Nos. 19-251, 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

MATTHEW RODRIQUEZ,
Acting Attorney General of California,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

MATTHEW RODRIQUEZ,
Acting Attorney General of California,
Respondent.

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

BRIEF FOR STATES OF NEW YORK, COLORADO, CONNECTICUT, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, AND VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF RESPONDENT

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MATTHEW W. GRIECO
Assistant Solicitor General

28 Liberty Street
New York, New York 10005
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

(*Counsel listing continues on signature pages.*)

QUESTION PRESENTED

Whether the First Amendment prohibits a State from requiring charitable organizations to submit to the State's attorney general—on a nonpublic basis and for the purpose of enforcing state charities law—the same schedule identifying the organizations' major donors that the organizations provide annually to the Internal Revenue Service.

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INTEREST OF THE AMICI STATES

Amici States of New York, Colorado, Connecticut, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, and Virginia, and the District of Columbia are regulators of charities and other not-for-profit organizations. Amici States have a direct interest in the question of whether and to what degree state charities regulators may require the reporting of basic information about organizations' operations, including the sources of their funding.

Like California, several of the Amici States require charities to file with state regulators the same Schedule B containing major-donor information that organizations already file with the Internal Revenue Service on a confidential basis. Contrary to the arguments of petitioners and their amici, that information has meaningfully facilitated Amici's supervision of charities by enabling state regulators to check the accuracy of charities' financial reporting, ensure compliance with basic regulatory responsibilities, and identify and remedy fraud and abuse. At the same time, these state reporting requirements impose little to no burden on charities: they have already prepared the Schedule B for federal tax-exemption purposes; and, like the IRS, the States that require this information take steps to keep the information confidential. Amici States have a direct interest in a ruling that the First Amendment permits confidential reporting requirements that meaningfully advance state regulation at little to no cost to the regulated parties.

More broadly, all of the Amici States have an interest in preserving their ability to collect comprehensive information from charities that seek to operate

within their jurisdictions. The major-donor information at issue here is simply one example of the significant financial and other information that state regulators already require charities to report as a matter of course. Petitioners' assertion that these reporting requirements should be subject to strict scrutiny or a least-restrictive-means test would hamper the States' ability to collect relevant information about charitable organizations and undermine the States' charities supervision.

STATEMENT OF THE CASE

1. Charities have long been subject to sovereign oversight, based on a tradition that stretches back far into Anglo-American history. The Statute of Charitable Uses,[1] adopted under Elizabeth I, expressed the English government's "desire to replace the whim of patronage with legally enforceable adherence to principle in philanthropic action." Kevin C. Robbins, *The Nonprofit Sector in Historical Perspective: Traditions of Philanthropy in the West*, in *The Non-Profit Sector: A Research Handbook* 25 (Walter W. Powell & Richard Steinberg, eds., 2d ed. 2006). The Statute both (a) defined the types of causes the Crown recognized as legitimately charitable, including "aid of the poor, care of veterans, nurture of orphans, advancement of learning, and promotion of religion"; and (b) empowered any local government in England to prevent "'any breach of trust, falsity, non-employment, concealment . . . or conversion'" of funds intended for charity. *Id.*; *see also* Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal & State Law and Regulation* 29 (2008) (dual purposes of

[1] Statute of Charitable Uses, 1601, 43 Eliz., c. 4 (Eng.).

Statute were to identify proper charitable purposes and "provide a method for correcting the abuses in the administration of charitable gifts that had been multiplying in the previous period"). As this Court has recognized, the authority of the English sovereign "as the superintendent of 'all charitable uses in the kingdom'" laid the foundation for the power of States to act as parens patriae over charitable organizations. *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251, 257 (1972) (quoting 3 Wm. Blackstone, *Commentaries* *47). At the core of this power is the obligation of the sovereign to act on behalf of those who are incapable of acting for themselves, such as charitable beneficiaries. *See id.*; *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982).

The States' regulatory power over charities "has been greatly expanded in the United States beyond that which existed in England." *Hawaii*, 405 U.S. at 257. State governments have extensively supervised charitable organizations since the country's first decades. "The power to ensure proper application of charitable funds rests with the attorney general in each state, and from the earliest days of the republic there are reported cases in which the attorney general participated." Fremont-Smith, *supra* at 54. In the period immediately following the Founding, those regulations imposed far more stringent limitations on charitable activities than apply today. During the 1780s and 1790s, for example, most States outside New England had laws governing how much citizens could give to charity. *See* Peter Dobkin Hall, *A Historical Overview of Philanthropy, Voluntary Associations, & Nonprofit Organizations*, in Powell & Steinberg (eds.), *The Non-Profit Sector*, *supra* at 35. Others, like Connecticut, did

not limit contributions but instead restricted how much property any given charity could hold. *Id.*

State oversight continued over the following centuries. By the late 1800s, some northeastern States were encouraging charitable activity by offering broad tax exemptions to organizations that identified themselves as charitable, religious, educational, or artistic. *Id.* at 37. Much of the Midwest, South, and West followed suit, but these States' laws often demanded that organizations provide a much more detailed demonstration of charitable purpose to receive tax exemptions. For example, Pennsylvania in the late 1800s required an organization claiming a tax exemption to demonstrate that it was organized for an actual charitable purpose, benefited a substantial but indefinite number of people, and derived no income whatsoever "other than that necessary to make the charity self-sustaining." *Trustees of Acad. of Protestant Episcopal Church v. Taylor*, 150 Pa. 565, 575-76 (1892); *see also* Hall, *supra* at 37. Today, States retain their longstanding discretion to supervise charitable organizations, typically through the offices of state attorneys general, "with differences occurring across states." Evelyn Brody, *The Legal Framework for Nonprofit Organizations*, in Powell & Steinberg (eds.), *The Non-Profit Sector*, *supra* at 244.

