

Nos. 19-251 & 19-255

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.

THOMAS MORE LAW CENTER,
Petitioner,

v.

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

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

**AMICUS CURIAE BRIEF OF THE
PHILANTHROPY ROUNDTABLE
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether California's bulk collection of personal information about the identity of donors to charities, which the Ninth Circuit upheld without applying exacting or strict scrutiny, impermissibly violates their constitutional freedoms of speech, religion, and association under the First and Fourteenth Amendments in light of California's lack of a compelling interest in the bulk collection of donor information and ample tools for ensuring charities comply with state law.

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INTEREST OF *AMICUS CURIAE*¹

The Philanthropy Roundtable is a leading network of charitable donors. Its 600 members include individual philanthropists, family foundations, and private grantmaking institutions. Its mission is to foster excellence in philanthropy, protect philanthropic freedom, assist donors in achieving their philanthropic intent, and help donors advance liberty, opportunity, and personal responsibility in the United States and abroad. The Philanthropy Roundtable seeks to advance the principles and preserve the rights of private giving, including the freedom of individuals and private organizations to determine how and where to direct charitable assets.

As an organization whose members include both donors and recipients of charitable contributions, and as an organization that is itself supported by charitable donations, *amicus* has a substantial interest in preserving the freedom of donors to support organizations and causes that contribute to a robust civil society, the freedom to do so anonymously, and the freedom of charitable organizations to maintain the privacy of their donors. *Amicus* respectfully urges this Court to protect

¹ Pursuant to Rule 37.3(a), counsel for Respondent provided *amicus* with written consent to file this brief and counsel for Petitioners filed blanket consents to the filing of *amicus curiae* briefs, which are on file with the Court. Pursuant to Rule 37.6, counsel for *amicus* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and that no person other than *amicus* and its counsel made such a monetary contribution.

the First Amendment right of Americans who wish to keep their donations confidential for a variety of good and valid reasons, including religious conviction, fear of retaliation, privacy concerns, and avoiding unwanted solicitations.

Amicus is concerned that the California Attorney General’s demand that protected and confidential personal information—including the names and addresses of donors—be turned over to the State implicates serious constitutional concerns. The State’s demand abridges philanthropic freedom, chills charitable giving, weakens the ability of individual donors and nonprofit organizations to carry out their goals and missions, and, therefore, abridges their freedoms of speech, religion, and association under the First and Fourteenth Amendments without articulating a compelling State interest. *Amicus* respectfully requests that this Court reverse the Ninth Circuit’s judgment.



SUMMARY OF ARGUMENT

Privately funded efforts to address social issues, enrich culture, and strengthen society are among the most significant American undertakings, and have been for hundreds of years. The United States is the most generous nation in the world, with charitable gifts by individuals (including bequests) totaling over \$449.64 billion in 2019.² Nonprofit and charitable

² See *Giving USA 2020: Charitable Giving Showed Solid Growth, Climbing to \$449.64 Billion in 2019, One of the Highest*

organizations across the country benefit from those donations, including religious organizations, schools, hospitals, foundations, food pantries, and homeless shelters.³ These organizations include approximately 115,000 charities registered in California, including *amicus*.⁴

America’s culture of charitable giving has flourished because its legal framework recognizes the importance of a robust—and free—civil society, separate from government. Regrettably, however, California’s push to collect, in bulk and without any compelling reason, the names, addresses, and donation amounts of donors to organizations that operate in California (regardless of where they may be incorporated) transgresses this crucial boundary between government and civil society and infringes on the rights of donors who wish to keep their charitable giving and association with nonprofit organizations anonymous, rather than disclosed to government officials and/or the public at large. The Supreme Court ruled unanimously in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), that “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause.” Alabama

Years for Giving on Record, GIVING USA (June 16, 2020), <https://givingusa.org/giving-usa-2020-charitable-giving-showed-solid-growth-climbing-to-449-64-billion-in-2019-one-of-the-highest-years-for-giving-on-record>.

³ *Ibid.*

⁴ *Attorney General’s Guide for Charities*, CAL. DEP’T OF JUSTICE, CHARITABLE TRUSTS SECTION 1 (Jan. 2019), https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf.

could not compel the NAACP to reveal the names and addresses of its members because doing so would expose them “to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility” and thereby restrain “their right to freedom of association.” *Id.* at 462. This case implicates the same concerns.

The State’s interest in administering tax benefits to nonprofits does not justify abridging donors’ First Amendment freedoms. On the contrary, a key purpose of such tax benefits—*i.e.*, the deduction of contributions to charities and exclusion of earnings thereon from income tax—is to preserve and protect donors’ First Amendment freedoms from government overreach, and these tax benefits must be administered accordingly.

The State’s justification for its bulk collection of donor information arises from a misunderstanding of the interaction between the public finance objectives embodied in the Sixteenth Amendment and the individual freedoms guaranteed in the Bill of Rights. The Sixteenth Amendment subjects all “incomes, from whatever source derived,” to taxation to achieve efficiency, fairness, and simplicity in public finance. Having appropriated all income for government use through taxation, however, it is necessary to reverse out the small portion of such income devoted to the nonprofit sector, lest the income tax eliminate First

Amendment freedoms.⁵ Contrary to the State’s assertions, the nonprofit “tax benefits” are not a matter of legislative largesse or subsidy justifying the State’s regulatory agenda; rather, they are a bulwark protecting civil rights and liberties and should *prevent* the State’s regulatory agenda—not encourage it. The State’s bulk collection of private donor information is a symptom of this fundamental misunderstanding of tax policy.

