Nos. 19-251 & 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
v.
MATTHEW RODRIQUEZ, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
MATTHEW RODRIQUEZ, 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 NATIONAL COUNCIL OF NONPROFITS IN SUPPORT OF RESPONDENT

TIM DELANEY
Counsel of Record
TIFFANY GOURLEY CARTER
DAVID L. THOMPSON
STEVEN WOOLF
NATIONAL COUNCIL OF NONPROFITS
1001 G Street NW, Suite 700E
Washington, D.C. 20001
(202) 932-0322
tdelaney@councilofnonprofits.org
Counsel for Amicus Curiae

March 31, 2021

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTERESTS OF *AMICUS CURIAE*[1]

National Council of Nonprofits, a charitable nonprofit organization recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code ("Code"), respectfully submits this *amicus curiae* brief for itself and in its representational capacity for its members and charitable nonprofits throughout the country to bring to the Court's attention relevant matters and perspectives not already brought by the parties. Those matters and perspectives center largely around concerns of significant harm to the work of charitable nonprofits and thereby harm to the public if a decision results in unintended collateral damage to the law and practices governing the operations of charitable organizations. The National Council of Nonprofits and charitable nonprofits throughout the country have significant compelling interests in how this case is resolved, interests we explain now to help the Court avoid inadvertently weakening the ability of charitable nonprofits to provide services to the millions of people who depend on them daily.

Before the pandemic struck, more than 1.3 million charitable nonprofits across the United States worked with every part of society. Collectively, charitable nonprofits employed 12.5 million people

---

[1] Pursuant to this Court's Rule 37.3(a), all parties have granted written consent for filing this brief. Pursuant to Supreme Court Rule 37.6, counsel of record for *amicus curiae* discloses that no counsel for a party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Moreover, no person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution intended to fund this brief's preparation or submission.

pre-pandemic, making the sector the third largest private workforce in the country – larger than construction, finance, and even manufacturing.[2] Individually, however, most charitable nonprofits are small in size, with 92 percent spending less than $1 million annually, and 88 percent spending less than $500,000.[3] Thus, the "typical" nonprofit is community-based, serving local needs.

Although Petitioners are also tax exempt under Section 501(c)(3), they are hardly representative of the broader charitable community. In 2018, Petitioner Americans for Prosperity Foundation ("AFP Foundation") spent $18.8 million, and Americans for Prosperity ("AFP"), a related corporate entity with which it shares extensive interlocking and overlapping directors and officers, spent $89.6 million, for a total of $108.2 million in spending under largely common control, according to their most recent Form 990 Informational Returns (see Part I, line 18).[4] AFP, a noncharitable nonprofit organized under Section

---

[2] *See* Lester M. Salamon and Chelsea L. Newhouse, *The 2020 Nonprofit Employment Repor*t, Nonprofit Economic Data Bulletin no. 48, Johns Hopkins Center for Civil Society Studies, June 2020, *available at* http://ccss.jhu.edu/wp-content/uploads/downloads/2020/06/2020-Nonprofit-Employment-Report_FINAL_6.2020.pdf.

[3] *See* National Council of Nonprofits, *Nonprofit Impact Matters*, Fall 2019, at 17, *available at* https://www.nonprofitimpactmatters.org/site/assets/files/1/nonprofit-impact-matters-sept-2019-1.pdf.

[4] *See* Prosperity Foundation's 2018 Form 990, https://pdf.guidestar.org/PDF_Images/2018/521/527/2018-521527294-17150111-9.pdf (last visited March 29, 2021), and AFP's 2018 Form 990, *available at* https://pdf.guidestar.org/PDF_Images/2018/753/148/2018-753148958-17183216-9O.pdf (last visited Mar. 29, 2021).

501(c)(4) of the Code, has been very active politically.[5] The Prosperity "family" is even larger: AFP has another related entity, a political action committee called Americans for Prosperity Action, Inc. ("Prosperity Super PAC"), that is registered with the Federal Election Commission. *See* Fed. Election Comm'n Campaign Finance Data, *available at* https://www.fec.gov/data/committee/C00687103/?cycle=2020 (last visited March 29, 2021). Prosperity Super PAC reported spending more than $47.6 million in independent expenditures to influence elections during the 2019-2020 election cycle. *Id.*

Petitioner Thomas More Law Center ("Law Center") spends less money, but enjoys strong support across the country, having 797 *pro bono* attorneys at its side, according to its 2019 Form 990 (see Part III, line 4).[6] Comparatively few charitable nonprofits control or are connected to as much clout or resources as either Petitioner.