2. Modern laws requiring charities to register and file annual reports were adopted in aid of the States' traditional supervisory role, "based on the fact that an attorney general could not carry out his common law duties as supervisor of charitable funds without knowledge of the charities subject to his jurisdiction and the nature and extent of their financial dealings." Fremont-Smith, *supra* at 54. Today, the overwhelming

majority of States require every charitable organization that solicits donations within their borders to provide information to a state agency: forty-two States and the District of Columbia require the filing of an initial registration before soliciting, and forty-three States require the filing of annual reports.[2] The mere fact of solicitation (or incorporation) in a State is typically enough to trigger these reporting requirements, without any need for the state regulator to establish a suspicion of wrongdoing. And failure to provide the required information has serious consequences: for example, many States' statutes authorize the state attorney general or another official to prohibit solicitation of contributions by organizations that fail to register or file an annual report. *See, e.g.*, Ala. Code § 13A-9-71(r).

These mandatory filings commonly include reporting of a wide array of financial or other information, including potentially sensitive information. Florida, for example, requires every charity to inform the Department of Agriculture and Consumer Services of "the purpose for which it is organized, the name under which it intends to solicit contributions, and the purpose or purposes for which the contributions to be solicited will be used." Fla. Stat. § 496.405(2)(b). Each charity must also identify "[t]he name of the individuals or officers who are in charge of any solicitation activities," *id.* § 496.405(2)(c), and annually

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[2] Nat'l Ass'n of State Charities Officials (NASCO), *State Charity Registration Provisions* (rev. May 15, 2020) (internet) (summarizing laws of all fifty States and the District of Columbia). In forty-one States, these requirements apply to charities generally; Arizona and Texas more narrowly register organizations that solicit for specific types of causes, such as veterans issues, law enforcement, or public safety. *Id.*

update "[t]he names and street addresses of the officers, directors, trustees, and principal salaried executive personnel," *id.* § 496.406(2)(g)(2). Every year, each charity must also provide either a full financial report or certain federal tax returns. *Id.* §§ 496.405(2)(a), 496.407(2)(a). And an organization must maintain full records of all activities covered by the law for at least three years, and such "records must be made available, without subpoena, to the department for inspection." *Id.* § 496.418(2).

Many States' laws contain similar reporting requirements.[3] Among the information that charities must routinely report to state regulators include "[t]he gross amount of contributions received," "[t]he amount of contributions disbursed or to be disbursed to each charitable organization or charitable purpose represented," and "[t]he amount spent for overhead, expenses, commissions and similar purposes." Tenn. Stat. § 48-101-504(c); *see also* Kan. Stat. § 17-1763(b) (similar). It is common for these laws to require extensive reporting about sources of revenue. For example, Kansas requires an annual financial statement "clearly setting forth" the organization's "[g]ross receipts and gross income from all sources, broken down into total receipts and income from each separate solicitation project or source." Kan. Stat. § 17-1763(b)(15). Some States require a charity to maintain information for examination by regulators upon request. For example, Georgia requires a charitable organization to maintain records of "the name and address of each contributor" who gives more than twenty-five dollars, along with "the date and amount of the contribution," and to make all such records avail-

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[3] *See* NASCO, *supra* n.2 (detailing statutes).

able for "reasonable periodic, special, or other examinations by representatives of the Secretary of State." Ga. Code Ann. § 43-17-5(d)-(e). States also have a practice of reciprocity in screening charities; many States require an organization to declare whether any other State has ever revoked the organization's authority to solicit or canceled the organization's registration. *See, e.g.*, Ohio Code § 1716.02(B)(7); Kan. Stat. § 17-1763(b)(13).

3. In contrast to the longstanding role of the States, the federal government played little role in charities regulation until the twentieth century and the adoption of a federal income tax. Hall, *supra* at 53; *see also* Fremont-Smith, *supra* at 53-54 ("Regulation of charities was the exclusive province of the states until enactment of federal tax laws in the early years of the twentieth century.") In particular, the adoption of § 501(c) in the 1954 Internal Revenue Code created, for the first time in federal law, "an elaborate classificatory scheme that afforded different kinds of tax privileges and degrees of regulatory oversight to the various types of [nonprofit] entities," including charities. Hall, *supra* at 53. But because the federal role was limited to the carrot-and-stick of the tax power, the States remained "better suited to correcting the behavior of charitable fiduciaries" than the IRS given the States' broader oversight role and remedial authority. Fremont-Smith, *supra* at 54.

Every organization that claims exemption from federal income tax under § 501(c) must file a Form 990 with the IRS each year; that form reports substantial financial and operational information about the organization, including the organization's revenue, expenses, and assets. *See* 26 U.S.C. §§ 501, 6033; *see also* Internal Revenue Serv., Form 990 Instructions. Along with Form

990, the organization must also submit a number of mandatory schedules, including Schedule B if the organization receives contributions totaling $5,000 or more from any one contributor during a tax year. Internal Revenue Serv., Schedule B to Form 990, Schedule of Contributors. Schedule B reports to the IRS the names and addresses of each contributor who gave the greater of $5,000 or two percent of the contributions received during the year, along with the type and amount of contributions received from that contributor during the tax year. *Id.*

IRS guidance expressly anticipates that States may require tax-exempt organizations to submit their Form 990s and associated schedules, including Schedule B, for the State's own regulatory purposes, and accordingly cautions organizations to make such regulatory filings with care to avoid inadvertent public disclosures of Schedule B information. The IRS's General Instructions for Schedule B thus advise that if a state government requires filing of Form 990, an organization should not automatically "include its Schedule B . . . in the attachments for the state, *unless a schedule of contributors is specifically required by the state*." *Id.* (emphasis added).

Consistent with the IRS's expectation, twenty States require organizations to file their Form 990s with the State's charities regulator, without specifically requiring a schedule of contributors. *See, e.g.*, W. Va. Stat. § 29-19-5. In some of those States, any organization that did not file a Form 990 with the IRS must instead provide substantially the same information that would be on a Form 990, using the State's own forms. *See, e.g.*, Ga. Code Ann. § 43-17-5(b)(4). In addition to the twenty States that require Form 990 when avail-

able, there are five other States that allow organizations to choose to provide either Form 990 or a comparable financial statement with similar information.[4]

4. At issue in this case is California's requirement that every charity operating within the State provide its Schedule B along with its Form 990 as part of the total package of financial and other information that must be reported to the State. Several other States have the same or a similar reporting requirement.