As a practical matter, many donors simply will not give unless they can keep their donations confidential—whether their anonymity is motivated by religious conviction, fear of retaliation, privacy concerns, avoiding unwanted solicitations, or some other reason. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995) (holding that the First Amendment protects anonymous speech, including when the “decision in favor of anonymity” is “motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.”). Forced disclosure of donor names to state governments undermines donors’ reliance on anonymity and, in turn, threatens the ability of charitable organizations to rely on those donors. At the same time, California already has ample tools to protect the public from charitable fraud, including

⁵ See William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972); Alexander Reid, *Renegotiating the Charitable Deduction*, 71 TAX ANALYSTS 21 (2013).

targeted use of the California Attorney General’s subpoena power.

This Court’s reversal of the Ninth Circuit’s ruling is needed to reject the California Attorney General’s bulk-disclosure policy, which serves no important or compelling state interest, could be accomplished by narrower means, and results in a chilling effect on giving that will negatively impact innumerable donors and charitable organizations across the country.

◆

ARGUMENT

I. The Ability to Make Anonymous Donations is an Important Vehicle for Encouraging Broad-based Civic Participation.

In a recent 2021 survey, nearly 70 percent of Americans indicated that privacy concerns are important to them when making charitable donations.⁶ Over 80 percent of high net-worth households say that in making a charitable gift, it is important to them that the recipient honor their requests for privacy and anonymity.⁷ The freedom enjoyed by private individuals and associations in giving for public benefit, including

⁶ See *BBB Wise Giving Alliance Poll Shows Donors Concerned About Data Privacy*, BBB WISE GIVING ALLIANCE (Jan. 28, 2021), <https://www.give.org/news-and-updates-new/2021/01/28/bbb-wise-giving-alliance-poll-shows-donors-concerned-about-data-privacy>.

⁷ See *2016 U.S. Trust Study of High Net Worth Philanthropy Report*, U.S. TRUST & IND. UNIV. LILLY FAMILY SCH. OF PHILANTHROPY 40 (Oct. 2016), http://www.ustrust.com/publish/content/application/pdf/GWMOL/USTp_ARMCGDN7_oct_2017.pdf.

giving anonymously, has been a hallmark of American civil society since the Founding. Writing in 1840, Alexis de Tocqueville observed that “[t]here is nothing, in my opinion, that merits our attention more than the intellectual and moral associations of America.”⁸ Today, Americans exercise some of their most cherished constitutionally protected rights through making charitable donations—creating organizations that engage in freedom of speech, freedom of association, and freedom of religion. In this way, charitable giving is, as Tocqueville saw, fundamental not only to our civil society but also to our republican form of government.

The Constitution protects, and American civil society depends on, the right of American donors to associate—whether they do so publicly or anonymously—for any of the reasons explained above and others. Indeed, this Court has “repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). The right to speak and associate anonymously, which is implicit in the First Amendment, extends to the “significant number of persons who support causes anonymously.” *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 166-67 (2002). That protection includes the right of donors to “pool money through contributions” in order to “join together ‘for the advancement of beliefs and ideas’” through

⁸ Alexis de Tocqueville, 2 *DEMOCRACY IN AMERICA* 902 (Eduardo Nolla ed., James T. Schleifer trans., Indianapolis: Liberty Fund, 2010) (1840).

charitable giving. *Buckley*, 424 U.S. at 65-66 (quoting *NAACP*, 357 U.S. at 460); see also *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 611 (2003) (“The First Amendment protects the right to engage in charitable solicitation.”); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 555 (1963) (maintaining privacy is a “strong associational interest”).

The Ninth Circuit’s ruling ignored the fact that by mandating organizations to disclose the names, addresses, and donation amounts of their major donors, California infringes on not only the rights of donors who wish to keep their charitable giving and association with nonprofit organizations anonymous, but also the rights of organizations to maintain their donors’ confidential information, rather than disclose it to the government. This Court should step in to protect donors’ constitutional freedoms and prevent further unwarranted incursions into private charitable giving that will chill the exercise of First Amendment freedoms and upset long-settled donor expectations of privacy and confidentiality.

A. The State’s Bulk Collection of Charitable Donor Information Threatens the Right to Make Anonymous Charitable Donations Pursuant to the Dictates of Faith.

Disclosure to government officials and to the public—through California Public Records Act requests,

leaks, or otherwise⁹—threatens the freedom to engage in the religious exercise of making anonymous charitable donations pursuant to the dictates of conscience and faith.¹⁰ *See McIntyre*, 514 U.S. at 341-42 (acknowledging individuals’ various motivations to exercise First Amendment rights anonymously).

Many donors who desire to remain anonymous are motivated by deeply held religious or moral beliefs that have made anonymous philanthropic giving the norm when it comes to charity over the past two millennia. As recorded in the gospel of Matthew, Jesus Christ admonished his followers that God rewards only those

⁹ The post-trial amendment to California regulations which purports to maintain the confidentiality of the donor lists collected by California are not meaningfully different than the California Attorney General’s prior policies regarding confidentiality, which, as the trial court found, resulted in a “pervasive, recurring pattern of uncontained Schedule B disclosures.” Pet. in No. 19-251, at app. 52a; *see generally* Cal. Code Regs. tit. 11, § 310(b). Regardless of assurances by the California Attorney General that, going forward and unlike in the past, donor lists actually will be kept confidential from the public at large, there still remains the problem of forced disclosure to government officials itself and the potential (and perhaps inevitability) of public disclosure, either due to inadvertent errors by government officials or hacking by outsiders.

