Nos. 19-251 & 19-255

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION, *Petitioner,*
v.
MATTHEW RODRIQUEZ, *Respondent.*

THOMAS MORE LAW CENTER, *Petitioner,*
v.
MATTHEW RODRIQUEZ, *Respondent.*

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

BRIEF OF CAMPAIGN LEGAL CENTER, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, COMMON CAUSE, AND LEAGUE OF WOMEN VOTERS OF CALIFORNIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

This brief is filed on behalf of four nonprofit, nonpartisan organizations that work in the areas of campaign finance, ethics, and election law to ensure government is accountable, accessible, and transparent.[2]

All *amici* organizations have registered with California's Registry of Charitable Trusts and are subject to the reporting requirement at issue here. Campaign Legal Center also participated as *amicus curiae* in the Ninth Circuit (No. 16-55727).

SUMMARY OF ARGUMENT

This constitutional challenge to California's nonpublic "Schedule B" reporting requirement, Cal. Code Regs. tit. 11, § 301, is a solution in search of a problem. Petitioners Americans for Prosperity Foundation and the Thomas More Law Center seek sweeping changes to this Court's disclosure jurisprudence to address only a "highly speculative" First Amendment injury that their own experience refutes. *Buckley v. Valeo*, 424 U.S. 1, 70 (1976) (per curiam).

Neither petitioner has demonstrated that California's nonpublic reporting requirement imposes an "actual burden" on expressive or associational rights, *Doe v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008)), either facially or as applied. Yet their entire legal argument—and their

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[1] This brief is filed with the written consent of all parties. This brief was not authored in whole or in part by counsel for any party. No person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] A description of *amici curiae* is attached as Appendix A.

demand for the most stringent degree of constitutional scrutiny—rest on the presumption that donor-disclosure laws "*always* [represent] a severe burden on First Amendment rights," Law Center Br. 51 (emphasis added), regardless of what they require.

In this submission, *amici curiae* examine petitioners' presumption of injury in light of the factual record, weighing the First Amendment "burdens" at stake here against those in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), *Doe*, 561 U.S. at 200, and other cases upon which petitioners rely. This review confirms that petitioners' asserted "injury" is almost entirely contingent on the supposition of gross state error and malfeasance, not on any direct First Amendment harm arising from the nonpublic reporting requirement itself. Petitioners offer nothing to warrant review under strict scrutiny or an equivalent standard, much less to justify the broad facial ruling they seek.

Petitioners advance two theories of First Amendment injury, both based on facts unique to their own circumstances. Neither theory succeeds. Nor can either be generalized to show any broader harm to the more than 100,000 charities operating in California, as would be necessary for facial relief. *See* Resp. Br. 28, 36-41; U.S. *Amicus* Br. 30-31.

First, petitioners contend that reporting under the law will "chill" their large contributors by exposing them to a "reasonable probability" of "threats, harassment, or reprisals" from the general public. *Buckley*, 424 U.S. at 74. But because the disclosure requirement at issue here is, on its face, *non*public, crediting this theory requires assuming that (1) the public will

gain access to petitioners' confidential Schedule Bs *and* (2) will use that information to harass or threaten their donors to a degree that violates protected associational interests. The record does not support either premise.

Second, even if Schedule Bs are kept confidential, as the law requires, petitioners suggest that California will use the nonpublic donor information contained on Schedule B to harass or selectively target petitioners and their large contributors. This claim was entirely undeveloped in the courts below; petitioners offered only unsubstantiated hearsay that appearing on Schedule B would expose donors to unwanted governmental attention—not from California, but from the IRS, whose reporting requirements petitioners do not challenge.

Notwithstanding the tenuous nature of petitioners' claimed First Amendment injury, they urge the application of "strict scrutiny" here—or at least a stringent "narrow tailoring" analysis[3] at odds with this Court's more accommodating review of disclosure laws for a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Doe*, 561 U.S. at 196 (citing *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010)).

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[3] The Law Center calls for strict scrutiny directly, Br. 17, 28; the Foundation acknowledges that "exacting scrutiny" applies, but demands a form of narrow tailoring analogous to the least-restrictive-means test applied in strict scrutiny. Foundation Br. 38 (arguing that review turned on whether more "narrowly tailored options are available") (citation omitted); *see also id.* at 34-39.

At no point do petitioners explain why a charity's *non*public disclosure of its major contributors to state regulators is so much more burdensome than the public disclosure of the referendum petition signatories in *Doe* that "substantial relation" review would not suffice. Whether petitioners call for strict scrutiny or a standard indistinguishable from it, accepting their demand would require this Court to implicitly overrule almost fifty years of precedent clearly subjecting disclosure laws to a less rigorous test. "Before overruling precedent, the Court usually requires that a party *ask* for overruling." *Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 n.5 (2020) (emphasis added).

In any event, there is no need to take such a radical course. Any First Amendment burdens imposed by nonpublic reporting are exceedingly minimal, and could be more effectively addressed by narrower forms of relief, such as an injunction directing California to comply with its existing confidentiality regulation.

Certainly, any attenuated prospect of "chill" specific to *petitioners* and their donors cannot be imputed to "all charities," Law Center Br. 43, or "nearly every application," Foundation Br. 2, 31. The record is bereft of evidence that would support this sweeping allegation of facial overbreadth. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008); Resp. Br. 28, 36-41.

ARGUMENT

I. PETITIONERS' THEORY OF ASSOCIATIONAL INJURY IS BASED ON EXTRAPOLATION AND CONJECTURE, NOT ANY ACTUAL BURDEN ON FIRST AMENDMENT RIGHTS.

