fundraising, an activity that

[1] No party counsel authored any of this brief, and no party, party counsel, or person other than *Amicus* or its counsel paid for brief preparation and submission. The parties consented to the filing of this brief.

this Court has repeatedly held is entitled to the highest level of First Amendment protection. There is no evidence or even suggestion that these organizations, Americans for Prosperity Foundation and the Thomas More Law Center, both 501(c)(3) groups, have engaged in any illegal activity. Nor is there any evidence that this compelled disclosure is necessary for the Attorney General to enforce California's legitimate regulation of charities; indeed, other than Florida and New York, no other state in the nation compels charities like AFP and the Center to turn this private information over to the government.[2] Instead, when other states want this information, they go through ordinary constitutional channels by seeking a subpoena.

Despite the experience of the 47 states that successfully regulate charitable solicitation without demanding unfettered access to the private details of charities' associations with their donors, the Ninth Circuit upheld the Attorney General's sweeping intrusion into AFP's and the Center's private association with its donors. In doing so, the Ninth Circuit expanded the scope of this Court's campaign-finance-disclosure jurisprudence beyond its historical limits of speech related to political campaigns. As this case shows, that expansion sweeps in a vast amount of protected First Amendment activity that has nothing to do with political campaigns. This activity also poses none of the concerns that this Court has identified as justifying the

[2] *See* Br. *Amicus Curiae* Charles M. Watkins Supp. Appellant at 7 n.2, *Ctr. for Competitive Pol. v. Harris*, 784 F.3d 1307 (9th Cir. 2014).

diminished protection this Court has often afforded to campaign financing. Whether or not the disparate treatment of campaign finance can be justified on its own merits, this Court should not allow that jurisprudence to rob other categories of First Amendment activity of their rightful protection.

Because the Ninth Circuit based its ruling on this Court's *sui generis* campaign-finance precedent, its ruling is also in serious conflict with this Court's other First Amendment precedent. Although this Court has repeatedly recognized that compelled disclosure of one's private associations is necessarily chilling, the Ninth Circuit held that this disclosure is chilling only if one can produce evidence that the disclosure will lead to harassment or reprisal. But the Ninth Circuit's evidentiary standard is so high that virtually no one will ever be able to satisfy it, even if, as here, a group's supporters have already received death threats.

Finally, in conflict with decisions of this Court and other circuits holding that burdens on charitable solicitation are subject to strict scrutiny, the Ninth Circuit reviewed those burdens with only intermediate scrutiny. This was possible because this Court has often used the phrase "exacting scrutiny" to describe both strict and intermediate scrutiny. At best, this has created confusion in the lower courts; at worst, it has empowered lower courts to evade the dictates of strict scrutiny whenever it suits them to do so. This Court should now clarify that campaign-finance decisions about contribution limits and disclosure have not

reduced the protection afforded to charitable solicitations.

ARGUMENT

I. This Court Should Not Allow Its *Sui Generis* Campaign-Finance Jurisprudence to Undermine First Amendment Protection in Other Areas of the Law.

This is a case about charitable solicitations. Yet the Ninth Circuit erroneously relied on campaign-finance-disclosure precedent to analyze California's requirement that a registered charity disclose its donors. This error is particularly disturbing because, for decades, this Court has treated aspects of campaign finance as outliers that government may regulate in ways this Court would never tolerate in other areas of protected expression. As this case shows, these aspects of the Court's campaign-finance jurisprudence are now leaking out to and endangering other First Amendment activity. This Court should now cabin the scope of its campaign-finance precedent and make clear that this precedent does not reduce constitutional protections outside the electoral setting.

In general, this Court requires burdens on political speech to satisfy strict scrutiny, a standard that demands the government proffer actual evidence and prohibits laws that regulate with too broad a brush. But this Court has departed from that approach, and thus ordinary First Amendment principles, in two

areas of its campaign-finance jurisprudence: disclosure requirements, *see Citizens United v. FEC*, 558 U.S. 310, 366-69 (2010), and contribution limitations, *see Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam).