¹⁰ Because the California mandate infringes some donors’ ability to freely associate *and* exercise their religion, this case is of the sort envisioned by this Court that implicates both the freedom of association and the free exercise of religion. *See Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 882 (1990) (“[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns.”).

who give “in secret.”¹¹ In the fourth and fifth centuries, St. Augustine sought to separate charity from a concern with social relationships and refocus it toward the donor’s relationship with God.¹² In the thirteenth century, St. Francis preached that charitable giving was undermined when publicly disclosed by a donor because a true charitable virtue “had nothing to do with public recognition.”¹³ Martin Luther and John Calvin, who led the Protestant Reformation, similarly discouraged public charitable giving. Luther taught that “to give alms in secret means where the heart does not expose itself, or seek honor and name from it.”¹⁴ According to Calvin, Jesus taught “that we be unwilling to seek men’s admiration through our beneficence.”¹⁵

Other major religions have also historically promoted anonymous charitable giving. Muslim donors may prefer to give *sadaqah*, an anonymous donation taught as the “best” form of giving.¹⁶ Jewish donors may follow Maimonides’s teaching that the second and

¹¹ *Matthew* 6:2-4.

¹² James Allen Smith, *Anonymous Giving*, in 1 PHILANTHROPY IN AMERICA: A COMPREHENSIVE HISTORICAL ENCYCLOPEDIA 24 (Dwight F. Burlingame ed., 2004).

¹³ *Ibid.*

¹⁴ MARTIN LUTHER, COMMENTARY ON THE SERMON ON THE MOUNT 237 (Charles A. Hay trans., 1892).

¹⁵ JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION 344 (Ford Lewis Battles trans., Wm. B. Eerdmans Publ’g Co. 1995) (1536).

¹⁶ Qur’an, *Surat Al-Baqarah* 2:271; Giving Charity in Secret & Publicly, ZAKAT FOUND. OF AM., <https://www.zakat.org/en/giving-charity-secret-publicly> (last visited Sept. 19, 2019).

third highest forms of *tzedakah* (“charity” or “righteousness”) are to give anonymously to unknown or known recipients.¹⁷ Hinduism teaches its adherents to give the *gupt dān* (meaning an anonymous charitable gift).¹⁸ Buddhism also encourages the practice of confidential giving as the “‘secret virtue’ of Buddhism.”¹⁹ For donors who live by the aforementioned moral or religious convictions, the mere disclosure of their donation may harm their free exercise of religion.

B. The State’s Bulk Collection of Charitable Donor Information Deters Anonymous Giving for Secular Personal Reasons.

Secular philosophers also have favored anonymous giving for millennia. For example, the first century Roman senator and philosopher Lucius Annaeus Seneca, known as Seneca the Younger, wrote: “How sweet, how precious is a gift, when he who gives does not permit himself to be thanked,” and who also wrote that “all writers on ethical philosophy tell us that some benefits ought to be given in secret * * * when they do not promote a man or add to his social standing, but help him when in weakness, in want, or in disgrace,

¹⁷ Julie Salamon, *RAMBAM’S LADDER: A MEDITATION ON GENEROSITY AND WHY IT IS NECESSARY TO GIVE* 127-46 (2003).

¹⁸ ERICA BORNSTEIN, *DISQUIETING GIFTS: HUMANITARIANISM IN NEW DELHI* 26-27 (2012).

¹⁹ DAISSETZ TEITARO SUZUKI, *ESSAYS IN ZEN BUDDHISM* 345 (1961).

they should be given silently, and so as to be known only to those who profit by them.”²⁰

Accordingly, some donors choose to give anonymously for philosophical or personal concerns that the revelation of their identity might overshadow the efforts of their charity. *See, e.g.,* Claire Cain Miller, *Laurene Powell Jobs and Anonymous Giving in Silicon Valley*, N.Y. TIMES: BITS (May 24, 2013)²¹ (quoting Ms. Powell Jobs, the widow of Apple founder Steve Jobs, as saying “[w]e’re really careful about amplifying the great work of others in every way that we can, and we don’t like attaching our names to things”); Keely Lockhard, *George Michael’s Incredible Acts of Kindness Revealed Following His Untimely Death*, THE TELEGRAPH (Dec. 26, 2016)²² (describing the late pop singer George Michael’s wish that his generous support for causes including aid to cancer patients and abused children be kept anonymous so that the attention would be focused on the good work by the charities and not himself).

Anonymity also allows donors to give to important causes even if they would otherwise decline out of a desire to lead a private life and avoid public displays of wealth. Pittsburgh banker and philanthropist

²⁰ LUCIUS ANNAEUS SENECA, ON BENEFITS: ADDRESSED TO AEBUTIUS LIBERALIS 25-27 (Aubrey Stewart trans., George Bell & Sons 1887).

²¹ Available at <http://bits.blogs.nytimes.com/2013/05/24/laurene-powell-jobs-and-anonymous-giving-in-silicon-valley>.

²² Available at <https://www.telegraph.co.uk/news/2016/12/26/george-michaels-acts-kindness-revealed>.