A. The challenged reporting requirement is not a public disclosure law.

Petitioners' theory of associational injury rests on a faulty premise: presumed public disclosure. But the donor information reported to federal and California regulators on Schedule B—unlike the rest of Form 990—is *not* public. *See* 26 U.S.C. § 6104(d)(1)(A)(i), (3)(A); Cal. Gov't Code § 12590; Cal. Code Regs. tit. 11, §§ 301, 310. No causal nexus links the supposed associational harms that would attend public disclosure of petitioners' Schedule Bs and the validity of California's nonpublic reporting requirement.

At the outset of this litigation, California maintained the confidentiality of Schedule B merely as a matter of informal policy. *See* Pet.App.66a-68a. Petitioners initially feared that Schedule B was subject to disclosure under California public records laws, or at least that the Attorney General's informal non-disclosure policy left too much discretion in the hands of state regulators. *Id.* at 61a-62a; 66a-68a. Although there was no indication that the Registry had ever received a public records request for Schedule B information, much less fulfilled one contrary to its policy, California has since adopted a formal regulation that allays any doubts about its commitment to treat Schedule Bs as confidential. Cal. Code Regs. tit. 11, § 310(b) (effective July 8, 2016).

While petitioners highlight evidence of inadvertent confidentiality lapses in the past, the Registry has since adopted numerous new protocols to address those issues—a fact petitioners alternately ignore or treat as irrelevant. These past lapses were of two varieties: (1) a technical vulnerability in the Registry database, "a singularity" attributed to a third-party security vendor that the State swiftly remedied, Pet.App.36, and (2) inadvertent human error in the processing and classification of paper filings, identified and catalogued by petitioners' expert only with "extra computing power" and "hundreds of hours" of dogged effort. *See* Resp. Br. 48-49; Pet.App.34a-39a. There was no evidence that these failures were willful or targeted at particular viewpoints, and petitioners do not contend otherwise. Nor was there evidence that any members of the general public actually accessed another group's Schedule B as a result of either lapse.

While the lapses attributed to human error by Registry staff were of potentially greater concern below, the state has taken numerous steps to prevent their recurrence. Pet.App.36a-38a; Resp. Br. 9-11. Petitioners offered no evidence that California's improved "cybersecurity protocols are deficient or substandard as compared to either the industry or the IRS, which maintains the same confidential information." Pet.App.37a.[4]

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[4] To reach either the facial or as-applied "injury" arising from the theoretical public disclosure of Schedule B, the Court would necessarily have to assume certain facts about the adequacy of California's security protocols. But these are questions that the record cannot answer, given its exclusive focus on past breaches; as California notes (Br. at 48), however, major corporations like Delta Airlines and Citibank have experienced similar issues.

The district court, however, based its conclusion about the *future* risk of inadvertent disclosure entirely on these *past* lapses, refusing to consider whether intervening changes to the Attorney General's regulations and technical protocols had obviated that risk going forward. *Id.* That finding was clearly erroneous.

If past cybersecurity vulnerabilities or inadvertent data leaks are enough to make any confidential information in the government's possession effectively "public," irrespective of whether the vulnerabilities have been rectified or laws strengthened, it would call into question whether the government can ever collect sensitive information for valid regulatory ends without running afoul of constitutional rights. *Cf. NASA v. Nelson*, 562 U.S. 134, 155 (2011) (noting Court's longstanding recognition that "government 'accumulation' of 'personal information' for 'public purposes' may pose a threat to privacy" but "a 'statutory or regulatory duty to avoid unwarranted disclosures' generally allays these privacy concerns") (citing *Whalen v. Roe*, 429 U.S. 589, 605 (1977); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 458-59 (1977)). As the Second Circuit opined in rejecting a similar challenge, "if the sheer possibility that a government agent will fail to live up to her duties were enough for us to assume those duties are not binding, hardly any government action would withstand our positively philosophical skepticism." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018).

Petitioners' untested assumption that a facially nonpublic reporting requirement is tantamount to a

public disclosure law *notwithstanding* the State's enhanced confidentiality protocols only underscores the tenuous nature of their asserted injuries—which rest on the future occurrence of a "highly attenuated chain of possibilities," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), beginning with the prospect that California will disclose what its own laws require it to keep confidential.

B. Even if the possibility of public disclosure is credited, the information subject to Schedule B reporting is minimal and any First Amendment harm remains "highly speculative."

Even if this Court accepts the remote possibility that petitioners' Schedule Bs would be made public through state error, petitioners still have failed to show a plausible risk of cognizable First Amendment harm. The prospect that petitioners or their major contributors would face any constitutionally significant associational "chill" based on a reasonable probability of "threats, harassment, or reprisals" remains "highly speculative." *Buckley*, 424 U.S. at 70, 74.

For one thing, the Schedule B reporting required here is not comparable to the sweeping disclosure demands in cases like *NAACP* or *Shelton v. Tucker*, 364 U.S. 479 (1960). Those cases involved state efforts to compel indiscriminate disclosure of a group's rank-and-file membership or of an individual's every group affiliation over five years, and there was strong indication of invidious or discriminatory intent. In *NAACP*, for instance, the group challenged only the state's blanket request for its full membership list, and did "not object[] to divulging the identity of its

members who are employed by or hold official positions" in the organization. 357 U.S. at 464.