---

[5] "Americans for Prosperity (AFP), a § 501(c)(4) political advocacy organization whose resources are so substantial, and whose political spending is so massive and widespread, some have suggested it 'may be America's third-biggest political party.'" Erin Chlopak, *One of These Things Is Not Like the Other: NAACP v. Alabama Is Not a Manual for Powerful, Wealthy Spenders to Pour Unlimited Secret Money into Our Political Process*, 69 Am. U. L. Rev. 1395, 1418, 134 (2020) (citations omitted), *available at* http://www.aulawreview.org/one-of-these-things-is-not-like-the-other-naacp-v-alabama-is-not-a-manual-for-powerful-wealthy-spenders-to-pour-unlimited-secret-money-into-our-political-process/.

[6] *See* Law Center's Form 990 (2019), *available at* https://pdf.guidestar.org/PDF_Images/2019/383/448/2019-383448297-202031849349301433-9.pdf (last visited Mar. 29, 2021).

By contrast, the National Council of Nonprofits works with and advocates for America's charitable nonprofits nationwide – with a special focus on small and midsize community-based organizations. Through our network of state associations of nonprofits and 25,000-plus member charitable nonprofits, faith-based groups, and foundations – the nation's largest network of Section 501(c)(3) organizations – we serve as a central coordinator and mobilizer to help nonprofits achieve greater collective impact in local communities across the country. We achieve this by analysis, advocacy, engagement, and training on the practical operations and legal rights and obligations of charitable nonprofit organizations – all to improve compliance, impact, performance, and public trust. Our membership reflects the broad panoply of charitable missions recognized under Section 501(c)(3), including educating children, nursing the sick, inspiring through the arts, nurturing faith and spirituality, caring for veterans, supporting elders, mentoring youth, protecting natural resources, training the workforce, and serving the public in myriad other ways.

The ability of charitable nonprofit organizations to advance these and other crucial missions could be adversely affected by the outcome of this case. The public charity system functions only if the public has faith that their charitable donations help the public rather than private interests. If the Court follows Petitioners' invitations to chip away at the legitimate tools used by state law enforcement to ensure the charitable system is fair and not being abused by bad actors masquerading as charitable nonprofits or self-dealings by substantial contributors and complicit insiders, then the individuals who donate their time and money to nonprofits will no longer trust the system and will withhold their support. Consequently,

millions of people could lose services on which they depend.

Since the Great Recession, the public's reliance on charitable nonprofits has grown, with demand for nonprofit services increasing substantially.[7] That reliance intensified dramatically in 2020 due to the COVID-19 pandemic and its economic toll. People throughout the country have turned to nonprofits for help, many for the first time, illustrated most vividly by the miles-long lines at food banks. Charitable nonprofits on which tens of millions of Americans rely have stepped up to meet the skyrocketing demands for services, yet those very nonprofits have been struggling themselves with plummeting revenues and significantly increased costs to adapt to the COVID environment.[8]

---

[7] *See generally* United Way of Northern New Jersey, *On Uneven Ground: ALICE and Financial Hardship in the U.S.* (Dec. 2020), *available at* https://www.unitedforalice.org/Attachments/AllReports/2020AliceReport_National_Final.pdf (last visited Mar. 29, 2021) (from 2007 to 2018, there was a 38 percent increase in the number of households unable to meet a basic budget, with 16 million households below the federal poverty level and another 35 million employed but with insufficient income to afford essentials); *see also* Nonprofit Finance Fund*, State of the Nonprofit Sector Survey* (May 2018), *available at* https://nff.org/learn/survey (last visited March 29, 2021).

[8] *See generally* National Council of Nonprofits, *Data on How the Pandemic and Economic Crises Are Affecting Nonprofits, available at* https://www.councilofnonprofits.org/data-how-the-pandemic-and-economic-crises-are-affecting-nonprofits (last visited March 29, 2021) (presenting dozens of survey reports from academic centers, federal agencies, and state associations of nonprofits, including these: New Jersey Center for Non-Profits, *Trends and Outlooks 2021* (Feb. 2021) *available at* https://www.njnonprofits.org/2021AnnualSurveyRpt.pdf (last visited March 29, 2021) (survey of New Jersey nonprofits found demand for nonprofit

From March 2020 through February 2021, more than 925,000 nonprofit jobs have been lost.[9] There is grave concern about the sustainability of charitable nonprofits, especially small-to-midsize nonprofits embedded in local communities meeting local needs. Adding to the challenges: disasters attract fraudulent activities targeted at well-meaning donors who want to help but can be easily scammed.[10]

At this time when the public is relying so much on nonprofits, and this time of increased risk of fraudulent activities aimed at the donating public, any changes in charity law can cause short-term problems and long-lasting damage. Therefore, the National Council of Nonprofits respectfully submits this *amicus curiae* brief.