Charles McCune, for example, sought to avoid public recognition for his generous giving throughout his life—and the McCune Foundation carries on this preference by requesting that grantees not disclose gifts from the Foundation.²³ Similar privacy concerns pervade today—recent notable anonymous gifts include \$25 million to the Children’s Hospital in Los Angeles,²⁴ \$40 million to the NAACP to fund scholarships for a new generation of civil rights lawyers,²⁵ \$100,000 to

²³ Sean Parnell, Protecting Donor Privacy, PHILANTHROPY ROUNDTABLE 6-7, https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy_white_paper.pdf (last visited Sept. 19, 2019); *see also* Karl Zinsmeister, *Privacy as a Philanthropic Pillar*, PHILANTHROPY MAG. (Apr. 2017), <https://www.philanthropyroundtable.org/philanthropy-magazine/article/spring-2017-privacy-as-a-philanthropic-pillar> (describing New Orleans merchant Judah Touro’s decision in the early 1800s to give away the equivalent of \$2 billion, mostly anonymously, and his near cancellation of a gift to a war memorial when he was exposed as the donor); Sean Parnell, *Donor Dad Wants to Stay Anonymous*, ALLIANCE FOR CHARITABLE REFORM (Sept. 25, 2017), <http://acreform.org/blog/donor-dad-wants-stay-anonymous> (explaining that a wealthy father who made a substantial donation to Florida Atlantic University requested anonymity because his daughter attended the university and he wished to shield her from undue attention).

²⁴ Sophie Sherry & Christina Zdanowicz, *An Anonymous Donor Asked a Hospital Where It Needed Help and Gave \$25 Million to Make It Happen*, CNN: HEALTH (July 19, 2019), <https://www.cnn.com/2019/07/19/health/hospital-donation-25-million-trnd/index.html>.

²⁵ Michael Warren, *Anonymous Donor Gifts \$40 million to NAACP Fund for New Generation of Civil Rights Lawyers*, USA TODAY (Jan. 18, 2021), <https://www.usatoday.com/story/news/nation/2021/01/18/naacp-gets-40-million-anonymous-donor-civil-rights-lawyers/4202244001>.

fund scholarships to high school graduates in Brockton, Massachusetts,²⁶ \$5,000 to the food bank ministry of New Hope Missionary Baptist Church in Bridgeport, Connecticut,²⁷ \$750,000 to the Cascade Youth League in Hendricks County, Indiana to build softball and baseball fields for youth,²⁸ and \$2 million to the pandemic-devastated Colorado Symphony to pay its employees' salaries through Summer 2021.²⁹

Additionally, giving anonymously protects donors from unwanted solicitations by organizations to which they would rather not donate. The desire to minimize solicitations from other organizations was the most frequently cited motivation for giving anonymously in a university study (followed by “deeply felt religious conviction,” and then by “a sense of privacy, humility,

²⁶ Josie Albertson-Grove, *Anonymous Donation Funds Scholarship for Brockton Students*, THE ENTERPRISE (Feb. 9, 2019), <https://www.enterpriseneeds.com/news/20190209/anonymous-donation-funds-scholarship-for-brockton-students>.

²⁷ *\$5K Anonymously Donated to Bridgeport Food Bank*, NEWS 12 CONNECTICUT (Feb. 22, 2019), <http://connecticut.news12.com/story/40011272/dollar5k-anonymously-donated-to-bridgeport-food-bank>.

²⁸ Randy Speith, *Anonymous \$750,000 Donation Helping Youth Baseball, Softball Players*, CBS 4 (Mar. 8, 2019), <https://cbs4indy.com/2019/03/08/anonymous-750000-donation-helping-youth-baseball-softball-players>.

²⁹ John Wenzel, *An Anonymous \$2 Million Donation Has Paid Colorado Symphony Salaries Through Summer 2021*, THE DENVER POST (Feb. 8, 2021), <https://theknow.denverpost.com/2021/02/08/colorado-symphony-2-million-anonymous-gift-christopher-dragon-renewed/252466>.

[or] modesty”).³⁰ Major philanthropists have kept donations private to avoid the seemingly endless “deluge” of unwanted donation requests.³¹

C. The State’s Bulk Collection of Charitable Donor Information Puts Donors to Unpopular Social and Political Causes at Risk.

Donors may also prefer to give anonymously for the same important reasons articulated in *NAACP v. Alabama*—to avoid the threat of public censure, condemnation, and retaliation that can be associated with giving to unpopular causes. The Supreme Court ruled in that case that the Fourteenth Amendment protected the NAACP’s right to keep its membership list confidential. Revealing that information, it warned, was “likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate.” 357 U.S. at 462-63.

This threat to donors with unpopular positions has manifested itself throughout American history. President Andrew Jackson, for example, exposed

³⁰ Eleanor T. Cicerchi & Amy Weskema, Survey on Anonymous Giving, Center on Philanthropy, Indiana University—Purdue University at Indianapolis 9-10 (1991).