Petitioners here, by contrast, need only report a fraction of their contributors. From 2010 to 2014, the Foundation's Schedule Bs contained as few as four and a maximum of ten major contributors, out of thousands of donors and more than 2.5 million supporters; moreover, many of petitioners' Schedule B donors are already public. *See* Pet.App.8a-9a, 99a; ER1148, 1233-48, 1508-11; Law Center ER690-692. The minimum amount the Foundation received from a contributor subject to Schedule B reporting over that period was $272,000, and at least half of the contributors reported on its Schedule Bs over those years gave $1 million or more.[5] The Law Center's Schedule Bs over that period were only required to include between two and seven donors. Resp. Br. 12.

Although petitioners draw extensively from this Court's landmark associational rights decisions, they say notably little about the scope of information subject to Schedule B reporting. Perhaps this is why the circuit judges who dissented from the denial of en banc rehearing were under the mistaken impression that California required petitioners to "disclose most of their donors." Pet.App.78a. In actuality, Schedule B donors do not comprise anything close to "most of"

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[5] *See also* ER1233-35 (Foundation's 2010 redacted Schedule B showing seven contributors in amounts ranging from $345,000 to $7,547,911); ER1238-39 (2011: eight contributors, ranging from $500,000 to $9,000,000); ER1241 (2012: four contributors, ranging from $841,000 to $9,000,000); ER1248 (2013: seven contributors, ranging from $272,800 to $3,321,000); ER1174-75 (2014: ten contributors, ranging from $450,000 to $6,660,000).

petitioners' donors; the Foundation's Schedule Bs listed under 1% of its overall donors in four of five years, and approximately 2% in the fifth. *See* ER1148.

And given petitioners' repeated invocation of concepts like individual privacy and "personal liberty," Foundation Br. 22 (citing *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)), one might wonder how many *individual*, non-entity contributors actually appear on their Schedule Bs. "'Personal' in the phrase 'personal privacy' . . . . suggests a type of privacy evocative of human concerns—not the sort usually associated with an entity like, say, AT&T." *FCC v. AT&T Inc.*, 562 U.S. 397, 406 (2011). But the Foundation's Schedule Bs from 2010 to 2013 would have identified, *at most*, two to four non-entity contributors—or may not have included any. *See* ER1148, 1508-11. Meanwhile, many of petitioners' institutional contributors are private foundations, which are already public as a matter of federal tax law. 26 U.S.C. § 6104(d)(1), (3)(A).

C. There is no evidence of significant donor attrition or "chill."

Rather than analyzing the "actual burdens" posed by the nonpublic reporting of a minuscule fraction of their donors, petitioners largely resort to conclusory statements about the "devastating" consequences of public disclosure. *E.g.*, Law Center Br. 23. If anything, the record proves the opposite. Many of petitioners' past Schedule B donors *are* publicly known. Pet.App.29a. The Foundation did not present any ev-

idence that its publicly disclosed institutional contributors, which include donor-advised funds[6] and well-established private foundations, were "harassed" in connection with their considerable gifts. ER1508-11; Pet.App.107a.

Moreover, on several past occasions, the media and others have obtained and published materials purporting to reveal the Foundation's large donors or prospective donors. *See id.*; ER1132-34 (showing unredacted Schedule B purportedly filed by the Foundation in 2003 and reporting eight donors—one individual, three private foundations, and four for-profit corporations). The Foundation provided no evidence that these perceived large contributors experienced any "harassment" despite the information's widespread circulation online. ER1848-51.

In short, petitioners' theory is that the public disclosure of a dozen or so large donors, half of which are entities whose gifts are already public, will "deter contributions" from all donors—including the thousands who will never appear on a Schedule B—"to the point where [petitioners'] movement cannot survive." *Buckley*, 424 U.S. at 71. This conception of "injury" crosses from conjecture to sheer fantasy.

The record does not show that Schedule B reporting has had or will have any appreciable negative effects on either group's fundraising. Petitioners' claims of donor "chill" were based entirely on hearsay about the subjective fears of unnamed donors, but they

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[6] The Foundation receives a considerable proportion of its revenue from donor-advised funds, which allow individuals to direct charitable contributions without appearing on Schedule B. *See* ER1508-09, J.A.262-63.

could not show that Schedule B disclosure would cause even one major donor to stop contributing. *See* Pet.App.25a-30a, 106a; Resp. Br. 49-51.

Instead, the record demonstrates that petitioners' major donors are quite resilient in their support, even in the face of what they perceive to be public animus. For example, the Law Center offered testimony from Thomas Monaghan, its co-founder and longtime major donor, who "was told that [he] might be subject to some attacks" in connection with one of the Law Center's cases, but could not recall a single adverse consequence thereafter beyond appearing atop a list of people who are "antigay." Law Center J.A.441-44. He acknowledged that the episode had no effect on his financial support for the Law Center or willingness to associate with the group publicly. Pet.App.27a, 33a.

This resilience makes sense: petitioners relied on evidence of ostensible donor "harassment" directed at prominent public figures associated with numerous other groups and causes, any one of which could have prompted public opposition. *See* Pet.App.31a (Foundation witness was former statewide officeholder and well-known partisan figure); Law Center Br. 6 (Oklahoma State Representative client was "'inundated with vulgar emails' for speaking publicly about groups promoting same-sex lifestyles"). These figures are no strangers to controversy, and "have voluntarily exposed themselves to increased risk." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (First Amendment demands lessened protections for public figures to ensure robust public discussion). Over this period of alleged controversy, meanwhile, each petitioner's donor base and membership has remained robust or grown significantly; the Foundation's membership,

for instance, quadrupled between 2009 and 2016. ER1150-51, 1887. *See also* Law Center ER727.