---

services increased by 48 percent in 2020, far outpacing funding increases from programs such as the Paycheck Protection Program); and Pennsylvania Association of Nonprofit Organizations, *Impacts of COVID-19 on Pennsylvania Nonprofits*, as of Aug. 28, 2020 (Oct. 2020), *available at* https://pano.org/covid-19-impact-data/ (last visited March 29, 2021) (finding that six months into the COVID crisis, nonprofits providing human services had suffered – on average – a shortfall of $1.1 million per organization, from a combination of not only lost revenues ($879,300) but also higher costs ($220,600) to deliver services safely).

[9] *See* Lester Salamon, *Nonprofit Sector Lost Over 7% of Its Workforce in the First Year of the Pandemic*, Johns Hopkins Center for Civil Society Studies, March 12, 2021, http://ccss.jhu.edu/february-2021-jobs/.

[10] *See, e.g.*, Federal Bureau of Investigations, *FBI Warns of Potential Charity Fraud Associated with the COVID-19 Pandemic*, Press Release (Oct. 14, 2020) ("Many Americans want to help during the COVID-19 pandemic by contributing to charities, but the FBI is warning that scammers also want to help—they want to help themselves to your money").

SUMMARY OF THE ARGUMENT

With more than 75 briefs filed at the merits stage by the parties and numerous *amici curiae,* the Court does not need yet another brief focused on the legal standard of scrutiny. We agree with Petitioner AFP Foundation, Respondent California Attorney General, and the U.S. Solicitor General that exacting scrutiny is the proper standard to be applied. That is the standard the Court has applied in the past – a standard that has proven to be both reliable and flexible to accommodate unique circumstances.

The fundamental question before the Court is whether a state may require a charitable nonprofit to submit a confidential, non-public report about its substantial contributors – a report already prepared and submitted annually to the IRS – for the purpose of oversight and law enforcement. An issue not before the Court, yet one raised repeatedly in briefs submitted by Petitioners and many of their *amici*, is the serious harm that could result from compelled *public* disclosure of the names and amounts donated to specific charitable organizations.

But compelled *public* disclosure is not the issue before the Court, notwithstanding arguments and insinuations to the contrary.

The National Council of Nonprofits wholeheartedly agrees that the names of donors to charitable organizations should not be disclosed to the *public* under compulsion of law. Forced public disclosure of donor identities is anathema to donor protection, donor interests, and sound fundraising principles. But that is not what the California Attorney General is doing, and it is not the question presented.

These consolidated cases raise a charity law question, in the charity law context, with likely charity law consequences. Yet, the arguments and issues raised relate more to the long-running battles in the campaign finance and election law arena. Jumping from the campaign finance and election law field over into the charity law space puts the public and charitable nonprofits at risk. Words such as "compelled disclosure" may sound straightforward, but they have different meanings when flipping the frame between election law and charity law. Simply put, context matters. For example, in *election law*, disclosures are made to the public for the purpose of informing the electorate about who is trying to influence elections; with Schedule B in the *public charity space*, the reporting is confidential, only to law enforcement, for the purpose of protecting the public and taxpayers from fraud and misuse of charitable assets.

Charitable nonprofits make considerable efforts to ensure they operate ethically and in compliance with the law. But charitable organizations do not have the authority, capacity, or scale to go after bad actors or suspected fraudsters. To have faith in a system, the public must believe that participants are playing by the rules. That requires law enforcement. If the public believes that there is inadequate oversight allowing some to "game the system," then people will lose faith in that system and then withhold their support of time and money, damaging the ability of charitable nonprofits to deliver on their missions for the millions of people who depend on them. That is why deterrence of bad actors and fraud is such a weighty factor.

But deterrence requires resources. For more than a decade, Congress has significantly reduced spending on the IRS. The resulting underfunding has led to

drastic cutbacks, including reduced federal oversight of charitable nonprofits. In response to a growing backlog, the IRS altered its application process for those seeking tax-exempt status as Section 501(c)(3) organizations, making it much easier for applicants – whether they are eligible or not – to secure tax-exempt status and start receiving tax-deductible donations. As a result, there is reduced oversight and increased risk of losing the public's trust in the ability of law enforcement to protect them from fraudsters masquerading as legitimate nonprofits.

With the IRS stepping back from adequately screening applicants for charitable nonprofit status, the states have had to step forward to do more. Petitioners complain that California is using Schedule B while most other states are not, and then they complain that California is not using the Schedule B enough to justify using it at all. California's merits brief forcefully debunks Petitioners' numbers game. We add: you can only count what you can see, and sometimes what you do not see really counts. Deterrence of fraud cannot be overlooked, discounted, or reduced to numbers. Schedule B is a powerful deterrent tool against charity fraud that deserves more weight than has been given.