³¹ Paul Sullivan, *Kroc’s Giving, Like McDonald’s Meals, Was Fast and Super-Sized*, N.Y. TIMES: WEALTH MATTERS (Jan. 20, 2017), <https://nyti.ms/2k8KXCP> (noting Joan Kroc, wife of McDonald’s CEO Ray Kroc, shuttered her family foundation to limit solicitations).

abolitionist sympathizers to public ridicule, pressure, and threats.³² During the civil rights movement, many private actors and government officials fired, threatened, and otherwise intimidated supporters of civil rights. *NAACP*, 357 U.S. at 462. In the 1970s, government and private actors demonstrated hostility toward Socialist Workers Party members through threats, hate mail, destruction of property, and termination from work.³³ Indeed, it was charitable giving that helped educate Native Americans (in early America) and African-Americans (in the Jim Crow era), when the government refused.³⁴ Similarly, other charity-driven initiatives, such as abolition, women's suffrage, and civil rights, fundamentally altered the ability of Americans to fully participate in their government—in the face of resistance from the government itself.³⁵

The American suffragist movement greatly benefited from anonymous donations. For example, although philanthropist Olivia Sage publicized her charitable gifts to universities, hospitals, and other organizations, she insisted that her gifts to suffrage organizations be kept anonymous.³⁶ Similarly, philanthropist Katharine

³² Jennifer Rose Mercieca, *The Culture of Honor: How Slaveholders Responded to the Abolitionist Mail Crisis of 1835*, 10 RHETORIC & PUB. AFF. 51, 66 (2007).

³³ See L.S. Tankoos, *Constitutional Law—First Amendment*, 29 N.Y.L.S. L. REV. 801, 806-07 n.27 (1985).

³⁴ Reid, *supra* note 5, at 27.

³⁵ *Ibid.*

³⁶ See RUTH CROCKER, MRS. RUSSEL SAGE: WOMEN'S ACTIVISM AND PHILANTHROPY IN GILDED AGE AND PROGRESSIVE ERA AMERICA 215 (2006).

Dexter McCormick gave an anonymous \$5,000 donation in 1912 to eliminate the deficit of *The Woman's Journal Magazine*, which had become a formidable communications tool for the National American Women's Suffrage Association.³⁷ In 1914, an unnamed woman donated \$35,000 to the New York suffrage campaign.³⁸

Nor are risks to donors who support unpopular causes a thing of the past. Anonymous contributions were the leading source of support for LGBTQ causes and groups between 1970 and 2010.³⁹ No doubt, part of the motivation for anonymity was concern about the potential for violence and harassment against the LGBTQ community. The same is now true for donors seen as opposed to that community—businesses whose owners' families have supported causes (including religious causes) some deem contrary to LGBTQ rights have themselves been targeted for boycotts and disfavor from local government officials.⁴⁰ Revelation of

³⁷ ARMOND FIELDS, KATHARINE DEXTER MCCORMICK: PIONEER FOR WOMEN'S RIGHTS 107-08 (2003).

³⁸ SUSAN GOODIER & KAREN PASTORELLO, WOMEN WILL VOTE: WINNING SUFFRAGE IN NEW YORK STATE 173 (2017).

³⁹ Anthony Bowen, *Forty Years of LGBTQ Philanthropy: 1970–2010*, FUNDERS FOR LGBTQ ISSUES 4, 19 (Jan. 5, 2012), https://lgbtfunders.org/wp-content/uploads/2018/04/40years_lgbtqphilanthropy.pdf.

⁴⁰ Parnell, *supra* note 23, at 15; Travis LaCouter, *The Coachella Conservative?*, PHILANTHROPY DAILY (Jan. 11, 2017), <https://www.philanthropydaily.com/the-coachella-conservative> (wealthy donor immediately ceased donations to socially conservative organizations once made public).

private donations to right-leaning and left-leaning causes *alike* have led to harassment and threats of boycotts.⁴¹ It is no wonder that donors across the political spectrum, especially supporters of politically unpopular causes, prefer to exercise their First Amendment right to give anonymously. Some donors may even give anonymously to seemingly popular or uncontroversial causes out of concern that in today's divisive culture, those causes may later unforeseeably become the subject of controversy and tarnish their reputation and legacy.

II. The State Has No Compelling Interest in the Bulk Collection of Donor Information, Particularly Given the Serious Risks of Public Disclosure.

The constitutionally guaranteed freedoms of speech, association, religion, and privacy constrain government's unwarranted intrusion into charitable giving—including the bulk collection of donor identities at issue here—without an important, let alone compelling, interest and narrow tailoring. *See Bates v.*

⁴¹ *See, e.g.,* Parnell, *supra* note 23, at 14-16 (explaining that donors to Peachtree-Pine homeless shelter in Atlanta, Georgia faced pressure and retaliation unless they donated anonymously); Rebecca Jennings, *What happened when a beloved mom influencer donated to Trump*, VOX.COM (Jan. 27, 2021), <https://www.vox.com/the-goods/22252360/taking-cara-babies-trump-instagram-donation-drama> (explaining the backlash against and boycott of popular sleep-training teacher merely because it became public that her husband donated to former President Trump's campaign).

City of Little Rock, 361 U.S. 516, 524 (1960) (“When there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.”).

The Ninth Circuit’s decision, absent reversal by this Court, will give the State *carte blanche* to collect *all* major donor information, without any important or compelling interest in a specific charity’s information. The Ninth Circuit’s ruling ignored that the mere disclosure of information to the government may *itself* cause donors to cease giving to organizations who will be forced to turn over information to the State rather than risk the negative consequences that may result from disclosure. And the Ninth Circuit shrugged off clear examples of “death threats” and “harassment” that Petitioners’ donors demonstrated at trial (Pet. in No. 19-251, at app. 31a, 50a)—and which *amicus* donors likely will suffer too, absent this Court’s reversal. Unlike the district court, the five judges dissenting from the Ninth Circuit’s denial of *en banc* review, and other circuits, the Ninth Circuit declined to apply exacting scrutiny and substituted the district court’s factual findings with its own blind faith that California will cease disclosing donor information to the public. *Compare* Pet. in No. 19-251, at app. 34a-39a, *with id.* at app. 51a-53a; *id.* at 7-10, 15-17.