Finally, insofar as petitioners point to occasions where citizens have lawfully expressed disagreement with public positions that the Foundation or Law Center—or their supporters and affiliates—have taken, it would be antithetical to this Court's First Amendment jurisprudence to insulate petitioners from lawful criticism or peaceful protest spurred by their own speech. "[A] principal 'function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Texas v. Johnson*, 491 U.S. 397, 408-409 (1989) (citation omitted). "[O]ur Constitution says we must take this risk." *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508-09 (1969). In the words of Justice Scalia: "There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance." *Doe*, 561 U.S. at 228 (Scalia, J., concurring).

D. Requiring charities to confidentially report their major donors to state tax authorities does not categorically impose "severe burdens on free association."

Amici do not contest that the confidential reporting of a group's donor information could give rise to a cognizable associational injury, even absent any possibility of public disclosure. If petitioners, for instance, had evidence of governmental harassment or viewpoint-based or otherwise targeted state regula-

tion, this would raise clear First Amendment concerns. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 99-100 (1982) (noting government harassment and "massive" program of FBI surveillance). No serious allegations or findings to that effect are present here. *See* Pet.App.64a; Resp. Br 51-52.

The record does contain hearsay about the subjective concerns of unnamed donors that their disclosure on a Schedule B will expose them to official "targeting" or retaliatory audits—but by *federal* tax and labor regulators, not by California. J.A.211, 251-52, 266-67, 270-71 (recounting conversations with unnamed donors about "government intrusiveness they felt" from the IRS, "OSHA, the labor department in various states, [or] environmental agencies," and stressing concerns "about the federal government, especially with the IRS, recent leaks or scandals that happened there"). There is no creditable evidence that these fears had any basis in reality. Many of the Foundation's large donors own or operate large business enterprises; some do business with the government directly. J.A.267. That a business owner generous enough to appear on the Foundation's Schedule B was once the subject of an IRS audit is not evidence of official persecution—nor, certainly, evidence that *California* will abuse its regulatory authority.

Instead, petitioners and their *amici* recount an array of potential harms that they claim will be remedied by enjoining California's nonpublic collection of Schedule Bs, from concerns about "online campaigns," partisan polarization, and "cancel culture," Foundation Br. 2-3, Law Center Br. 24, 41, to threats posed

by Chinese cyberespionage or abuse of the federal terrorist watchlist, *see* China Aid Foundation *Amicus* Br. 14-19; Council on American-Islamic Relations *Amicus* Br. 7-15. Some of these phenomena may be cause for concern. But there is nothing on the face of *this* law—or the record in *this* case—to suggest that enjoining the confidential collection of Schedule Bs by California will do anything whatsoever to ameliorate these perceived societal ills.

Petitioners' theory of injury ultimately boils down to the proposition that the nonpublic reporting of large donors to a governmental authority is *per se* a "severe burden on free association," Law Center Br. 51, warranting review under strict scrutiny or its equivalent. This proposition cannot be squared with precedent. *See infra* Part II. Indeed, insofar as petitioners have already voluntarily relinquished their donor identities in exchange for tax benefits, it is unclear why this theory of "injury" significantly implicates the First Amendment at all. *See Regan v. Taxation with Representation*, 461 U.S. 540, 548-49 (1983). *See also infra* at 31-33.

II. ANY FIRST AMENDMENT BURDENS HERE ARE MINIMAL, SO STRICT SCRUTINY REVIEW—OR ITS EQUIVALENT—IS NOT WARRANTED.

A. Disclosure laws are subject to exacting scrutiny and "substantial relation" review.

Petitioners and respondent largely agree that some form of "exacting scrutiny" applies to the review of California's Schedule B reporting requirement. They diverge on whether exacting scrutiny here effectively requires "strict scrutiny," Law Center Br. 26-

29, a tailoring analysis comparable to a "least restrictive means" test, Foundation Br. 20-27, or the more flexible "substantial relation" test articulated in *Buckley* and *Doe*, Resp. Br. 18-19. *See also supra* note 3.

This Court, however, has already resolved the issue. In reviewing a law authorizing the public disclosure of signed ballot petitions, it explicitly held that the "exacting scrutiny" applicable to disclosure requirements is less stringent than strict scrutiny, *Doe*, 561 U.S. at 196, 199 n.2, and "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest," *id.* at 196 (quoting *Citizens United*, 558 U.S. at 366-67); *see also Davis*, 554 U.S. at 744 ("To survive [exacting] scrutiny . . . the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."). Petitioners offer no reason to depart from this clear directive.

Petitioners attempt to avoid these holdings by arguing that the "substantial relation" standard is reserved for disclosure laws in the electoral context. They instead point to a varied assortment of First Amendment association cases ranging from door-to-door canvassing restrictions, *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), to the mandated inclusion of women in a civic group, *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). *See* Foundation Br. 21, 25; Law Center Br. 23.

These cases, however, are clearly off point. Many do not concern donor or membership disclosure requirements, but rather direct restrictions on protected association or speech. It is true that where a

law directly and substantially interferes with the exercise of protected associational rights—*e.g.*, by compelling an association to accept unwanted members, *Roberts*, 468 U.S. at 623, requiring teachers on pain of termination to make sweeping disclosure of all organizational ties, *Shelton*, 364 U.S. at 481-82, or conditioning the retention of public employment on the employee's support of a political party, *Elrod v. Burns*, 427 U.S. 347, 351 (1976)—the Court has suggested that the law must be narrowly tailored to serve a compelling governmental interest. *See* Law Center Br. 28; Foundation Br. 27. But California's Schedule B reporting law, which requires only the nonpublic reporting of a handful of petitioners' largest donors, is simply not comparable.