New York requires charities that receive more than $25,000 annually from New York residents and entities to register and file an annual report with the Attorney General that includes "a copy of the complete IRS form 990, 990-EZ or 990-PF with schedules"—including Schedule B. 13 N.Y.C.R.R. § 91.5(c)(3). Unless an organization is exempt from reporting in New York, it must provide Form 990 and all schedules "regardless of whether such IRS forms are submitted or required to be submitted to the IRS." *Id.* § 91.5(c)(3)(i)(a). Although other charities filings are made available to the public, New York treats all documents that are confidential under federal law—including Schedule B—as automatically confidential under New York law. *See id.* § 96.2.[5]

New York accordingly maintains a rigorous multistep procedure to prevent public disclosures of Schedule Bs. Organizations that file online are instructed to upload Schedule B separately from their public filings. Every filing received by the Attorney General on a paper

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[4] *See generally* NASCO, *supra* n 2.

[5] Although the New York State Legislature enacted a statute in 2016 that would have required public disclosure of § 501(c)(3) and (c)(4) donor information in certain circumstances, that statute was judicially invalidated and never took effect. *See Citizens Union of N.Y. v. Attorney Gen. of N.Y.*, 408 F. Supp. 3d 478 (S.D.N.Y. 2019).

form is reviewed page-by-page by a human before it is uploaded to the publicly available database, to ensure that the organization did not mistakenly include Schedule B with the public documents. Charities Bureau staff place a distinct barcode on a Schedule B to distinguish it from the rest of Form 990 before it is scanned. Then, before any filing is moved to the public database, software uses Optical Character Recognition to scan the filing to double check that no Schedule B was overlooked during the earlier stages of human screening. Finally, software regularly scans the entire database to ensure that there are no Schedule Bs publicly available. These confidentiality protections have proven successful: when the Second Circuit rejected a challenge to New York's Schedule B filing requirement, that court found no evidence that a filer's Schedule B had been disseminated "beyond the officials in the Attorney General's office charged with enforcing New York's charity regulations." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018).[6]

New Jersey has a similar Schedule B filing requirement. All charitable organizations that operate in New Jersey must file annual financial reports that include a copy of the organization's most recent IRS Form 990, and "[a]ll schedules and statements shall be included." N.J. Admin. Code §§ 13:48-4.3(a)(8), 13:48-5.1(b)(5). If the organization's most recent IRS filings "did not include a completed schedule B," then the

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[6] In one instance, a charity's contributor information was made available to the public in New York because an organization included contributor information in a *non–Schedule B* document that the organization included in its annual filing. When the organization's erroneous inclusion of that information was called to the Attorney General's attention, that information was removed immediately from the public database.

organization must provide "a schedule of every contributor who, during the organization's previous tax year, gave the charitable organization, directly or indirectly, money, securities, or any other type of property totaling $5,000 or more." *Id.* §§ 13:48-4.3(a)(9), 13:48-5.3(b)(5). New Jersey uses Schedule B to screen for suspicious activity, to determine whether an organization is soliciting donors within the State (and thus must annually register), and for other investigations. *See* First Am. Compl. ¶49, *Bullock v. IRS*, No. 4:18-cv-103 (D. Mont. 2019), 2019 WL 1550986.

Hawai'i also requires some organizations to file Schedule Bs. Charitable organizations filing certain Form 990s with the IRS are required to file annual reports, and if the organization files Form 990, 990-EZ, or 990-PF with the IRS, then "the annual report shall be a copy of that Form 990, 990-EZ, or 990-PF." Haw. Rev. Stat. § 467B-6.5. Under § 467B-6.5, Hawai'i requires registered charities that file a Schedule B with the IRS to file the Schedule B with the Hawai'i Attorney General as well.

Other States do not require charities to report their Schedule Bs as a matter of course but use other means to obtain information about significant donors. For example, several States require any professional solicitors working for a charitable organization to maintain records of the date and amount of each contribution they receive and the name and address of each contributor, and to make that information available for inspection "upon demand" by state charities regulators. *See, e.g.,* 1 Miss. Admin. Code pt. 15, R. 3.03(A).

SUMMARY OF ARGUMENT

Petitioners assert that the First Amendment prohibits California from requiring charities to file with the State the same Schedule B that they already provide to the IRS because this reporting requirement imposes significant burdens without any corresponding regulatory benefit. Petitioners' arguments fundamentally misunderstand the nature of state charities regulation and exaggerate the burdens that charitable organizations face from mandatory requiring requirements like the one at issue here.

I. Mandatory and nonpublic reporting of major-donor information helps States ensure compliance with regulatory requirements and identify fraud and other abuses. For example, many States look to the amount or sources of donations to determine a charity's obligations under state law; Schedule B's donor information can reveal whether a charity is correctly complying with those obligations. Schedule Bs also can help state regulators determine whether fraud or other abuses are being conducted *by* donors or perpetrated *against* donors—for example, by flagging suspicious donations from related parties.

Contrary to petitioners' arguments, subpoenas or demand letters are no substitute for uniform reporting requirements like California's. Uniform reporting has been a key feature of state charities regulation since the Founding Era—drawing from an Anglo-American tradition that goes back centuries—and is now commonplace as a means of closely supervising other industries as well. As the States' experience demonstrates, mandatory reporting requirements give state regulators comprehensive information about an entire industry, induce compliance among regulated entities

that know that their operations can and will be scrutinized, and reduce the costs and delays of any investigation or enforcement actions that may prove necessary. After-the-fact subpoenas, issued only after a state regulator has suspicion of wrongdoing from other sources, provide none of these advantages.

II. Petitioners' arguments for strict scrutiny or a least-restrictive-means test all rest on the incorrect assumption that Schedule B reporting requirements will inevitably result in public disclosures in a way that will inhibit donations or otherwise interfere with charities' activities. But like the IRS, the States that require Schedule B filings have established strict confidentiality protections, and there is no basis to assume that States cannot or will not adhere to those protections. Absent any cognizable risk of public disclosure, petitioners have failed to identify any other burden that would warrant applying strict scrutiny or a least-restrictive-means test to mandatory reporting requirements on charities.