The most notable way in which this Court's treatment of campaign-finance disclosure and contribution limits varies from its approach in other cases is the treatment of evidence, or the lack thereof. For example, this Court has repeatedly held that government must proffer actual evidence to justify regulating speech, including even categories of speech traditionally entitled to limited First Amendment protection, such as commercial speech. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In campaign-finance-disclosure cases, however, this Court has deviated from that rule. It has, for example, upheld a disclosure requirement without relying on specific evidence because it assumed that requiring disclosure of campaign finances provides useful information to voters. *E.g.*, *Citizens United*, 558 U.S. at 366-71. But the presumed value of disclosure does not withstand close examination. Indeed, a growing body of scholarship finds that disclosure has no discernable benefits for voter decision-making. *See, e.g.*, David M. Primo, *Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge*, 12 Elec. L.J. 114, 127 (2013) (finding that disclosure information in ballot-issue campaigns had an "imperceptible" effect on the ability of voters to identify the positions of interest groups).

Similarly, this Court has upheld contribution limits as a valid way to combat the appearance of corruption, again with no evidence that contribution limits are effective in achieving that goal. This Court's conclusion is by no means obvious; indeed, one recent study found virtually no relationship between trust in government and campaign-finance laws. David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 Elec. L.J. 23 (2006). Yet in *Nixon v. Shrink Missouri Government PAC*, this Court upheld a state-level contribution limit based largely on newspaper clippings that merely asserted that special interests were having an outsized role in Missouri politics. 528 U.S. 377, 393-95 (2000). When the plaintiffs in that case offered actual studies on corruption to show the likely inefficacy of Missouri's contribution limits, this Court ignored those studies, stating simply that "there [was] little reason to doubt that sometimes large contributions will work actual corruption of our political system." *Id.* at 395. This led one scholar to note that actual evidence appears to be irrelevant in challenges to contribution limits. Ronald M. Levin, *Fighting the Appearance of Corruption*, 6 Wash. U. J.L. & Pol'y 171, 176-78 (2001).

This Court would not countenance that type of fact-free speculation in any other area of First Amendment law. Even in cases involving deeply unpopular speech, this Court requires the government to produce evidence to meet its burden. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 726 (2012) (rejecting ban on lying about military service because the government

"point[ed] to no evidence to support its claim"); *cf. City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 435-39, 442 (2002) (plurality opinion) (upholding law restricting locations of sexually oriented businesses because the government produced evidence supporting its theory); *id.* at 451-52 (Kennedy, J., concurring in judgment) (discussing the city's "fact-bound empirical assessments"). Yet in cases about campaign-finance disclosure or contribution limits, this evidentiary requirement is absent.

Another way in which this Court's treatment of campaign-finance disclosure and campaign contributions differs from ordinary First Amendment cases is a relaxed view of how closely tailored a law must be to satisfy judicial scrutiny. For example, this Court has generally held that the government may not suppress lawful expression simply because it is hard to distinguish from unlawful expression. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (striking down ban on virtual child pornography and stating, "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter."). Yet in the context of campaign-contribution limits, this Court has allowed stringent limitations even while conceding "that most large contributors do not seek improper influence over a candidate's position or an officeholder's action." *Buckley*, 424 U.S. at 29-30.

Given how easy it is for government to satisfy the "exacting" scrutiny that this Court applies in cases

involving campaign-finance disclosure and contribution limits—and how sharply it departs from the much higher demands that this Court applies to virtually all other burdens on speech and association—it is no surprise that the government has sought to import this precedent into other areas of First Amendment doctrine. The Ninth Circuit's decision below shows how dangerous this expansion is. If allowed to stand, the Ninth Circuit's decision will signal that campaign-finance precedent is no longer cabined to its unique circumstances and will lead to the further chilling of speech.

Without further guidance from this Court, there is nothing to prevent this Court's unique jurisprudence on campaign-finance disclosure and contribution limits from expanding and swallowing the general rule that government may not regulate peaceful political speech and association unless it can satisfy the demanding requirements of strict scrutiny. Over the long term, this Court should bring its campaign-finance doctrine in line with the rest of its First Amendment jurisprudence. But in the short term, this Court should clarify that nothing in its campaign-finance-disclosure cases was meant to supplant or overrule this Court's earlier decisions on compelled disclosure in other contexts.

II. The Ninth Circuit's Ruling Conflicts with This Court's Repeated Recognition That Compelled Disclosure Is Necessarily Chilling.