Even with respect to cases that *did* address some demand for membership or donor information, none applied the "strict scrutiny" that petitioners urge—or, as petitioners concede, even mentioned this term. *See* Law Center Br. 27 (admitting the Court had "not yet used the phrase 'strict scrutiny'" in cited case law); Foundation Br. 23.

Instead, as this Court has made clear, these nonelectoral disclosure cases in fact applied exacting scrutiny's "substantial relation" test. *Buckley* expressly held that "*[s]ince NAACP v. Alabama*"—the case upon which petitioners chiefly rely—"we have required that the subordinating interests of the State must survive exacting scrutiny." 424 U.S. at 64 (emphasis added). *Buckley* then clarified that this standard entailed examination of whether "there [is] a 'relevant correlation' or 'substantial relation' between the governmental interest and the information re-

quired to be disclosed." *Id.* To further support the application of the substantial relation standard, the Court cited the exact same cases that petitioners incorrectly argue dictate the application of strict scrutiny. *See id.* at 65 nn.73-75 (citing *NAACP*, 357 U.S. at 463; *Gibson v. Fla. Legis. Investigative Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. 415, 438 (1963); *Bates*, 361 U.S. at 524).

B. Petitioners ignore that the standard of review is calibrated to the severity of the First Amendment injury.

More fundamentally, petitioners' argument fails because they ignore the central tenet governing this Court's review of First Amendment cases: the level of scrutiny is dictated by the severity of the burden a challenged law imposes on First Amendment rights. *See, e.g.*, *Wash. State Grange*, 552 U.S. at 451-52 (noting that "severe burden[s] on associational rights are subject to strict scrutiny" whereas "a statute [that] imposes only modest burdens" requires less stringent review); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206 (1999) (Thomas, J., concurring in the judgment) (same); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661-62 (1994) ("must-carry provisions do not pose such inherent dangers to free expression . . . as to justify application of the most exacting level of First Amendment scrutiny"; an "intermediate level of scrutiny" sufficed).

This principle finds one of its clearest articulations in *Buckley*, where the Court analyzed each of the challenged campaign finance measures in turn, assessing the degree to which each burdened speech or expressive association and calibrating the level of scrutiny

to the severity of that burden. Expenditure limits were deemed the most burdensome because they bar individuals from "any significant use of the most effective modes of communication," 424 U.S. at 19-20; consequently, they were subjected to strict scrutiny. *Id.* at 44-45. Contribution limits represented a lesser burden because they "permit[] the symbolic expression of support evidenced by a contribution," *McConnell v. FEC*, 540 U.S. 93, 135 (2003), and therefore warranted "less rigorous" review, *id.* at 137.

On the opposite end of the spectrum from expenditure ceilings were disclosure requirements, which had at most only an "indirect" effect on association. *Buckley*, 424 U.S. at 65. Disclosure "impose[s] no ceiling on campaign-related activities," *id.* at 64, and "do[es] not prevent anyone from speaking." *Doe*, 561 U.S. at 196 (quoting *Citizens United*, 558 U.S. at 366). Logic thus dictated that disclosure requirements should receive less stringent "exacting scrutiny" review. *Buckley*, 424 U.S. at 64. It would confound reason to apply strict scrutiny both to expenditure limits, the most restrictive campaign finance regulation, and disclosure requirements, the "least restrictive" regulation, as petitioners urge here.

To be sure, *Buckley* acknowledged that "public disclosure of contributions" may "deter some individuals who otherwise might contribute." 424 U.S. at 68. But the Court accounted for this potential injury not by ratcheting up the standard of review or striking down the law on its face, but by creating an as-applied remedy for situations where this concern is acute: *i.e.*, a case-specific exemption from disclosure for a group that can show "a reasonable probability" that its donors would face "threats, harassment, or reprisals" if

their names were disclosed. *Id.* at 74. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting) (emphasizing that *NAACP* and its progeny "did not acknowledge any general right to anonymity," only "a right to an *exemption* from otherwise valid disclosure requirements").

Here, because the possibility of a public release of petitioners' Schedule B is so remote, the "burdens" petitioners allege are not even tantamount to the potential "chilling effect" arising from the *public* disclosure of donors discussed in *Buckley*. *See supra* at 5-8, 13-15. There is no reason to question or heighten the "substantial relation" standard that *Buckley* established for the review of the facial validity of a disclosure law.

Petitioners also lack any grounds for the narrower relief of *Buckley*'s as-applied exemption. *See supra* at 5-15. Unless the harassment feared is coming at the hands of government actors directly, the obvious prerequisite for *Buckley*'s as-applied remedy is a law that on its face requires *public* disclosure. Petitioners' theory of injury requires them to establish a likelihood not only that public disclosure of their Schedule Bs will cause colorable First Amendment harm, but also that the Attorney General will disclose their Schedule Bs in the first place, in clear violation of his own regulation. "[T]his requires [the Court] to assume even more than that [it] refused to do in *Buckley*. There the disclosures were to be made in accordance with the statutory scheme. [Petitioners'] disclosures could only be made if the statutory scheme were violated." *Whalen*, 429 U.S. at 601 n.27.