* * *

There is much more at stake here than meets the eye. In light of the the broad potential harm to the work of frontline nonprofits and thereby risk to the public, we urge the Court to dismiss the writ of *certiorari* as having been improvidently granted and let the Ninth Circuit's decision stand as is. Alternatively, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. PUBLIC DISCLOSURE OF CHARITABLE CONTRIBUTIONS SHOULD NEVER BE COMPELLED

The fundamental question before this Court is whether a state may require a charitable nonprofit to submit a confidential, non-public report about its substantial contributors – a report already prepared and submitted to the IRS – for the purpose of oversight and law enforcement. An issue not before the Court, yet one raised repeatedly in briefs submitted by Petitioners and many of their *amici*, is the serious harm that could result from compelled *public* disclosure of the names and amounts donated to specific charitable organizations. But compelled *public* disclosure of all donors is not the issue before the Court, notwithstanding arguments and insinuations to the contrary.

This case resides fully in the charity law context, which is in large part controlled at the federal level by the Internal Revenue Code, notably Sections 501(c)(3), 6033, and 6103-6104. The Code already compels most charitable organizations organized under Sections 501(c)(3) to disclose on an annual basis "the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors." 26 U.S.C. § 6033(b)(5). That compelled disclosure, via Schedule B, is private to the IRS. Likewise, California treats Schedule Bs submitted by charitable nonprofits as confidential, non-public documents. There is no meaningful difference – both governments compel the same Schedule B that both governments treat as confidential, non-public information.

But on the issue of compelled *public* disclosure of donor information, let there be no uncertainty. The National Council of Nonprofits wholeheartedly agrees that the names of donors to charitable organizations should not be disclosed to the *public* under compulsion of law. Forced public disclosure of donor identities is anathema to donor protection, donor interests, and sound fundraising principles. But that is not what the California Attorney General is doing and it is not the question presented.

II. THIS IS A CAMPAIGN FINANCE CASE CLOAKED IN CHARITY LAW CLOTHING

A. Tampering with Charity Law Is Dangerous for the Public, Taxpayers, and the Work of Charitable Nonprofits

On the surface, this case has the look of a charity law matter, dressed in all the trappings: Two 501(c)(3) charitable nonprofits are resisting the requirement to file a complete charitable solicitation registration form that has not bothered tens of thousands of other charitable nonprofits from filing annually. They challenge the authority of the state's top charity regulator designated by that state's legislature to protect the people of the state who might be potential contributors, the state's taxpayers, and the charitable nonprofits in that state. Any decision this Court makes will impact the work of charitable nonprofits in that state, plus all others, as state charity regulators elsewhere adjust to the retention or loss of this and perhaps other law-enforcement tools.

But there is a different energy roiling beneath the surface of all those indices of charity law, which is the product of common law and federal and state statutes and regulations. In the field of election law, there has

been a long-running war over campaign-finance disclosure issues with fierce battles between those pushing for anonymity of contributions and campaign finance expenditures versus those pushing for full disclosure to ban "dark money." Until now, these battles have occurred largely on election-law grounds and thus subject to certain limits under the Code and IRS regulations.[11]

We recognize and celebrate that Petitioners are free to advance theories in charity law matters just as they do in campaign finance and other election law confrontations. But jumping the line from the campaign finance and election law context over into the charity law space to tamper with the standard of scrutiny could lead to tragic results.

While not immediately evident in 2010, this Court's opinion in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), caused much unintended confusion in the charitable community for many years. The opinion used the generic term "nonprofit" throughout. While accurate, Citizens United is tax-exempt under Section 501(c)(4) – as were many of the examples the majority opinion cited: American Civil Liberties Union, National Rifle

[11] This case is not the first or only effort to carry the battle of campaign finance disclosure over into charity law. Bills in Congress in recent years have sought to weaken the longstanding law requiring charitable nonprofits to refrain from endorsing or opposing candidates for public office (sometimes called the "Johnson Amendment," see footnote 13, *infra)*. *See*, *e.g.*, Free Speech Fairness Act, H.R. 781 and S.264, 115th Cong. (2017-2018). Had those bills passed, donors would have been able to funnel their partisan political donations undetected through charitable organizations AND receive a tax deduction for their donations.

Association, and the Sierra Club. But "noncharitable nonprofits" – groups tax exempt under 501(c)(4) and 501(c)(6) – legally can be politically active. Yet, the term "nonprofits" also encompasses 501(c)(3) organizations – charitable nonprofits, foundations, and houses of worship – that under charity laws may not engage.