As explained by Petitioners, there is real constitutional harm caused by unjustified forced disclosure of donor information. *Id.* at 28-35; Pet. in No. 19-255, at 20. Insofar as the Ninth Circuit’s opinion allows forced disclosure without requiring a compelling or actually

important interest, Pet. in No. 19-251, at app. 19a (requiring only some improvement in “efficiency”), or narrow tailoring, Pet. in No. 19-251, at app. 16a-17a (applying a mere “substantial relation” standard), this Court should reverse. Donor anonymity is too important a First Amendment right to be sold at so cheap a price—as recognized by the other Circuits that have discussed non-election donor disclosure. *See* Pet. in No. 19-251, at 24-28.

Moreover, as explained by the five judges dissenting from the Ninth Circuit’s denial of *en banc* review (*id.* at 93a-96a), the State failed to show a strong interest—much less a compelling one—for the bulk collection of donor names. There is no statute specifically authorizing bulk collection by the State and certainly no legislative finding of a relation between the bulk-disclosure requirement and a compelling state interest. Federal tax laws—which require limited disclosure of donor identities to the IRS and bar subsequent disclosure with very narrow exceptions that do not include bulk disclosures—have no state analogue that could justify the disclosure to which the State lays claim. In the absence of a compelling state interest, no government agency should compel a charity to identify its donors where, as here, the risk of public disclosure—through California Public Records Act requests, leaks, or otherwise—is grave.

Amicus recognizes the *federal* government’s legitimate interest in allowing the IRS to identify substantial contributors to certain charities on a confidential basis and to require their disclosure to the IRS. These

measures help to prevent donors from claiming fraudulent tax deductions, protect charities against self-dealing, and ensure that charitable grants support genuinely charitable organizations. But even in these limited instances where donor identities are disclosed to the IRS, the disclosure satisfies discrete federal tax law requirements that have no state law analogue. Indeed, the IRS recently eliminated the requirement to disclose names and addresses of donors to certain 501(c) organizations altogether and given its efforts to eliminate such disclosure obligations through regulatory means, it presumably would have also extended the protection to 501(c)(3) organizations but for the statutory impediments presented in doing so.⁴² The reason given for eliminating the request for donor information is simply that “[t]he IRS does not need the names and addresses of substantial contributors” to carry out the internal revenue laws.⁴³ The IRS recognizes that requiring disclosure as needed on a case-by-case basis avoids increased compliance costs to organizations, preserves IRS resources otherwise dedicated to the statutorily required redaction of certain information, and reduces the risk of inadvertent disclosure of individuals’ private information.⁴⁴

⁴² See Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959 (May 28, 2020) (to be codified at 26 C.F.R. pt. 1 & 56), <https://www.govinfo.gov/content/pkg/FR-2020-05-28/pdf/2020-11465.pdf>.

⁴³ *Id.* at 31963, 31966.

⁴⁴ *Id.* at 31963-31966.

At the federal level, donor names are required to ensure compliance with discrete, technical provisions of the Internal Revenue Code. For example, some provisions of the Internal Revenue Code prohibit excess benefit transactions by public charities with substantial contributors, 26 U.S.C. § 4958, and bar donor-advised funds from conferring prohibited private benefits on donors, *id.* § 4967. Section 507 provides for the termination of private foundation status based on the aggregate tax benefits received by statutorily defined “disqualified” persons, which include “substantial contributors.” *Id.* §§ 507, 4946(a)(1)(A). Section 4941 prohibits self-dealing transactions between substantial contributors and private foundations. *See id.* § 4941. Lastly, Section 4943 forbids private foundations from holding excess business holdings together with substantial contributors. *Id.* § 4943.

State governments, however, lack the same interest in collecting donor identities because they do not have analogous tax rules to enforce. Indeed, the California Franchise Tax Board has expressly stated that California does not have rules analogous to the federal government and does not apply federal tax rules that require the bulk disclosure of donor identities. *See, e.g.*, California Franchise Tax Board, Summary of Federal Income Tax Changes 436-37 (2006) (analyzing Pension Protection Act, which modified many of the federal rules applicable to exempt organizations, and determining that the impact of those changes on California revenue is “not applicable”). That the California Attorney General generally has “broad powers” over

charitable trusts, Cal. Gov't Code § 12598(a), maintains a register of charities, *id.* § 12584, and can make regulations regarding the contents of reports setting forth the nature of a charitable organization's assets, *id.* § 12586(a)-(b), does not mean all such regulations are compelling based solely on the Attorney General's say so. Indeed, none of these laws specifically contemplates or authorizes bulk donor collection.