And petitioners seek a constitutional remedy that was created at least in part to protect groups facing both "ingrained" public hostility *and* governmental persecution. *See Brown*, 459 U.S. at 100-01; *FEC v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416, 419-20 (2d Cir. 1982) (highlighting a long "history of governmental surveillance and harassment" and an "extensive body of state and federal legislation subjecting Communist Party members to civil disability and criminal liability"). But here there is no record of *any* governmental attention to petitioners prior to this litigation, much less actual adverse action. *See supra* at 13-15.

Nor do petitioners succeed in more broadly analogizing their case to pre-*Buckley* precedents that provided as-applied relief from disclosure to groups based on the unique threats such disclosure would pose to their members or donors. *See, e.g.*, *NAACP*, 357 U.S. at 466; *Bates*, 361 U.S. at 523-24.

For example, in *NAACP v. Alabama*, the subpoena for membership information was judged against the NAACP's "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. The NAACP's briefing described how its members faced both "open opposition by state officials" and "violent hostility" from the general public. Br. for Pet'r, *NAACP v. Alabama*, 357 U.S. 449 (1958), 1957 WL 55387, at *12-*17 ("Negroes have been refused official protection from threats of physical violence, [but] where Negroes have protested against deprivation of their rights, state officials have been quick to

curb this 'lawless' activity . . . . Alabama officials have committed themselves to a course of persecution and intimidation of all who seek to implement desegregation."). The brief also cited news articles recounting, in part, a "[y]ear-long series of bombings and shootings"; "19 major acts of violence" in Montgomery—"9 bombings and 10 shootings"; "Ku Klux Klan activity, demonstrations, and cross burnings" in communities across Alabama; and bombings of four churches and multiple private residences. *Id.* at *16 n.12.

Petitioners, of course, offer no comparable evidence here. While the bar for as-applied relief may not be set as high as the persecution faced by the NAACP seventy years ago, it certainly requires more than a speculative chain of causation premised on the untenable propositions that California will either violate its own confidentiality regulation and thereby expose petitioners' major donors to public harassment, or will itself target and harass petitioners though unlawful governmental action.

C. That electoral disclosure is distinguishable does not bolster petitioners' case for strict scrutiny.

Petitioners contend that the electoral disclosure cases—and the "substantial relation" test they employ—do not govern cases about non-electoral disclosure because the government's "important interest in preventing electoral corruption" is irrelevant to a non-public reporting law like California's. Law Center Br. 29.

Amici do not dispute that the compelling governmental interests justifying electoral disclosure laws

differ substantially from the interests California asserts here. But the strength of the state's interest does not determine the appropriate standard of scrutiny; it only bears on whether the law being challenged survives review under the applicable standard. *See, e.g.*, *NAACP*, 357 U.S. at 463 (describing assessment of the state's interest as the "final question" in the Court's inquiry); *Bates*, 361 U.S. at 524 (same).

Petitioners stress that "[t]ransparency in the electoral process" has been found to "buttress trust and faith in public institutions, which is essential for our democracy." Foundation Br. 29. They enumerate, for instance, that the campaign finance disclosure laws upheld in *Buckley* advanced at least three "critical" interests: (1) "deterring electoral corruption and the appearance of corruption," (2) providing information to "aid[] voters' evaluation of candidates for office," and (3) "detecting violations" of the law. Law Center Br. 29.

Amici agree that this Court has repeatedly stressed these unique interests in upholding public disclosure requirements. Indeed, the Court has recognized that the informational interest is "alone . . . sufficient to justify" such laws. *Citizens United*, 558 U.S. at 369. The strength of this informational interest has been found to justify a wide range of disclosure laws, both electoral and non-electoral—including laws shining a light on the financing of lobbying, *see United States v. Harriss*, 347 U.S. 612, 625 (1954); advocacy for and against ballot referenda, *see First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 n.32 (1978); and broadcast advertisements addressing "political matter[s] of national importance," *McConnell*, 540 U.S. at 240-43.

It may be that the interests supporting electoral disclosure are weightier than the enforcement interests asserted by California here; indeed, lower courts have regularly deemed them "compelling." *See, e.g.*, *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1004-05 (9th Cir. 2010) (collecting cases); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 11 (D.C. Cir. 2009). That California's asserted interests here differ from the anti-corruption and informational interests recognized in *Buckley*, however, is no basis for a different or more rigorous standard of scrutiny. *Cf.* Resp. Br. 29 (analogizing enforcement interests).

D. The "substantial relation" standard does not require a least-restrictive-means test.

Insofar as petitioners advocate only a "closer" tailoring standard than that applied by the court of appeals, Foundation Br. 24-27, and not *de facto* strict scrutiny, their quarrel is not with the "substantial relation" standard. *But see supra* note 3. This standard is a balancing test, analyzing whether "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196 (quoting *Davis*, 554 U.S. at 744).

Petitioners complain that any "sliding scale" approach should be rejected, Law Center Br. 51, but this is precisely how the "substantial relation" standard has been explained by this Court and applied by the lower courts. *See infra* note 7.

Indeed, if petitioners are urging only some form of close tailoring, it is unclear how "the standard they advocate is distinguishable from the ordinary 'substantial relation' standard." Pet.App.16a. Petitioners'

problem is not the standard of review but the insubstantiality of their injury. It was only because the First Amendment burdens imposed by nonpublic reporting were so contingent and implausible that the lower court treated California's burden to demonstrate its "sufficiently important" interest as correspondingly light. *See id.* at 103a.