ARGUMENT

I. Mandatory, Nonpublic Reporting of Major Donations Provides Valuable Information to State Charities Regulators.

State charities regulation has long relied on across-the-board reporting of financial and other information by all charities seeking to operate within a State. The California requirement at issue here extends this commonplace regulatory regime to the Schedule Bs that charities already file with the IRS. Petitioners and their amici assert that state charities regulators have no need for Schedule B's major-donor information and

no justification for requiring all charities to report this information, but they are wrong on both counts.

This Court has long recognized that States have a strong and legitimate interest in promoting transparency in the charities sector, ensuring compliance with state charities rules, and preventing fraud. *See Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 619-624 (2003). And Congress has specifically recognized that state officials have a legitimate interest in § 501(c) organizations' federal tax "returns and return information" for purposes of "the administration of State laws regulating the solicitation or administration of charitable funds or charitable assets of such organizations." 26 U.S.C. § 6104(c)(3).[7]

Mandatory reporting of the major-donor information contained in Schedule B advances the same state interests previously recognized by both this Court and Congress, as the courts of appeals that have considered this question have concluded. *See Americans for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1009 (2018) (see AFP Pet. App. 1a-40a), *reh'g en banc denied*, 919 F.3d 1177 (9th Cir. 2019) (see AFP Pet. App. 74a-112a); *Citizens United*, 882 F.3d at 382-83 (upholding New York's nonpublic Schedule B disclosure requirement). Such information, in combination with the significant financial information that all charities already report, gives state charities regulators a comprehensive picture of the organizations that solicit donations in their

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[7] Section 6104(c)(3)'s explicit recognition of "State laws regulating the solicitation or administration of charitable funds or charitable assets of such organizations" rebuts petitioners' unfounded assertion (AFP Br. 6-7 & n.2) that the Internal Revenue Code limits a State's interest in federal tax information to the IRS's own determinations of federal tax exemption.

States, and allows these States to serve the public interest by ensuring that such organizations are financially stable and free from misconduct.

A. Major-Donor Information Supports Effective State Charities Regulation.

1. Donor information allows States to verify the accuracy of an organization's financial reporting and to ensure compliance with state regulatory requirements.

Like California, many States (see *supra* at 8-9) require charities to file their federal Form 990s with the State and rely on the information contained in that form to decide whether and how to regulate such charities. The major-donor information contained in Schedule B provides more extensive data in service of the same purpose. Petitioners wrongly assume that the sole use of this reported information is to identify and prevent fraud or other wrongdoing. Although that interest is certainly an important one (see *infra* at 17-20), a more common use of Schedule B is to verify the accuracy of organizations' financial reports and to ensure that organizations are properly complying with their basic regulatory responsibilities.

For example, New York requires annual reports only from charities that receive at least $25,000 in in-state donations during a given year. In the past six months alone, at least six different organizations have incorrectly asserted on their New York filings that they do not meet this donation threshold. New York's routine review of the organizations' Schedule Bs revealed otherwise and enabled the State to ask each organization to correct its regulatory filings and submit

the annual reports that are critical to ensuring that the State has comprehensive and up-to-date information about the charities that it supervises.[8]

New York law also requires an organization to publicly disclose any federal, state, or local government funding that it receives, so that the public is aware of which private organizations seek and receive taxpayer money. *See* 13 N.Y.C.R.R. §§ 91.7(b)(2)(ii), 91.5(c)(2)(ii). Mandatory reporting of Schedule Bs has enabled New York to verify whether an organization has received governmental funding that would trigger this further disclosure requirement. For example, in another case from the last six months, an organization incorrectly claimed on its registration filing that it did not receive any government grants, but the organization's Schedule B revealed that it had in fact received grants from New York City's Department of Transportation and Department of Small Business Services.

As these examples show, the major-donor information contained in Schedule B is part of the day-to-day compliance review that state charities regulators conduct, and can inform regulators' determination of whether and to what extent an organization must comply with various other regulatory responsibilities that may turn on the amounts or sources of its funding.

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[8] Other States have similar laws tying reporting requirements to in-state donations. In light of charities' increasing reliance on solicitation via the internet, some States have begun to adopt laws that treat an organization as soliciting within the State if certain thresholds are met. For example, Mississippi law treats any organization as soliciting in Mississippi—and thus as required to register in Mississippi—if the organization either receives at least $25,000 in donations from Mississippi residents or receives contributions from at least twenty-five different Mississippi residents. 1 Miss. Admin. Code pt. 15, R. 2.08(A)(3).

Major-donor information is not unique in this respect: state regulators routinely make similar determinations based on the broad range of other information that charities are mandated to report as a matter of course, including information about their revenues, expenditures, and executive compensation. Taken as a whole, this information works together to provide a comprehensive picture of a charity's operations and enable the States to effectively supervise these organizations.

2. Donor information also allows States to investigate and respond to misconduct by charitable organizations.

New York also uses Schedule B to screen for serious fraud and misconduct by charities, including "potential violations of our statutory related-party and conflict of interest requirements," and "donations that may conceal money-laundering or other illegal transactions." N.Y. State Att'y Gen., Proposed Public Hearing Testimony on Proposed Rulemaking: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations (REG-102508-16) (Jan. 17, 2020) (internet). Schedule B allows state charities officials to identify various types of illegal conduct—some of which involve fraud *by* donors, and others of which involve fraud *upon* donors.

Schemes that have been exposed through examination of Schedule B include: (1) pass-through schemes in which a charitable organization's assets are diverted to personal use; (2) self-dealing in which money is passed through a charity to friends or family; (3) diversion of assets to profitable enterprises not related to the charitable organization's purpose; (4) sham charities in which purported donors are actually customers paying

for services that are misleadingly labeled contributions; and (5) gift-in-kind scams, in which organizations intentionally overstate the value of noncash donations they have received (a tactic that allows an organization to mask high fundraising and overhead costs by causing those expenses to appear to be a lower percentage of all expenses). *See* NASCO, Comment Letter on Proposed Rulemaking: Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations (REG-102508-16) (Dec. 5, 2019) (internet).