For generations, this Court has vigorously protected the right of private association. A central theme of this precedent is the understanding that when government compels private citizens to disclose their private associations, those citizens will be chilled from associating. And the existence of this chilling effect, which this Court has taken as intuitively obvious, is supported by scholarly research.

The Ninth Circuit, however, ignored all of that, and instead held not only that AFP and the Center must prove that their speech had been chilled, but that they must do so with evidence of previous harassment to obtain relief. Part A describes how this Court's compelled-disclosure precedent has long recognized the per se harm of allowing government to intrude into private association. Part B describes how the Ninth Circuit's decision unjustifiably conflicts with this line of precedent. This Court should now resolve this conflict and clarify that compelled disclosure of private association is a per se harm.

A. This Court Has Long Protected Private Association from Compelled Disclosure.

This Court has long recognized the constitutional importance of the right of expressive association. "This right is crucial in preventing the majority from imposing its views on groups that would rather express

other, perhaps unpopular, ideas." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000). It stems from the text of the First Amendment and protects individuals who join together in advocacy of a wide array of goals. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *see also Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 576 (1963) (Douglas, J., concurring) ("By the First Amendment we have staked our security on freedom to promote a multiplicity of ideas, to associate at will with kindred spirits, and to defy governmental intrusion into these precincts.").

For just as long, this Court has recognized that this right is fragile and relies largely on a concomitant right to privacy in one's expressive associations. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association. . . ." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). This is because the consequences of exposing one's beliefs—whether unpopular or otherwise—may dissuade people from forming expressive associations. *Id.* at 462-63. Thus, privacy, "the right to be let alone," protects people from being chilled in the exercise of their First Amendment rights. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 193 (1890).

Because of the constitutional value of private association, this Court has long protected individuals and private organizations from compelled disclosure of their associations. This Court explained the inherent chilling effect of compelled disclosure in its seminal decision of *NAACP v. Alabama ex rel. Patterson*. That case

arose in the midst of the Civil Rights Movement, when Alabama's attorney general sought to enjoin the NAACP from conducting activities in the state for violating the state's business regulations. 357 U.S. at 451-52. As part of those proceedings, the government demanded a wide array of NAACP documents, including its membership list. *Id.* at 453.

This Court rejected Alabama's attempt to compel disclosure of members, finding that this disclosure would chill constitutionally protected association. *Id.* at 460-66. The Court considered it "apparent" that compelled disclosure of the NAACP's membership list would adversely affect the NAACP's constitutional activity because it would discourage people from participating with the NAACP. *Id.* at 462-63.

Since *Patterson*, this Court has continued to recognize that compelled disclosure chills constitutionally protected activity, even when those disclosures are made only to the government and not to the public at large. In *Shelton v. Tucker*, for example, this Court considered the constitutionality of an Arkansas law that required teachers at state-supported schools to identify the organizations to which they belonged or donated. 364 U.S. 479 (1960). This Court struck the law down, holding that "[e]ven if there were no disclosure to the general public, the pressure upon a teacher to avoid any ties which might displease those who control his professional destiny would be constant and heavy." *Id.* at 486.

Patterson and *Shelton* are just two examples from the line of cases stretching back more than a half century that consistently protect the right of individuals and groups to resist government intrusion into their associations. *See also Gibson*, 372 U.S. 539 (holding unconstitutional a legislative-committee investigation demanding membership and donor lists); *Bates v. City of Little Rock*, 361 U.S. 516 (1960) (striking down an ordinance requiring the disclosure of membership and donors); *Sweezy v. New Hampshire ex rel. Wyman*, 354 U.S. 234 (1957) (plurality opinion) (invalidating a state subpoena requiring a private individual to testify as to his organizational membership).

As these cases show, the notion that compelled disclosure is necessarily chilling is firmly established. It is thus no surprise that charities across the ideological spectrum routinely maintain the privacy of their donors. A cursory search reveals that the American Red Cross,[3] Habitat for Humanity,[4] Doctors Without Borders,[5] The Federalist Society,[6] American Constitution

[3] American Red Cross, 2020 Annual Report at 26-29, https://www.redcross.org/content/dam/redcross/about-us/publications/2020-publications/fy20-annual-report.pdf (last visited Feb. 23, 2021).