If, however, petitioners could demonstrate that this law imposes relatively "serious" First Amendment burdens, the substantial relation test would require a proportionately stronger demonstration of the State's interest. There is no need to contort governing case law or invent new standards of review to compel a close analysis of the "fit" between California's reporting requirement and the state's asserted interests.

Petitioners also, in an attempt to distinguish *Buckley*, make a contradictory claim—that substantial relation review entails a least-restrictive-means test. This claim is based on the theory that *Buckley* "conducted a 'least restrictive means' analysis in the course of applying" exacting scrutiny to the disclosure law challenged there. Foundation Br. 28. *Buckley* correctly noted that, compared to the other campaign finance measures under consideration, disclosure "in most applications appear[ed] to be the least restrictive means of curbing the evils of campaign ignorance." 424 U.S. at 68. But the Court in no way suggested this was a requisite element of substantial relation review, and the contrary interpretation makes no sense: immediately before this observation, the Court had declined to apply strict scrutiny to disclosure, the only standard that entails a least-restrictive-means test. *See id.* at 64-65.

If *Buckley* had really undertaken a least-restrictive-means analysis as part of substantial relation review, there would have been no need for further inquiry into the tailoring of the challenged disclosure provisions—according to petitioners, the Court had already "fashioned a per se rule" that electoral disclosure laws were the least restrictive means. Foundation Br. 28. Instead, the Court proceeded to craft a "narrow construction" of the statutory term "expenditure" to cure overbreadth concerns, *see* 424 U.S. at 78-80, and to assess whether "the monetary thresholds in the record-keeping and reporting provisions [had] a *substantial nexus* with the claimed governmental interests," *id*. at 82 (emphasis added). These are quintessential tailoring analyses. Similarly, *McConnell*'s review of the inclusion of executory contracts in the disclosure provisions challenged there can only reasonably be understood as a tailoring inquiry. 540 U.S. at 104 ("The record contains little evidence of any harm" so "speculation" about compliance burdens "cannot outweigh the public interest in ensuring full disclosure.").[7]

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[7] Lower courts would be surprised to learn that electoral disclosure laws are categorically the "least restrictive means," obviating any need to evaluate a law's tailoring, or alternatively, that *Buckley* directed a least-restrictive-means analysis in reviewing disclosure laws. Indeed, given that the interests supporting electoral disclosure are so well-established, "substantial relation" review often functions largely as a tailoring inquiry. *See, e.g.*, *Indep. Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) (determining that Colorado's disclosure requirements "are sufficiently tailored to meet exacting scrutiny"); *Worley v. Fla. Sec'y of State*, 717 F.3d 1238, 1249 (11th Cir. 2013) (characterizing tailoring analysis as "more than a rubber stamp" (citation omitted)); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 483

III. PETITIONERS DEMAND UNDULY SWEEPING REMEDIES FOR THEIR CLAIMED FIRST AMENDMENT INJURIES.

The associational injuries alleged in this case, even if credited, can readily be redressed on narrower grounds and without the sweeping doctrinal changes pressed by petitioners.

The Foundation asks this Court to declare broadly that any collection of information revealing the identities of a "private nonprofit"[8] organization's major donors, at least outside of the election context, must meet a tailoring standard akin to a "least restrictive means" test. Foundation Br. i; *supra* note 3. The Law Center asks the Court to find that strict scrutiny applies to any collection of information "that burden[s] non-electoral, expressive associational rights." Law Center Br. i.

But petitioners' reliance on facts peculiar to the record concerning this particular state collection program and its particular impact on the petitioners demonstrates that resolution of this case does not call for the broad facial ruling that petitioners urge. Moreover, petitioners' proffered questions would call into doubt not only California's reporting regime, but also

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(7th Cir. 2012) (finding state's "interest" in disclosure "strongly outweighs any burdens on protected speech"); *N.C. Right to Life Comm. v. Leake*, 524 F.3d 427, 439-40 (4th Cir. 2008) (reviewing disclosure law's "burdens" but declining to require narrow tailoring).

[8] Petitioners' invocation of the rights of "private nonprofits" belies their federal designations as *public* charities availing themselves of both state and federal tax benefits. *See* Resp. Br. 2-3, 29, 46-47.

numerous collections programs by tax agencies, business regulators, and even this Court's rule requiring disclosure of an *amicus curiae*'s financial backing, Sup. Ct. Rule 37.6.

This Court's learned practice is "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Chicago v. Morales*, 527 U.S. 41, 76-77 (1999) (Scalia, J., dissenting) (citation omitted); *accord Citizens United*, 558 U.S. at 373 (Roberts J., concurring). Petitioners urge precisely the opposite: reaching far beyond the facts presented here to issue a wholesale doctrinal ruling that would potentially threaten a broad range of transparency measures and information collection programs.

A. This case presents no opportunity for the Court to address public disclosure.

Petitioners' primary claim to injury is based on the presumption that California will inadvertently disclose their donor information to the public. *See* Foundation Br. 49-53; Law Center Br. 44-51. The challenged program, however, collects information that is to be "maintained as confidential by the Attorney General and shall not be disclosed" to the public. Cal. Code Regs. tit. 11 § 310(b). The nonpublic nature of the program not only minimizes the burdens reporting poses to petitioners, *see supra* at 5-8, but also necessarily limits the interests California can cite to justify its law.