For example, a Schedule B filed in New York by a charity with nationwide operations, the National Children's Leukemia Foundation (NCLF), was the trigger for a significant enforcement action. An accountant in the New York Attorney General's Charities Bureau noticed several unusual claims of gift-in-kind donations in NCLF's Schedule B, including a claim that an NCLF board member had donated a helicopter to the organization. Further investigation revealed that the helicopter donation was a fabrication. And an investigation into a family foundation that was listed as a large donor on NCLF's Schedule B further revealed that NCLF had submitted a grant application with many misrepresentations to the foundation. These initial, troubling discoveries led the New York Attorney General to uncover even more wrongdoing that ultimately resulted in a petition to dissolve NCLF based on its use of false and misleading practices to solicit more than $13 million from Americans across the country between 2009 and 2013, while directing less than six percent of that revenue to programs and less than one percent to care for children with leukemia, the organization's stated purpose. *See* Verified Pet., *People ex rel. Schneiderman v. National Children's Leukemia Found., Inc.*, No. 508930/2015 (N.Y. Sup. Ct. Kings County July

20, 2015), 2015 WL 4550147. In response to the Attorney General's petition, NCLF agreed to dissolve, and the Attorney General delivered NCLF's remaining $380,000 in assets to legitimate children's leukemia charities. *See* N.Y. State Att'y General, Press Release, A.G. Schneiderman Announces $1 Million Settlement with Officials of So-Called Children's Leukemia Foundation and Their Auditor (Dec. 17, 2015) (internet).

In some cases, major-donor information in a Schedule B allows the New York Attorney General to determine whether a putative charity is genuinely distinct from a major donor—an important question for purposes of preventing self-dealing and the improper diversion of charitable assets. In one recent case, a private foundation's Schedule B listed as the organization's sole contributor a private equity firm with an address that was the same as the organization itself. Further investigation by the New York Attorney General's Charities Bureau revealed that the foundation was in fact operating within the equity firm's office and thus did not have a genuinely separate existence. In another case, a director of a for-profit corporation under investigation by the New York Attorney General gave his shares of the company's stock to a not-for-profit organization that was created by the director himself. The Attorney General sought to assess whether that organization had any other major donors, and thus to assist in determining whether the organization had a bona fide existence apart from the director who had created it.

Schedule B review also helps screen for instances in which the same identified goods are reported as contributions by multiple organizations, with each organization in the chain recording the goods as both a

contribution received and a contribution given. For example, after Hurricane Sandy caused widespread devastation in the New York City area in 2012, the Charities Bureau identified instances in which truck-loads of donated books and shoes were passed from one organization to another up and down the East Coast, raising concerns about both efficiency and abuse. In some cases, there was no operational need for multiple organizations to take possession of the goods; instead, the transfers were done so that multiple organizations could inflate their reported revenue and expenditures. *See* N.Y. State Att'y Gen., *Charitable Response to Hurricane Sandy* (Oct. 2014) (internet).

Another common scheme in recent years has been the syndicated conservation easement, in which a not-for-profit organization assists private individuals or entities in fraudulently obtaining tax benefits. *See* S. Comm. on Fin., 116th Cong., *Syndicated Conservation-Easement Transactions* (Comm. Print 2020). In such a scheme, an individual or for-profit taxpaying entity obtains an inflated appraisal of the development value of a particular piece of real property, and then creates a conservation easement that runs with the land, ostensibly preserving the land as undeveloped forever. *Id.* at 16. The owner then donates the land to a not-for-profit organization and claims a tax deduction for granting the easement. *Id.* Because this scheme depends on the participation of not-for-profit organizations, Schedule B can allow regulators to identify repeat players.

B. The Commonplace Practice of Requiring Across-the-Board Reporting Serves Important State Interests That Cannot Be Satisfied by After-the-Fact Subpoenas or Audits.

In addition to questioning the usefulness of major-donor information, petitioners and their amici also challenge California's requirement that all charities report such information, and contend that a State could just as easily obtain the same information after the fact through a subpoena or audit when the State has reason to suspect wrongdoing by a particular organization. AFP Br. 31, 34-39; Law Center Br. 38; Arizona Amicus Br. 5-6. This argument ignores the distinct benefits of uniform reporting requirements, which are commonplace in closely regulated areas, and would hamper the States' ability to effectively supervise charities and other industries.

The long history of state regulation of charities dating back to the Founding (see *supra* at 2-5) demonstrates that States have always required charitable organizations to report extensive financial and other information to regulators as a matter of course before being authorized to solicit or do business in the State. That type of close state supervision has long been understood to be essential due to the unique regulatory challenges posed by charities. Unlike with other types of organizations (such as corporations with shareholders), there is no natural private overseer of charitable operations. The beneficiaries of a charity change over time, can be diffuse, and often lack the means to police the charity's activities; and donors are typically not involved in a charity's operations and lack the incentive or authority to monitor the charity's use of their contributions. At the same time, charities are

responsible for receiving and disbursing enormous sums of money, making their operations an attractive target for unscrupulous individuals. Given these circumstances, there is no substitute for close state oversight of charities, in exercise of the State's long-standing role to represent those who are unable to look after their own interests. *See Hawaii*, 405 U.S. at 257. That oversight has invariably required state regulators to have ready access to comprehensive information about the charities that they supervise. *See* Fremont-Smith, *supra* at 54. Accordingly, the vast majority of States—including many of the States supporting petitioners—continue to require *every* charity to report its finances, organizational purpose, and other information. See *supra* at 4-7.