[4] Habitat for Humanity International, Annual Report FY2020 at 44-47, https://www.habitat.org/sites/default/files/documents/HFHI_AR_20_FINAL_6NOV.pdf (last visited Feb. 23, 2021).

[5] Doctors Without Borders, U.S. Annual Report 2019 at 7-49, https://www.doctorswithoutborders.org/sites/default/files/documents/MSF_ANNUAL%20REPORT_2019%20-%20website%20PDF.pdf (last visited Feb. 23, 2021).

[6] The Federalist Society, 2017 Annual Report at 48-53, https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/MvqGg29Q81NilIcwowGDQLsgpEPHGmkvUxyjlAys.pdf (last visited Feb. 23, 2021).

Society,[7] Denver Zoo,[8] Smithsonian National Air & Space Museum,[9] Special Olympics,[10] and National 4-H Council[11] all maintain the privacy of at least some of their donors. It is also likely that most of these donors have no particular concern that they will be subject to reprisal for their charitable contributions to humanitarian organizations or community zoos. Instead, most are likely motivated by some other desire, such as wanting to avoid being contacted by similar organizations seeking donations, preferring family to not prematurely discover how a will devises assets, maintaining a religious or philosophical objection to public charity,[12] or "merely by a desire to preserve as much of one's privacy as possible," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995).

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[7] American Constitution Society, 2015-2016 Biennial Report at 14-15, https://www.acslaw.org/wp-content/uploads/2011/06/ACS-Biennial-Report-2015-2016.pdf (last visited Feb. 23, 2021).

[8] Denver Zoo, 2018 Annual Report at 21-24, https://www.flipsnack.com/DenverZooAnnualReport2018/denverzoo_2018_annualreport_digital-fdtietk7e.html (last visited Feb. 23, 2021).

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[11] National 4-H Council, 2018 Annual Report at 18-27, https://cdn.4-h.org/wp-content/uploads/2021/01/National-4H-Council-FY18B-Annual-Report.pdf?_ga=2.205500688.1854243355.1614097155-2012331422.1614097155 (last visited Feb. 23, 2021).

[12] *See, e.g.*, *Matthew* 6:2 ("[W]hen you give to the needy, do not announce it with trumpets. . . .").

Empirical evidence supports the common-sense intuition that mandatory disclosure chills association. One recent study found that people are less likely to make contributions in other contexts if they know their personal information will be disclosed. Dick M. Carpenter II, *Mandatory Disclosure for Ballot-Initiative Campaigns*, 13 Indep. Rev. 567, 575 (2009). When asked why, the reason most often given was a desire to keep their contribution private. *Id.* at 575-76. ("Responses such as 'Because I do not think it is anybody's business what I donate and who I give it to' and 'I would not want my name associated with any effort. I would like to remain anonymous' typified this group of responses."). In other words, compelled disclosure would chill the participants' association with political groups. *Id.*; *see also* Dick M. Carpenter II & Jeffrey Milyo, *The Public's Right to Know Versus Compelled Speech: What Does Social Science Research Tell Us About the Benefits and Costs of Campaign Finance Disclosure in Non-Candidate Elections?*, 40 Fordham Urb. L.J. 603, 623-31 (2012) (discussing the costs of compelled disclosure in non-candidate campaign efforts).

B. The Ninth Circuit's Decision Below Conflicts with This Precedent.

In conflict with this precedent and scholarly research, the Ninth Circuit below determined that the compelled disclosure of AFP's supporters was not chilling. The court wrote off this Court's compelled-disclosure decisions as predicated only upon the harm the NAACP faced during the Civil Rights Movement.

See AFP's Pet. Writ Cert. App. at 28a-29a & n.5. But not only is that conclusion inconsistent with this Court's disclosure decisions, it is a distinction that this Court rejected over 35 years ago. *See NAACP v. Button*, 371 U.S. 415 (1963).