The disruption caused by use of the indistinct term of "nonprofit," when there are distinct differences to 501(c)(3) charitable nonprofits, is part of the reason we are filing this *amicus curiae* brief. When writing the opinion in this case, it is essential the Court apply a laser-like focus on the charity law implications to avoid jeopardizing the work of charitable nonprofits and putting at risk the services being delivered to millions of people.[12]

Another example of how common words have different meanings in the election law arena versus the charity law space is the term "compelled disclosure." Just as the word "nonprofit" has important distinctions, usage of "compelled disclosure" in election law matters has a different connotation when applied to charity law. Simply put, context matters.

- In *election law*, disclosures are made to the public; with Schedule B in the *public charity space*, the reporting is confidential, just to law enforcement.
- In *election law*, campaign contributions are not tax deductible; in the *public charity space*, reporting is a condition prece-

[12] One way would be to refer to Section 501(c)(3) organizations as "charitable nonprofits" and the nonprofits that legally can engage in partisan political electioneering as "noncharitable nonprofits."

dent because of the preferential tax treatment to both the donor and the receiving charitable nonprofit.

- In *election law*, campaign donations are made to advance personal partisan interests of the donors; in the *public charity space*, charitable contributions are made for the public good.
- In *election law*, the purpose of public disclosure is to inform the electorate about who is trying to influence elections by funding partisan activities for or against candidates for public office; in the *public charity space*, the purpose of confidential reporting to law enforcement is to protect the public and taxpayers from fraud and misuse of charitable assets.
- In *election law*, engagement in partisan, election-related activities is the sole focus; in the *public charity space*, charitable organizations enjoy protection from the rancor of partisan election-related activities because of the longstanding, and widely embraced, prohibition against participating in or diverting charitable assets to any political campaign on behalf of or in opposition to any candidate for public office.[13]

---

[13] See the third proviso in 26 U.S.C. § 501(c)(3), sometimes referred to as the Johnson Amendment, first enacted in 1954 and strengthened in 1978, 1986, and 1987. For more information on the broad nonprofit community's perspective on keeping partisan politics out of the public charity space, see National Council of Nonprofits, *Protecting the Johnson Amendment and Nonprofit*

While many of those favoring anonymity want to move the goalposts of the standard of scrutiny in a way favorable to their views in the election law arena, doing so in the charity law context would have far broader ramifications. In the charity law context, this case is not about preventing disclosure of all donors to the public, but about constructing barriers of secrecy for substantial contributors and groups masquerading as charities to impede legitimate law enforcement.

Petitioners attempt to invoke *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958), as supporting their position. It does not. *NAACP v. Alabama* and its progeny do not operate like a sealed vault to keep the identities of charitable nonprofits' largest donors secret from being reported confidentially to federal and state law enforcement for the purpose of stopping fraud relating to preferential tax treatment. Those civil rights cases concerned contrivances by hostile governments to intimidate and disrupt citizens coming together through a charitable nonprofit fighting for racial and economic equality. The oppression being wrought under color of law was so offensive that the Court intervened. It stopped the abuse of the NAACP and its members, in a decision focused "*solely*" on the rights of the NAACP's "*ordinary rank-and-file members*," "because [NAACP] and its *members* are, in every practical sense, *identical*. 357 U.S. at 466 (emphasis added).

But the question presently before the Court does not involve governmental oppression contorting legal processes to target minority groups. And this is not a

---

Nonpartisanship, available at https://www.councilofnonprofits.org/trends-policy-issues/protecting-nonprofit-nonpartisanship (last visited March 29, 2021).

case about the *members* of an organization, for which in a proper case and proper showing, those civil rights cases are available for full protection.

As the Court considers this election law battle being waged in a charity law context, the National Council of Nonprofits asks the Court to be sensitive to the greater risks and the ever-present law of unintended consequences. This is not the proper vehicle to be deciding what is essentially a campaign finance issue.

B. The Charity System Requires the Public's Trust

The charitable nonprofit community recognizes that mission-driven nonprofits can be successful only by earning and maintaining the public's trust. If the public stops trusting nonprofits, then people will stop contributing their time and money, which will damage the ability of most charitable nonprofits to deliver on their missions for the millions of people who depend on them.

That is why charitable nonprofits strive to be good as they do good. Nonprofits have developed best practices materials to help guide paid staff and volunteer board members on topics such as ethics, financial controls, and governance.[14] Nonprofit capacity building groups, including state associations of nonprofits, management support organizations, and academic centers, provide compliance and best practices train-

---

[14] *See*, *e.g.*, National Council of Nonprofits, *Principles and Practices – Where can you find 'best practices' for nonprofits?*, *available at* https://www.councilofnonprofits.org/tools-resources/principles-and-practices-where-can-you-find-best-practices-nonprofits (last visited Mar. 29, 2021); and Maryland Nonprofts, *Standards for Excellence*, *available at* https://standardsforexcellence.org/ (last visited Mar. 29, 2021).

ing across a wide range of topics. Prominent nonprofit entities exist to help nonprofits comply with specific aspects of nonprofit practices, such as BoardSource (governance), Propel Nonprofits (finances), and NTEN (technology).