This Court has previously recognized this precise point, noting that States have long exercised "'genera[l] superintend[ence]'" over charities in addition to after-the-fact enforcement "'to redress grievances, and frauds.'" *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 526-27 (2009) (alteration in original) (quoting *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 676 (1819)). And this model of regulation has become a familiar one beyond the charities context as well. In many other closely regulated areas, a sovereign's authority has been understood to include not only post hoc law enforcement, but also a degree of direct oversight, including "routine disclosure of economically significant information" to regulators on a nonpublic basis. *Pharmaceutical Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). Such uniform and mandatory reporting requirements are "indistinguishable from other underlying and oft unnoticed forms of disclosure

the Government requires" where a government agency is the "only audience." *Full Value Advisors, LLC v. SEC*, 633 F.3d 1101, 1108-09 (D.C. Cir 2011). "There are literally thousands of similar regulations on the books," including "(most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer." *Pharmaceutical Care Mgmt. Ass'n*, 429 F.3d at 316; *see also Full Value Advisors*, 633 F.3d at 1108-09 (upholding provisions of Securities and Exchange Act requiring all institutional investors to report the securities they hold to the SEC).

Given the lengthy history of this type of direct supervision in the charities context, and its widespread nature in other closely regulated fields, petitioners fundamentally misconceive the State's regulatory role when they presume (see AFP Br. 35; Law Center Br. 38) that suspicion of wrongdoing is a prerequisite for the State to inquire into a charity's finances. Charities regulation is not at its heart a fault-based regime, but instead a supervisory system that relies on broad-based, uniform reporting by regulated entities to give state regulators the information they need to responsibly keep an eye on the operations of these important organizations. Such reporting is also consistent with the principal objective of state charities regulators, which is not to prosecute wrongdoers in the first instance, but rather to help charities avoid wrongdoing, do better work, and preserve their fiscal integrity. "State officials are not necessarily trying to put an organization out of business or make others doubt its effectiveness; they'd almost always rather help improve it and let it continue on with its mission if there is a low-key way to have that happen." *The Shifting Boundaries of Nonprofit Regulation and Enforcement:*

A Conversation with Cindy M. Lott, Nonprofit Quarterly 12, 14 (Summer 2016) (internet). As a result, "the most frequent enforcement mechanisms by far are letters and phone calls to nonprofits from state regulators or enforcers when they think that something may be wrong." *Id.*

Regular and routine reporting of charities' financial information helps to further this model of supervision. And such oversight has the broader benefit of bolstering the public's confidence that charities are in fact serving their stated missions and complying with all applicable regulations—confidence that in turn encourages more donations as donors feel secure that their contributions are being well spent. For example, the New York Attorney General receives hundreds of inquiries every month from private donors, government agencies, and other funding sources seeking confirmation that the organizations to which they wish to contribute are meeting all compliance obligations. By using the confidential Schedule B to verify the accuracy of the public information that organizations provide, the Attorney General can reassure prospective donors about the fiscal integrity and operational soundness of charitable organizations.

By contrast, relegating state charities regulation to audits or subpoenas would significantly hamper state oversight of the charities industry. For one thing, States would lose the ability to address both innocent mistakes and acts of malfeasance that are currently uncovered through day-to-day screening of charities' routine reporting—such as an organization's failure to comply with the other filing requirements upon which petitioners urge that the States should rely. See *supra* at 15-17. A uniform reporting requirement also gives States immediate access to relevant information and

thus facilitates the efficiency of any investigation or regulatory response; by contrast, audits or subpoenas typically involve greater delay and much greater expense. *See AFP*, 903 F.3d at 1010 (citing *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015)). Finally, in those cases where an organization actually *is* engaged in outright fraud, the issuance of a subpoena or audit notice necessarily alerts the organization to the State's concerns and raises the attendant risk that the target will destroy documents or otherwise engage in obstruction—a particularly serious problem in an area where many investigations focus on the possibility of self-dealing and illegal pass-through schemes.

Uniform regulatory reporting requirements also have the added benefit of being neutral and generally applicable—and thus less rather than more likely to be used by the government to target disfavored groups. Petitioners suggest (AFP Br. 22; Law Center Br. 3) that *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), shows that disclosure requirements can be used to target disfavored groups, but that case bears no resemblance to this one. In that case, the Alabama Attorney General sought to compel membership information from the NAACP alone; in resisting that targeted effort, the NAACP expressly disclaimed any "absolute immunity" from generally applicable state laws, *id.* at 463-64. By contrast, the law at issue here is a law of general applicability, applied in a neutral fashion to all charities. The Ninth Circuit so found, *see AFP*, 903 F.3d at 1006, and the Second Circuit reached the same conclusion in rejecting a similar challenge to New York's Schedule B filing requirement: "these objective and definite disclosure requirements are being applied" in "a uniformly content-neutral fashion"

to all charities, *Citizens United*, 882 F.3d at 388. The sector-wide and generally applicable nature of this reporting requirement demonstrates that it bears no resemblance to the targeted disclosure at issue in *NAACP*.

C. Petitioners' Attempts to Undermine the States' Regulatory Interests Are Meritless.

Petitioners' remaining arguments against the States' legitimate interests in either mandatory reporting generally, or major-donor information specifically, misconceive the nature and purpose of charities regulation.

For example, petitioners make much of the purportedly small number of enforcement actions in which California has used Schedule B information relative to the overall volume of such information that charities must report. (*E.g.*, AFP Br. 43.) But the number of reported enforcement actions is a wholly inadequate measure of the value of mandatory reporting, which serves important non-enforcement objectives as well. For one thing, uniform reporting requirements deter wrongdoing by regulated entities in the first place, thus reducing the need for enforcement actions, because the knowledge that their information is available to regulators for inspection tends to induce compliance with the law. Indeed, one core purpose of a supervisory regime is to encourage compliance and discourage noncompliance by a mechanism other than formal enforcement actions. In addition to this deterrent effect, uniform reporting requirements often do result in regulators receiving information that suggests malfeasance, and leads regulators to make inquiries

and pursue corrective action without the need for enforcement actions. See *supra* at 15-17, 23-24.

Thus, looking to enforcement actions alone fails to capture the full benefit of mandatory reporting regimes. If a low proportion of enforcement proceedings rendered such supervisory regimes constitutionally suspect, then the IRS's own collection of taxpayer information—including its requirement that every § 501(c) organization submit a Form 990 and Schedule B—would itself be called into question given the extremely low rate of IRS audits.[9] But petitioners do not go that far, and for good reason: mandatory reporting regimes are commonplace and indispensable in closely regulated areas (see *supra* at 22-24), and the universality of the obligations they impose on regulated entities provides meaningful benefits that would be lost by relying solely on after-the-fact enforcement.