Although this Court's rulings on private expressive association have often related to the harassment the NAACP suffered during the Civil Rights Movement, this Court has never suggested that the protection afforded to private association was limited to the NAACP. Rather, this Court has looked to the circumstances of the demanded disclosure and the activity of the parties before it to determine when the Constitution prohibits that disclosure. For instance, this Court in *Shelton* focused not on the identity of the groups with which the petitioner associated, but on the "completely unlimited" scope of the statute that required Arkansas teachers "to disclose every single organization with which [they have] been associated over a five-year period." 364 U.S. at 485-89. Similarly, in *Sweezy*, this Court reversed the contempt conviction of a teacher who refused to disclose his private associations with suspected "subversive" organizations. 354 U.S. at 236-45. In doing so, a plurality of this Court noted that it could "not . . . conceive of any circumstance wherein a state interest would justify infringement of" the right of private political association. *Id.* at 251; *see also id.* at 265 (Frankfurter, J., concurring) (describing the "overwhelming" importance of the "inviolability of privacy belonging to a citizen's political loyalties").

Furthermore, this Court has already rejected the argument that the protections of the First Amendment are limited to the NAACP. In *NAACP v. Button*, the Court struck down a Virginia law prohibiting the NAACP from soliciting clients, holding that the group's activities were expression and association protected by the Constitution. 371 U.S. at 428-29. This Court later extended that holding to the ACLU, rejecting the government's argument that the NAACP was somehow entitled to constitutional protection that others were not. *In re Primus*, 436 U.S. 412, 427-28 (1978). Again, rather than focusing on the identity of the plaintiff, the Court looked to the ACLU's activity—litigation as a form of political expression and association—and held that it was entitled to constitutional protection. *Id*.

In short, there was no valid justification for the Ninth Circuit to decline to apply this Court's precedent on the per se chilling effect of compelled disclosure. And its refusal to do so will have profound negative consequences. Thankfully, few groups face the sort of harassment and violence that the NAACP faced in the 1950s and 1960s, but that does not mean that other individuals or groups go unharmed. There are many valid reasons people wish to keep their associations private, and those people should be able to challenge laws compelling disclosure without showing a history of death threats. If allowed to stand, the decision below will stifle protected activity and chill people throughout the Ninth Circuit from associating, depriving both themselves and society of the benefits of expressive association.

III. The Ninth Circuit Applied the Wrong Level of Scrutiny Because of the Multiplicity of Tests Called "Exacting Scrutiny."

On top of its failure to recognize the chilling effect of compelled disclosure, the Ninth Circuit applied the wrong level of constitutional scrutiny. As explained below in Part A, this Court has held that lower courts must review burdens on charitable solicitation with strict scrutiny. But, as explained in Part B, the Ninth Circuit applied a different and much lower level of scrutiny, which this Court has, to date, applied exclusively to campaign-finance disclosure requirements. That error stemmed in part from the fact that this Court has at times used the same label—"exacting scrutiny"—to describe the two different tests. This Court should now clarify that strict scrutiny remains the proper test for reviewing burdens on charitable solicitation.

A. Strict Scrutiny Applies to Burdens on Charitable Solicitation.

The First Amendment protects charitable solicitation. The challenged regulation here burdens charitable solicitation—the Attorney General demands, as a condition of AFP's and the Center's ability to solicit charitable contributions in California, that these groups disclose to the government the identity of their donors. And like all charitable groups organized under 26 U.S.C. § 501(c)(3), AFP and the Center cannot divert these charitable resources to partisan political activity. Thus, the relevant cases to call upon when analyzing

California's requirement are those in which this Court has reviewed burdens on charitable solicitation.

When reviewing laws that burden charitable solicitation or require charities to disclose to the government facts about their private associations, this Court has consistently applied the very highest level of judicial scrutiny, upholding those burdens only if they are narrowly tailored to serve a compelling government interest.[13] In some of these cases, the Court has called this standard "exacting scrutiny," but the elements of this standard are synonymous with what this Court has elsewhere called "strict scrutiny." *Compare Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 442 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest."), *with Reed v. Town of Gilbert*, 575 U.S. 155, 171 (2015) ("[C]ontent-based restrictions on speech . . . can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (internal quotation marks omitted)).