But the nonprofit community cannot do it alone. Charitable nonprofits do not have the authority, capacity, or scale to go after bad actors or suspected fraudsters. That is why we expect, support, and request reasonable and non-burdensome regulations and policies. An appropriate balance must be struck that recognizes the unique role of charitable nonprofits and respects both the public spirit of these organizations which are still independent, private entities.

We have seen through organizational experience – from complying with regulatory reporting laws ourselves to providing training about compliance to others – that one of the most effective tools that federal and state law enforcement have to influence compliance is deterrence. Most people want to do the right thing; knowing there is accountability and enforcement is essential. It is true with even simple activities like driving: seeing the radar camera has a way of reminding people about the advisability of following the rules.

Were the Court to take away the deterrent of non-public, confidential law-enforcement access to Schedule B, as Petitioners implore, the actions of honorable people will not change. But it would give a green light for others to abuse the system, thereby tainting the pool of public trust for all.

C. The Public's Trust in the Charity System Requires Deterrence of Fraud

To have faith in a system, the public must believe that participants are playing by the rules. That is true in sports. Major League Baseball prohibits betting by players as it could ruin spectators' support if they thought players were giving less than their best.[15] It is true in business. The Securities and Exchange Commission monitors the security industry to prevent and detect insider trading to ensure public confidence in the market.[16] And it is true for charitable nonprofits. If the public believes there is inadequate governmental oversight allowing some to "game the system," people will lose faith in the system and withhold their support of time and money.

This is not just idle speculation. The U.S. Government Accountability Office recently warned, "When abusive tax schemes involve tax-exempt entities, they also can erode the public's confidence in the charitable sector."[17] The Treasury Inspector

---

[15] Examples include Pete Rose and the 1919 Chicago Black Sox. *See generally* Stephen Ross, James Gorman III, Ryan Mentzer, "*Reform of Sports Gambling in the United States: Lessons from Down Under*," 5 ARIZ. ST. SPORTS & ENT. L.J. Iss. 5, 1 at 26-33 (Fall 2015).

[16] *See, e.g.*, Del Guercio, Diane and Odders-White, Elizabeth R. and Ready, Mark, *The Deterrence Effect of SEC Enforcement Intensity on Illegal Insider Trading: Evidence from Run-up before News Events*, JOURNAL OF LAW & ECONOMICS (June 20, 2017), *available at* http://dx.doi.org/10.2139/ssrn.1784528.

[17] U.S. Gov't Accountability Office, *IRS Could Better Leverage Existing Data to Identify Abusive Schemes Involving Tax-Exempt Entities*, Report to the Committee on Finance, U.S. Senate, GAO-19-491 at Highlights (Sept. 2019), *available at* https://www.gao.gov/assets/gao-19-491.pdf.

General for Tax Administration expressed essentially the same concern last month:

> If the [IRS] does not follow established procedures and effectively identify noncompliance, unscrupulous taxpayers may conduct abusive schemes using tax-exempt organizations for their own financial gain. This could cause taxpayers to question the integrity of all tax-exempt organizations and affect the amount of charitable contributions made to these important entities.[18]

The Court needs to be conscious of the much larger consequences of this case if it overturns the Ninth Circuit decision and begins limiting law enforcement oversight of charitable nonprofits and their substantial contributors. If the public loses trust in the work of nonprofits, then donations of time and money will decrease. We urge the Court to proceed cautiously, vacate its writ of *certiorari*, and let the Ninth Circuit opinion stand as is.

---

[18] Treasury Inspector General for Tax Administration, *Obstacles Exist in Detecting Noncompliance of Tax-Exempt Organization*, Report Number: 2021-10-013 (Feb. 17, 2021), *available at* https://www.treasury.gov/tigta/auditreports/2021reports/202110013fr.pdf ("[T]ax abuse continues to occur within the tax-exempt sector because unscrupulous organizations may use elaborate or fraudulent schemes to conceal their illegal activities, making such abuse difficult to identify. The complexity of the tax law, limited examination resources, and a lack of filing requirements for some types of entities make identifying tax abuse by tax-exempt organizations challenging.").