Petitioners and their amici further suggest that because only a few States require charities to report their Schedule Bs, the interest of those States cannot be compelling. (AFP Br. 35; Law Center Br. 13; Arizona Amicus Br. 5.) That argument is mistaken as well. Policy choices, resource constraints, and the number and size of charities located in each State unsurprisingly lead different States to make different judgments about whether and to what extent they will regulate charities. The First Amendment does not compel uniformity in this regard. To the contrary, an attempt to enforce uniformity "runs contrary to [this Court's] established practice of permitting the States, within the broad bounds of the Constitution to experiment with solutions

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[9] *See* Internal Revenue Serv., *Internal Revenue Service Data Book, 2019*, at 32, 54 (internet).

to difficult questions of policy." *Smith v. Robbins*, 528 U.S. 259, 272 (2000).

Especially relevant here, there are massive differences in the scale of charitable operations in different States, leading to very different levels of charities enforcement. In 2015, there were 32,753 charities based in New York, with a combined $217 billion in revenue, and 51,113 charities in California with $189 billion in revenue. *See* Nat'l Ctr. for Charitable Statistics, *Active and Reporting Public Charities by State* (Aug. 27, 2018) (internet). The other States whose charities reported more than $100 billion in total revenue were Massachusetts, Oregon, and Pennsylvania. *Id.* By contrast, Arizona had only 6,131 charities with $29 billion in revenue, and many States have even lower numbers. *Id.* Commensurate with these differences in scale, States have dedicated different levels of resources to charities supervision. For example, New York alone employs seventy-two people whose jobs are dedicated to charities regulation, constituting twenty percent of all state-level charities personnel nationwide, whereas nearly a third of States have one or fewer full-time-equivalent employees dedicated to charities enforcement, and only nine States employ ten or more. *See* Cindy M. Lott et al., *State Regulation and Enforcement in the Charitable Sector* v, 8 (Urban Inst. 2016) (internet) (national study finding that there are 355 lawyers and nonlawyer support staff in state government nationwide). It takes staff to process information, and a State that is leanly staffed may not be able to take advantage of the additional information provided by Schedule B. In light of these differences, it is entirely reasonable that the States that are homes to the most charities in the country, and that have chosen to dedicate their resources to charities supervision, have

required that such organizations report more information than other States do.

II. Petitioners' Arguments for Strict Scrutiny or a Least-Restrictive-Means Test Ignore the Distinct Nature of Nonpublic Regulatory Filings.

Petitioners and their amici urge this Court to apply either strict scrutiny or a least-restrictive-means test to California's Schedule B filing requirement. But their arguments ignore the critical fact that California's reporting requirement does not directly interfere with associational rights, and requires only the nonpublic reporting of Schedule Bs in a manner that will be kept confidential. Any burden imposed on charities by California's requirement is thus no different from that imposed by the IRS, which also requires a confidential filing for regulatory purposes alone. Such regulatory reporting requirements, where a government agency is the "only audience," *Full Value Advisors*, 633 F.3d at 1108, do not merit the application of strict scrutiny or a least-restrictive-means test. And even the "exacting scrutiny" standard should heavily weigh the nonpublic nature of the filing requirement here and its dedication solely to regulatory purposes.

1. Petitioners' arguments about the "chilling effect" of California's Schedule B requirement assume that their Schedule Bs will "inevitably" be made publicly available by California (despite the IRS's uncontested ability to keep them confidential). (*E.g.*, AFP Br. 42.) For example, AFP raises "the specter of harmful publicity" and contends that prospective donors will fear "potential intimidation, retaliation, and harassment" by members of the public. (AFP Br. 2.) The Law Center likewise faults California for triggering "the devastating

consequences of public disclosure" with its Schedule B filing requirement. (Law Center Br. 23.)

Consistent with that assumption, petitioners' cases all involve situations where public disclosure was either explicitly or implicitly contemplated by the challenged state action. In *Bates v. City of Little Rock*, the Court confronted municipal ordinances that "expressly provide[d] that all information furnished shall be public and subject to the inspection of any interested party at all reasonable business hours." 361 U.S. 516, 518 (1960). In *NAACP*, the Court was considering a demand that one locally disfavored organization's membership records be produced in the midst of a court proceeding, leading to the "revelation of the identity of its rank-and-file members" and resulting "public hostility." 357 U.S. at 462. This Court's campaign-finance cases all involved "*public* disclosure of campaign-related donors," as petitioner AFP acknowledges (AFP Br. 28.) And in *Riley v. National Federation of the Blind of North Carolina, Inc.*, the law at issue involved compelled speech to members of the public who were potential donors. *See* 487 U.S. 781, 795 (1988).

That concern about public disclosure is not presented here. As petitioners acknowledge, the IRS is able to require organizations to file their Schedule Bs with little risk of public disclosure. The States that require charities to file the same form likewise can and do effectively prohibit Schedule B information from being disclosed to the public. *See* 26 U.S.C. § 6104(d)(1)(A)(i), (3)(A); Cal. Code Regs. tit. 11, § 310(b); 13 N.Y.C.R.R. § 96.2; N.J. Stat. Ann. 45:17A-31(a). Those protections have successfully maintained the confidentiality of Schedule Bs in New York and New Jersey (see *supra* at 10). And California, under a rule adopted in 2016, has a clearly stated confidentiality

requirement and "excludes [Schedule Bs] from public inspection on the registry website." *AFP*, 919 F.3d at 1188 (Fisher, J., statement respecting the denial of rehearing en banc).