Lower courts outside the Ninth Circuit have also consistently applied strict scrutiny to burdens on charitable solicitation. For instance, the Fifth Circuit

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[13] *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961, 965 n.13 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Patterson*, 357 U.S. at 463-64.

struck down a requirement that for-profit solicitors disclose certain information to the public after determining that the law did not satisfy strict scrutiny. *Nat'l Fed'n of the Blind of Tex., Inc. v. Abbott*, 647 F.3d 202, 211-14 (5th Cir. 2011). Similarly, the Sixth Circuit applied strict scrutiny in preliminarily enjoining an ordinance banning charitable-donation bins. *Planet Aid v. City of St. Johns*, 782 F.3d 318, 330 (6th Cir. 2015). Indeed, even courts that have upheld burdens on charitable solicitation have done so only when those burdens survived strict scrutiny. *See Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 338-39 (4th Cir. 2005) (upholding, under strict scrutiny, a requirement that for-profit companies soliciting donations for charities by telephone explain that they are seeking donations and disclose the charity on whose behalf they are fundraising).

B. The Ninth Circuit Applied Intermediate Scrutiny, in Conflict with This Precedent, Because of the Confusing and Conflicting Labels This Court Has Applied to Its Tests.

Unlike this Court's charitable-solicitation cases, which demand strict scrutiny, the Ninth Circuit applied a much lower standard of review. Rather than requiring that California demonstrate that its policy was narrowly tailored to serve a compelling government interest, the Ninth Circuit instead held that California could satisfy its constitutional burden merely by showing "a substantial relation between the disclosure

requirement and a sufficiently important governmental interest," AFP's Pet. Writ Cert. App. at 15a (internal quotation marks omitted), a test that this Court has elsewhere described as intermediate scrutiny, *see, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) ("To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective.").

The Ninth Circuit's error stems in part from the fact that this Court has, in different contexts, described both tests—strict and intermediate scrutiny—using the phrase "exacting scrutiny." In charitable-solicitation cases, this Court has used "exacting scrutiny" synonymously with strict scrutiny. *Compare Williams-Yulee*, 575 U.S. at 442 ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest."), *with id.* at 444 ("This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny."). By contrast, in the realm of campaign-finance disclosure, this Court has used "exacting scrutiny" synonymously with "intermediate scrutiny." *See Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010) ("The Court has subjected [disclaimer and disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.").[14]

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[14] Lower courts other than the Ninth Circuit have recognized this standard of review to be intermediate scrutiny. *E.g.*, *The Real*

Though strict scrutiny and intermediate scrutiny sometimes share the "exacting scrutiny" name, they are markedly different. For instance, this Court's treatment of evidence depends on the test it is applying. *Compare, e.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813, 822-23 (2000) (invalidating a law requiring the scrambling of sexually explicit material under the narrow-tailoring and compelling-government-interest standard because the government failed to present more than "anecdote and supposition"), *with, e.g.*, *Citizens United*, 558 U.S. at 366-70 (concluding, with no particular evidentiary showing, that a campaign-finance-disclosure scheme was substantially related to a sufficiently important government interest). The tailoring analysis also differs between strict and intermediate scrutiny. *Compare, e.g.*, *Playboy Entm't*, 529 U.S. at 813 (holding under strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"), *with, e.g.*, *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (noting that, in reviewing contribution limits under intermediate scrutiny, "instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, a contribution limit involving significant interference with associational rights passes muster if it satisfies the lesser demand of being *closely drawn* to match a sufficiently important interest" (emphasis added, internal quotation marks omitted)).

Truth About Abortion, Inc. v. FEC, 681 F.3d 544, 548-49 (4th Cir. 2012).

As was perhaps inevitable, this use of the same term to refer to two very different tests has led to confusion in lower courts. Although other circuits have faithfully applied strict scrutiny to burdens on charitable solicitation, *see supra* § III.A, here, the Ninth Circuit saw the word "disclosure" and reflexively applied the campaign-finance-disclosure version of exacting scrutiny. But courts, like any other government actor, may not "foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429. What matters is the underlying activity. And this Court's precedent makes clear that, when the activity is charitable solicitation, strict scrutiny is the rule.