III. DETERRENCE PLAYS A SIGNIFICANT ROLE IN PREVENTING FRAUD AND ROOTING OUT BAD ACTORS MASQUERADING AS CHARITABLE ORGANIZATIONS

Charitable nonprofits accept and embrace the truth that to maintain the public's trust there is a proper role for law enforcement. A major part of that role is deterrence – to stop bad acts before they even occur. When weighing the merits of the parties' arguments, deterrence merits the extra weight it has with charitable nonprofits.

A. Dual State and Federal Oversight of Charitable Nonprofits

Whatever descriptive terms are applied to the shared oversight of charitable nonprofits – overlapping, dual, joint, concurrent, fragmented – the fact remains that the states and federal government have oversight responsibilities. That is not to say, however, there is a clean division of responsibilities or a complete overlap of jurisdiction. For the system to work, the federal government and the states need to fully perform. But that has not been happening on a consistent basis.

B. The Federal Government Has Been Underperforming Its Oversight Duties

More than a decade ago, Congress began defunding the IRS. From 2010 through 2018, Congress cut the IRS budget by more than 21 percent, reducing the number of operations staff by 31 percent.[19] That severe

---

[19] *See* Chye-Ching Huang, *Depletion of IRS Enforcement Is Undermining the Tax Code*, Testimony, Center for Budget and Policy Priorities; Hearing Before the House Ways and Means

underfunding has led to drastic cutbacks, including reduced federal oversight of charitable nonprofits.

In 2014, the IRS radically changed its application and approval process for groups seeking charitable tax-exempt status. Until then, the application, Form 1023, served multiple purposes, including a powerful deterrent role. Applicants were required to perform certain tasks, such as preparing a three-year statement of revenues and expenses, learning about and thinking through unique requirements for charitable nonprofits (such as limitations on activities, compensation, and use of charitable assets), and attaching copies of their state formation documents and bylaws.[20] The application process played two important deterrent roles: weeding out those who mistakenly thought it would be a quick way to get easy money, and putting applicants on notice about accountability.[21]

But the IRS eliminated those important deterrent effects for most applicants by creating a short form,

---

Comm. (Feb. 11, 2020), *available at* https://www.cbpp.org/sites/default/files/atoms/files/2-11-20tax.pdf.

[20] See the extensive *Instructions for Form 1023*: *Application for Recognition of Exemption Under Section 501(c)(3)*, Internal Revenue Service (Rev. Jan. 2020), *available at* https://www.irs.gov/pub/irs-pdf/i1023.pdf.

[21] "The level of detail on Form 1023 is also helpful in signaling to applicants that they are entering into a complex regulatory environment with a strict set of rules. While most people who establish a new charity are good people and want to do good things, the thoroughness of Form 1023 helps underscore that tax exemption is a privilege that comes with responsibilities." Internal Revenue Service, *Advisory Committee on Tax Exempt and Governmental Entities (ACT): Report of Recommendations*, (Rev. 06-2012) Publication 4344: Catalog Number 38578D, at 87 (June 6, 2012), *available at* https://www.irs.gov/pub/irs-tege/tege_act_rpt11.pdf.

the 1023-EZ.[22] It did so over significant objections of experts on its Advisory Committee on Tax Exempt and Government Entities, its state regulatory partners with the National Association of State Charities Officials ("NASCO"),[23] and practitioners in the charitable community. The IRS made the change for management reasons of reducing a large backlog of applications, not to protect the public. Now anyone claiming they represent an organization that will have total assets of less than $250,000 and anticipated annual gross receipts less than $50,000 can use Form 1023-EZ to apply and easily secure tax-exempt status and start receiving tax-deductible donations and tax exemptions from state and local governments. Short-term efficiency of approval rates won out over long-term effectiveness.

Unfortunately, what everyone foresaw has occurred. Since the IRS stopped performing its full due diligence to block ineligible applicants, the IRS's Taxpayer Advocate's Office has conducted four extensive audits that have proved the experts right. The Office

---

[22] Form 1023-EZ, Streamlined Application for Recognition of Exemption under Section 501(c)(3) of the Internal Revenue Code (June 2014), and Instructions for Form 1023-EZ, *available at* https://www.irs.gov/forms-pubs/about-form-1023-ez.