2. Petitioners assert that these confidentiality protections should be ignored as a matter of law because public disclosure is somehow unavoidable. Neither the record of this case nor common sense supports this assertion. In this case, petitioners failed to prove at trial that California's current "cybersecurity protocols are deficient or substandard as compared to either the industry or the IRS, which maintains the same confidential information." *AFP*, 903 F.3d at 1019. Although petitioners pointed to inadvertent disclosures by California during an era when that State had only an "informal policy of treating Schedule B as a confidential document," petitioners have not shown any evidence of Schedule B disclosures in California since that State codified stricter confidentiality protections. *See id.* at 1005; *see also* Cal. Code Regs. tit. 11, § 310(b). And although petitioners argue (AFP Br. 46; Law Center Br. 12) that federal law's criminal penalties for disclosure of tax-return information provide greater protection, they have identified no public disclosures outside of California from New York or the other States that protect the confidentiality of Schedule B information through non-criminal means. What petitioners are left with is the "sheer possibility" that States may disregard their own confidentiality laws, *Citizens United*, 882 F.3d at 384. But that prospect is too speculative to support petitioners' attempt to recharacterize California's nonpublic filing requirement as a public disclosure regime given the presumption that States act in good faith and in compliance with their legal

obligations. *See Alden v. Maine*, 527 U.S. 706, 755 (1999).

Petitioners also suggest that, even without public disclosure, they could face persecution by state charities regulators themselves. (*E.g.*, AFP Br. 44.) That concern is even more speculative. There is no record of such persecution here. The Second Circuit explicitly rejected the argument that New York's "objective and definite disclosure requirements are being applied in anything but a uniformly content-neutral fashion." *Citizens United*, 882 F.3d at 388. And petitioners' refusal to credit the good faith of state regulators is particularly unjustifiable when they raise no similar doubts about the IRS's use of Schedule B for its own regulatory purposes. Any suggestion that the Commissioner of Internal Revenue may be trusted but that the same trust should not be placed in state charities regulators disrespects the States' status as co-sovereigns.

3. Apart from their unsupported speculations about potential public disclosure or government persecution, petitioners have identified no cognizable burden or interference with associational rights. In particular, petitioners have not asserted that they face any administrative burdens from compiling and submitting this information to the State. Nor could they, given that California (like New York and New Jersey) allows charities to satisfy their state reporting obligations by submitting the same forms that they have already prepared and submitted to the IRS—a parallel filing requirement that is intended to minimize the burdens on charities. *See, e.g.,* N.Y. Executive Law § 172(10) (calling for "maximum use of information required in federal reporting forms").

The absence of any significant burden on petitioners is fatal to their argument that either strict scrutiny or a least-restrictive-means test should apply. This Court has applied strict scrutiny to laws that *directly* impose burdens by compelling or forbidding particular forms of speech or expressive association. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 659 (2000). By contrast, a more deferential standard applies to state regulations, such as disclosure requirements, that have at most an indirect effect on speech or association. *See Doe v. Reed*, 561 U.S. 186, 196 (2010).

The court below applied "exacting scrutiny" as the appropriate standard given the absence of any direct burden on petitioners. *See AFP*, 919 F.3d at 1189 (Fisher, J., statement respecting the denial of petition for rehearing en banc). Under that standard, there must be "a substantial relation between the disclosure requirement and a sufficiently important governmental interest," and "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196 (quotation marks omitted). This Court established the exacting scrutiny test in *NAACP* when the "actual burden" there, *id.*, consisted of legitimate fears of "economic reprisal, loss of employment, [or] threat of physical coercion" from public revelation of the NAACP's members, 357 U.S. at 462. Here, the absence of public disclosure means that no similar burden is presented, and thus this Court's scrutiny of California's reporting requirement should be even more deferential. Indeed, courts have suggested that regulatory filing requirements made to the government alone should be reviewed under "a test akin to the general rational basis test governing all government regulations under the Due Process Clause." *Pharmaceutical Care Mgmt.*

Ass'n, 429 F.3d at 316. At minimum, this Court's application of the exacting scrutiny standard here should heavily weigh the minimal burdens associated with this regulatory reporting requirement.

Finally, petitioners are wrong to say that this Court's precedents upholding disclosure laws in the campaign-finance context should be seen as sui generis, and that a different, stricter form of scrutiny should apply here. (AFP Br. 27-30; Law Center Br. 29-32.) That argument is mistaken on two fronts. One, as the United States correctly explains, this Court's observation in the campaign-finance cases that "disclosure requirements affect associational rights only indirectly" (U.S. Br. 23) applies here as well; and that effect is even less pronounced here given the nonpublic nature of the reporting of donor information to charities regulators. Two, the mere fact that States have different reasons for collecting donor information from charities does not make their interests categorically less important than in the electoral context. As explained (see *supra* at 2-3), charities regulation is among the oldest of state powers—transferred directly from the British crown to each State at the time of the Founding—and has long been a core exercise of the States' sovereignty. The States' weighty interest in information that would facilitate such regulation thus merits respect as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MATTHEW W. GRIECO
Assistant Solicitor General
barbara.underwood@ag.ny.gov

**Counsel of Record*

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PHIL WEISER
Attorney General
State of Colorado
136 State Capitol Bldg.
Denver, CO 80203

MAURA HEALEY
Attorney General
Commonwealth of Massachusetts
One Ashburton Pl.
Boston, MA 02108

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Ave.
Hartford, CT 06106

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

CLARE E. CONNORS
Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

AARON FORD
Attorney General
State of Nevada
100 North Carson St.
Carson City, NV 89701

KWAME RAOUL
Attorney General
State of Illinois
100 W. Randolph St.
Chicago, IL 60601

GURBIR S. GREWAL
Attorney General
State of New Jersey
25 Market St.
Trenton, NJ 08625

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

HECTOR BALDERAS
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

BRIAN E. FROSH
Attorney General
State of Maryland
200 St. Paul Pl., 20th Fl.
Baltimore, MD 21202

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

JOSH SHAPIRO
Attorney General
Commonwealth of Pennsylvania
Strawberry Sq., 16th Fl.
Harrisburg, PA 17120

MARK R. HERRING
Attorney General
Commonwealth of Virginia
202 North 9th St.
Richmond, VA 23219

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main St.
Providence, RI 02903

KARL A. RACINE
Attorney General
District of Columbia
Suite 630 South
441 4th St., NW
Washington, DC 20001