Here, the failure to apply strict scrutiny was outcome determinative. Applying the correct standard, AFP and the Center were entitled to relief. Strict scrutiny is demanding and requires that the government put forth concrete evidence justifying why its regulation is necessary. *See, e.g.*, *Playboy Entm't*, 529 U.S. at 822-23 (striking down a law under strict scrutiny because the government proffered no evidence and "failed to establish a pervasive, nationwide problem justifying" the law). In contrast, the Ninth Circuit here accepted the government's argument that intrusive disclosure was necessary to enforce the state's valid regulations of charitable solicitation with no actual evidence to support that proposition. AFP's Pet. Writ Cert. App. at 21a n.3 (observing that California has used Schedule B information to investigate a charity only 10 times over the last decade). Moreover, the court never asked whether the government's interest could

be adequately served by a less burdensome, more narrowly tailored law, as this Court's precedent requires. *See, e.g.*, *Village of Schaumburg*, 444 U.S. at 637-38. Here, the government has an obviously less intrusive approach available to it: It may request a subpoena as part of an investigation based on individualized suspicion.[15]

The Ninth Circuit's ruling harms charities throughout the Ninth Circuit and undermines this Court's previous holdings in such seminal cases as *Riley* and *Patterson*. Thus, this Court should clarify that burdens on charitable solicitation, including compelled disclosure, are subject to the compelling-interest and narrow-tailoring test: strict scrutiny.

Applying that standard here, as the district courts did in both AFP's and the Center's cases, the Attorney General's disclosure demands are not narrowly tailored to achieve a compelling interest. *See* AFP's Pet. Writ Cert. App. at 47a; Center's Pet. Writ Cert. App. at 56a.

In both cases, and now here, the Attorney General alleges that the Schedule B information assists with investigations to determine whether a charitable organization has violated the law. AFP's Pet. Writ Cert.

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[15] The Attorney General would no doubt object that seeking a subpoena would interfere with his claimed interest in "increas[ing] [his] investigative efficiency," *see* AFP's Pet. Writ Cert. App. at 19a, but, as this Court has noted, "the First Amendment does not permit the State to sacrifice speech for efficiency," *Riley*, 487 U.S. at 795.

App. at 43a; Center's Pet. Writ Cert. App. at 53a. But, as the district courts found in both cases, the evidence does not show that the collection of the Schedule B is substantially related to this purported interest. *See* AFP's Pet. Writ Cert. App. at 43a-45a (finding that the Attorney General was "hard pressed" to "find a single witness" to corroborate this allegation; AFP's "lack of compliance" with Schedule B disclosures "went unnoticed for over a decade"; and testimony from the Registrar for the Registry of Charitable Trusts in the Department of Justice and members of the investigative unit of that Section showed that "the Attorney General does not use the Schedule B in its day-to-day business" (internal quotation marks omitted)); Center's Pet. Writ Cert. App. at 54a-56a (finding that, like in *AFP*, the Attorney General went several years without noticing that the Center did not disclose its Schedule B information; and the supervising investigative auditor's testimony confirmed that the Attorney General did not use Schedule B information when investigating charities).

Further, as the district courts found, even assuming that the Attorney General has showed a sufficiently important government interest, the record shows that demanding the Schedule B disclosures is not the least restrictive means of achieving that interest. AFP's Pet. Writ Cert. App. at 47a; Center's Pet. Writ Cert. App. at 56a. As the district courts in both cases found, the testimony from a supervising investigative auditor for the Attorney General show that the Attorney General's investigators were able to

"successfully complete[] their investigations without using Schedule Bs, even in instances where they knew Schedule Bs were missing." AFP's Pet. Writ Cert. App. at 47a; Center's Pet. Writ Cert. App. at 57a. And, as the district court in *AFP* specifically found, it is "clear" that the Schedule B "played no role in advancing the Attorney General's law enforcement goals for the past ten years"; there was not "even a single, concrete instance" where a Schedule B "did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." AFP's Pet. Writ Cert. App. at 47a.

Given that the district courts have already made these factual findings, this Court need not remand for further factual development. In both AFP's and the Center's cases, the record shows that the Attorney General fails to satisfy strict scrutiny. Accordingly, the Court should now hold that the Attorney General's compelled disclosure requirement violates the First Amendment.

CONCLUSION

For the reasons stated above, this Court should now clarify that strict scrutiny remains the proper test for reviewing burdens on charitable solicitation, hold that the Attorney General's sweeping intrusion into AFP's and the Center's private association with its donors does not satisfy strict scrutiny, reverse the Ninth

Circuit's decision, and remand for entry of judgment in Petitioners' favor.

Respectfully submitted,

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