[23] NASCO did not oppose the use of a short form *per se*, but expressed concern and "strongly recommend[ed]" several improvements. NASCO's President also noted the important deterrent effect of the 1023 Form: "Even if bad actors are inclined to not answer these questions truthfully, the sheer fact that the questions are asked may deter some people from using tax-exempt status for nefarious purposes." National Association of State Charity Officials, Letter to Ms. Sunita Lough, Comm'r, Tax Exempt and Gov't Entities Div., May 23, 2014, *available at* http://www.nasconet.org/wp-content/uploads/2018/03/May-23-letter-to-IRS-re-1023EZ.pdf.

consistently found that virtually every entity that applies using the Form 1023-EZ receives tax-exempt status, regardless of eligibility. The approval of ineligible applicants has been occurring at astonishingly high rates: 37 percent (2015), 26 percent (2016), 42 percent (2017), and 46 percent (2019).[24]

We are not suggesting in any way that every entity wrongly approved is a crook or bad actor. Nor are we suggesting that IRS officials and employees do not care. But we state directly that there has been a concern about charitable nonprofits losing the public's trust if people do not have confidence in the ability of law enforcement to protect the public from fraudsters masquerading as legitimate nonprofits.

C. Consequently, State Regulators Have Had to Do More to Protect the Public

With the IRS stepping back from adequately screening applicants for charitable nonprofit status, the states have had to step forward to do more.

Petitioners complain that California is using Schedule B while most other states are not. See AFP Foundation Br. at 2 ("47 States protect their citizens from charitable fraud without compelling sweeping disclosure of Schedule Bs"); Law Center Br. at 3 ("47 states regulate charities without a blanket-disclosure scheme"). Yet Congress has not pre-empted the states from using Schedule B. Each state can – and long has been – deciding how best to protect their residents, taxpayers, and charitable nonprofits. Two of the most populous states, California and New York, have

---

[24] *See* National Taxpayer Advocate*, Internal Revenue Service, Annual Report to Congress 2019* (2019), *available at* http://www.TaxpayerAdvocate.irs.gov/2019AnnualReport.

decided to use Schedule B, as have Hawai'i and New Jersey.[25]

What Petitioners do not disclose is that California is not alone in fashioning its enforcement as it sees fit. Each state can and does forge its own way in regulating and overseeing the operations of charitable nonprofits. There is no uniform system. The four states using Schedule B are not outliers – they are the norm in that every state seems to go in different directions, some having not only their own mandatory forms but also their own definitions.[26] The result is a non-system – an agglomeration of oft-Byzantine and frustrating jumble of intricate forms and inconsistent processes that vary state to state. There needs to be a more uniform system. But that is a matter for Congress, state legislatures, and state charity officials, not this Court, which should avoid opening this Pandora's Box of having federal courts decide which forms and processes get used and which ones do not.

As Justice Brandeis famously observed:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with

---

[25] *See* Cal. Code Regs. tit. 11, 301; Haw. Rev. Stat. Ann. § 467B-6.5; N. J. Admin. Code § 13:48-4.3(a)(9); and N.Y. Comp. Codes R. & Regs. tit. 13 § 91.5.

[26] *See* Cindy Lott, *et al.*, *Bifurcation of State Regulation of Charities, Divided Regulatory Authority Over Charities and Its Impact on Charitable Solicitation Laws*, Urban Institute (April 3, 2018), *available at* https://www.urban.org/research/publication/bifurcation-state-regulation-charities. *See also* Shirley Adelstein and Elizabeth T. Boris, *Why do some states enforce charity regulations more than others?*, Urban Institute, June 18, 2018; https://www.urban.org/urban-wire/why-do-some-states-enforce-charity-regulations-more-others.

> serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[27]

After complaining that California is using Schedule B at all, Petitioners turn around and complain that, in their view, California is not using the Schedule B "enough." They do so by trying to reduce the value of Schedule B to a numbers game. See AFP Br. at 1 ("California virtually never uses Schedule B for law-enforcement purposes"); Law Center Br. at 3 (the Attorney General's "office never uses donor information to launch a fraud investigation, rarely uses the data at all"). The Attorney General's brief thoroughly dismantles those allegations. See CA AG Br. at 30-35; see also *amicus curiae* brief of the California Association of Nonprofits at 17-24. To that we add: you can only count what you can see, and sometimes what you do not see really counts. Deterrence of fraud cannot be overlooked, discounted, or reduced to numbers. It is a weighty factor for this Court to consider.

---

[27] *New State Ice Company v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J., dissenting).

CONCLUSION

The National Council of Nonprofits urges the Court to practice the Hippocratic Oath: first do no harm. The best way to achieve that would be to issue an order dismissing the writ of *certiorari* as having been improvidently granted, in light of the more complete picture of the broad potential harm to the work of frontline charitable nonprofits and thereby risk to the public. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

TIM DELANEY
Counsel of Record
TIFFANY GOURLEY CARTER
DAVID L. THOMPSON
STEVEN WOOLF
NATIONAL COUNCIL OF NONPROFITS
1001 G Street NW, Suite 700E
Washington, D.C. 20001
(202) 932-0322
tdelaney@councilofnonprofits.org

Counsel for Amicus Curiae

March 31, 2021