California falls back on its general interest in safeguarding abuse of the "tax-exempt status" or "special tax treatment" of charitable organizations. *E.g.*, Br. in Opp'n to Cert. at 2, 6-7. But this cannot explain why the California Attorney General requires "foreign entities" to register in California and disclose their donor information even if the entities do nothing more than receive regular donations from Californians through no fundraising or simply maintain "websites, online social media, [or] other Internet-based * * * platforms" that are accessible to Californians.⁴⁵ For example, a local charity in New York that does not actively fundraise or have any operation in California but that receives regular donations from Californians is required to register in California and disclose the names, addresses, and donation amounts of all of its major donors to the California Attorney General. As another example, a local charity in Missouri that maintains a

⁴⁵ See CALIFORNIA DEPARTMENT OF JUSTICE, CHARITABLE TRUST SECTION, ATTORNEY GENERAL'S GUIDANCE FOR CHARITIES: BEST PRACTICES FOR NONPROFITS THAT OPERATE OR FUNDRAISE IN CALIFORNIA (2020), https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf.

website that is accessible to all, including Californians, would apparently need to register with the California Attorney General and disclose the information of its donors. Such disclosures from out-of-state entities further highlight that California cannot show an interest, let alone a compelling one, for its broad collection scheme. Troubling too is that once California's vague guidance subjects a foreign entity to its laws and regulations, California can presumably require bulk disclosure of all nationwide donors to that entity, including out-of-state donors, who would be shocked to learn that donating to a local charity in another state discloses their private information to the California Attorney General.

Even if California limited its disclosure requirement to actual California-based charities, however, its general interest in administering non-profit tax exemptions and laws for charitable organizations does not justify abridging donors' First Amendment liberties. California's purported justification countermands the very purpose of tax exemptions for nonprofits—to create a bulwark protecting civil rights and liberties. As explained, *supra* Section I, charities and nonprofits have taken on numerous civil causes (minority education, women's suffrage, LGBTQ rights, to name a few) either ignored or opposed by the government at the time.

California attempts to justify its bulk collection of donor information using a sleight of hand. Like all magic tricks, it involves a complicated set up, but relies on a simple gimmick that is easy to miss if

one is not paying attention. The trick works like this: The Sixteenth Amendment subjects all “incomes, from whatever source derived,” to taxation. Income used to make charitable gifts is income belonging to the State. When the State allows taxpayers to deduct charitable gifts against their incomes, the State takes less income from taxpayers than the State is otherwise entitled. The charitable deduction, therefore, uses the State’s own funds. The State does not violate the First Amendment when the State limits how others use the State’s own funds. The State, therefore, can tell donors and nonprofits what to do with their charitable gifts—for example, the State could limit charitable contributions to the State’s preferred religion—without any concern of First Amendment violations. Collecting donor information in order to chill State-disapproved speech is trivial by comparison. Given this nonsensical result, it should be obvious that the argument proves too much—but where is its flaw?

The flaw is to treat charitable gifts as part of income in the first place. Fortunately, there is no need to do so because charitable gifts can, and should, be understood as payments that *reduce* income rather than as payments *of* income.⁴⁶ The Sixteenth Amendment only applies to income, so if charitable gifts are excluded from income, then the State does not own or control them, and the conflict with the

⁴⁶ Andrews, *supra* note 5.

First Amendment is avoided.⁴⁷ Everything rides on this logical misstep. By falsely treating charitable giving as income, the State is able to perpetuate the myth that when a donor gives to charity and claims a deduction against income tax, it is the State's own money at use, not solely the donor's. The State would have this Court believe that the income tax deduction and charitable exemption give the State the right to control what donors and charities can say or do, and with whom they can associate.

It does not have to be thus—indeed, it cannot be thus. The State must provide an income tax deduction for charitable gifts because giving is not included in income, so the State must exclude gifts from income in order to measure taxable income accurately pursuant to the State's own formulation of income. This simple explanation of the charitable deduction accords with the only reading of the Constitution that prevents a catastrophic clash between the Sixteenth and First Amendments. The State, having appropriated all income for government use through taxation, is obliged to reverse out such income devoted to First Amendment concerns or else those freedoms will be eliminated. As stated above, the nonprofit “tax benefits” are not a matter of legislative largesse or subsidy justifying the State's regulatory agenda; rather, they are a bulwark protecting civil rights and liberties and should *prevent* the State's regulatory agenda—not encourage it. The State's bulk collection of private

⁴⁷ Reid, *supra* note 5 at 21.

donor information is a symptom of this fundamental misunderstanding, and this Court should seize the opportunity to correct it.

Income tax exemptions are not mere “special treatment” or discretionary legislative benefits; they are crucial to ensuring that the government does not use taxation or other means to influence or otherwise trample on First Amendment-protected association rights of nonprofits and their donors and members. Thus, bulk collection of donor information is not a mere curtailment of a legislative largesse—it is a dangerous incursion on fundamental First Amendment freedoms based on a misunderstanding of tax policy and the Constitution.

In particular, the First Amendment guarantees that governments do not use purported public finance objectives from income tax generally to trounce on First Amendment association, speech, and religious rights. Philanthropy is not public money, so the need to reverse out income devoted to the nonprofit sector from the government’s reach has long been recognized. Absent that exemption, the government could usurp or hinder unpopular philanthropic causes and chill First Amendment-protected giving.

Moreover, California ignores that once donor names and information are in the hands of the State, they are more vulnerable to public disclosure through the operation of the California Public Records Act (CPRA), Cal. Gov’t Code §§ 6253, 6254. *See Am. for Prosperity Found. v. Harris*, 809 F.3d 536, 542 (9th Cir.

2015). The CPRA is a highly disclosure-oriented statute. *See, e.g., CBS, Inc. v. Block*, 725 P.2d 470, 473 (Cal. 1986) (“Maximum disclosure of the conduct of governmental operations was to be promoted by the Act.”). Although the CPRA has various exceptions, they must be narrowly construed—and they are permissive, not mandatory. *Marken v. Santa Monica–Malibu Unified Sch. Dist.*, 136 Cal. Rptr. 3d 395, 405 (Cal. Ct. App. 2012); Cal. Gov’t Code § 6254.

The Ninth Circuit concluded that a new regulation, Cal. Code Regs. tit. 11, § 310(b) (2016), now guarantees the Attorney General will not release information like donor information on IRS Form 990 Schedule B that cannot be released under federal law. Pet. in No. 19-251, at app. 34a-36a. But this regulation merely codifies the State’s preexisting “confidentiality policy”—the very policy in place when the State previously divulged confidential donor information to the public. *See id.* at app. 51a-53a. If the State’s policy has previously allowed at least “1,778 confidential Schedule Bs * * * [to be] publically posted [online],” *id.* at app. 52a, and the Attorney General’s office has been plagued by “systematic[] fail[ure] to maintain the confidentiality of Schedule B forms,” *id.* at app. 51a; *id.* at 14, it was not clearly erroneous for the district court to conclude that the potential for disclosure is still too great. This is especially true given the non-specific, aspirational nature of the new regulation and “protocols” and their unclear relationship with California’s disclosure statutes. *See* Cal. Code Regs. tit. 11, § 310(b); Cal. Gov’t Code § 6254. In the absence of a truly significant

or compelling state interest—an interest not identified by the State here—no state government agency should be able to force a charity to identify its donors.

Given that confidentiality in charitable giving is grounded in the constitutional freedom of association and is one of the most important elements of philanthropic freedom, this Court should prohibit the California Attorney General from *collecting*, let alone disclosing (“inadvertently” or otherwise), donor information in the future absent a truly compelling interest. Even the federal government—where safeguards are the strongest—is not immune from allegations of abuse and breaches of personal information from tax returns.⁴⁸ Especially in the context of California’s historical “inability to keep confidential Schedule Bs” collected in bulk, Pet. in No. 19-251, at app. 51a, the Ninth Circuit’s disregard of the need for a compelling interest for this collection should be overturned. Pet. in No. 19-251, at app. 21a-23a. Because the California Attorney General’s bulk collection fails that exacting scrutiny standard, this Court should reverse the Ninth Circuit to prevent government overreach, protect donor privacy, and preclude the chilling of First Amendment rights.

⁴⁸ See, e.g., Lisa Rein & Jonnelle Marte, *Hackers Stole Personal Information from 104,000 Taxpayers, IRS says*, WASH. POST (May 26, 2015), https://www.washingtonpost.com/news/federal-eye/wp/2015/05/26/hackers-stole-personal-information-from-104000-taxpayers-irs-says/?utm_term=.08bde831e6d1.

III. California Has Ample Tools for Ensuring Compliance with State Law Without Any Need for the Bulk Collection of Donor Information.

As explained above, California lacks the federal government's interest in collecting donor identities because it does not have analogous laws to enforce. Yet the State does have ample tools to protect the public from fraud and deceptive solicitation practices (the chief interests it identifies as supposedly justifying bulk information collection).

The California Attorney General serves as "*parens patriae*" (*i.e.*, the protector for those unable to protect

themselves) for charitable organizations in the State because charities have no shareholders. The Attorney General also holds subpoena power—available to address any individual instances of donor misbehavior. Cal. Gov't Code § 12588. These authorities are more than ample to assist the State in policing the charities within its borders. The bulk collection of donor names at the state level is simply not needed—especially given the success of federal and state regulators in ensuring compliance with already-existing regulations that have made fraud and self-enrichment rare among charitable organizations.⁴⁹

⁴⁹ See Joanne Florino, *Policing Philanthropy?*, PHILANTHROPY MAG. (Summer 2015), <https://www.philanthropyroundtable.org/philanthropy-magazine/article/summer-2015-policing-philanthropy->.

At the same time, the practical value of the request for the donor information is *de minimis* at best. The State does not allege that most, or even a significant number, of the over 100,000 charities in California are engaged in fraud or deceptive solicitation practices. To the contrary, as the district court found, the California Attorney General has only needed to review the Schedule B donor lists that it seeks in less than one percent (that is, five out of 540) of the investigations it has conducted of charities over the past ten years. Pet. in No. 19-251, at app. 45a; Pet. in No. 19-251, at 13; Pet. in No. 19-255, at 12. There is simply no persuasive reason—let alone a compelling one—for the mass collection of IRS Form 990 Schedule B for fraud and deceptive practices investigations. Even in the handful of cases (literally) where a Schedule B might be relevant to a valid investigation, the subpoena power—with procedural requirements that help guard donors’ privacy—could be used rather than seriously burdening the First Amendment rights of hundreds of thousands of other donors. As these numbers bear out, bulk collection here is not even remotely tailored to any government interest, let alone a compelling one.

In sum, the right to choose how and where to make charitable gifts, even unpopular ones, is fundamental to Americans’ exceptional philanthropic freedom. It also implicates fundamental constitutional rights. The State’s rule constitutes unwarranted government intrusion into the exercise of those rights, with

potentially dire consequences for charities throughout California and the United States.



CONCLUSION

For the forgoing reasons, *amicus* respectfully requests that this Court reverse the judgment of the Ninth Circuit.

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