Thus, it is unsurprising that the Attorney General "does not assert any state interest in *public* disclosure of Schedule B forms." Foundation Br. 28 (quoting

Pet.App.59a). California is not defending the challenged law as a public disclosure program at all. This means the Court cannot here resolve the balance between the petitioners' claimed burdens and the governmental interests in public disclosure given that the law is not being defended on informational or anti-corruption grounds.

To the extent that petitioners' claimed injury arises from California's failure to maintain the confidentiality of Schedule B information, or its lack of formal statutory or criminal confidentiality protections for such information, these harms can be redressed through much narrower means: a limited injunction, like that originally directed by the Ninth Circuit prohibiting public disclosure of Schedule Bs. Pet.App.68a-69a. That petitioners' worst-case scenario with respect to injury can be remedied by such a limited injunction only confirms that this case is an improper vehicle for the doctrinal revisions petitioners seek. Whatever the disposition here, it should have no bearing on the constitutionality of public reporting requirements, including appropriately tailored electoral disclosure laws.

B. Petitioners' particularized argument is best addressed narrowly and does not support facial relief.

Petitioners' arguments rely heavily on their characterizations of the record amassed in support of their as-applied claim. Based on that record, petitioners assert that "California virtually never uses Schedule B for law-enforcement purposes." Foundation Br. 1, 31-34; *see also* Law Center Br. 36-37. Petitioners also

highlight examples of "threats, harassment, or reprisals" that their members ostensibly suffered or would suffer if their Schedule Bs were made public. *See* Foundation Br. 49-53; Law Center Br. 44-51.

Even if these characterizations of the record are accepted as credible, petitioners rely almost entirely on the specific harm that allegedly would arise from the reporting of their *own* information—and as collected by California's Attorney General, not the IRS or other state tax authorities. Because "there is no reason to assume that any burdens imposed by disclosure of typical [donor information] would be remotely like the burdens plaintiffs fear in this case," *Doe*, 561 U.S. at 201, the case is an improper vehicle for the blanket declaration petitioners seek.

California oversees more than 100,000 registered charities, *see* Resp. Br. 2-5—including *amici* organizations here. There is no reason to think that major donors to the average charitable registrant, *e.g.*, a soup kitchen, museum, or community organization, face risks anything like those petitioners claim. Indeed, petitioners identify no evidence suggesting that the majority of registrants are expressive associations such that collection of their donors' identities would even raise a First Amendment question. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (explaining expressive associational rights do not attach to all groups); *City of Dallas v. Stanglin*, 490 U.S. 19, 24-25 (1989); *N.Y. State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988). Nor can petitioners argue that other registrants perceive the same First Amendment burdens as they claim here: certainly *amici* do not, and the record contains no findings or evidence

about groups other than petitioners. *See* Resp. Br. 36-37, 41.

The very record on which petitioners attempt to substantiate their claim demonstrates the peculiar nature of this challenge—one that defies the sweeping constitutional approach they seek. As was the case in *Doe*, the "problem for [petitioners] is that their argument rests almost entirely on the specific harm they say would attend disclosure" of their *own* reporting—namely, fears that petitioners' large donors would be subject to reprisals or harassment. 561 U.S. at 200. But the facial invalidation of a disclosure measure is not warranted when petitioners have "provided . . . scant evidence or argument beyond the burdens they assert disclosure would impose" on their *own* donors or associates. *Id.* at 201. A ruling limited to the "precise facts to which it is to be applied" remains the best practice. *Wash. State Grange*, 552 U.S. at 450 (citation omitted).

C. Petitioners concede that not every collection of donor identifying information warrants strict scrutiny review.

Petitioners concede, as they must, that strict scrutiny—or its equivalent—does not apply to every governmental collection of donor information. Yet even their caveat for its collection in electoral contexts is too limited, as their own briefing makes clear.

First, petitioners explicitly exempt electoral disclosure from their call for strict scrutiny, although their attempts to square this exemption with their proposed sweeping doctrinal revision are less than convincing. *See supra* at 15-26. At least, however,

they concede that the collection and public dissemination of the exact information to which they object here is not subject to strict scrutiny where that collection is related to an interest in "electoral transparency and informed voting." Foundation Br. 28; *see also* Law Center Br. 29.

Second, petitioners add an additional, and significant, qualification to their theory: they concede that the collection of nonprofit donor information is not subject to narrow tailoring—or any form of strict scrutiny—when such reporting serves "tax-collection purposes." Foundation Br. 45; *see also* Law Center Br. 53 (distinguishing collection "connected to a government tax-benefit program"). Rather, as the United States as *amicus* states, "[w]hen a disclosure regime is imposed as a condition of a governmental subsidy, exacting scrutiny does not apply." U.S. Br. 24.

Indeed, when imposed as a condition for a tax benefit, the Court has permitted a restriction on the beneficiaries' lobbying without heightened scrutiny, *see Regan*, 461 U.S. at 548-49, even though this condition, unlike disclosure, actually "prevent[s] [some]one from speaking," *Citizens United*, 558 U.S. at 366. Notwithstanding their request for broad facial relief, petitioners do not question the authority of either the IRS or the California Franchise Tax Board to collect the same information for tax administration purposes. *See* Foundation Br. 45 (distinguishing their challenge from California Franchise Tax Board's collection of the same information); Law Center Br. 54 (same). *See also* Resp. Br. 9, 37.

Petitioners' many caveats demonstrate that their proffered questions are unduly broad. The Court

should adhere to its practice of confining its constitutional ruling to the "precise facts" before it, *Citizens United*, 558 U.S. at 373 (Roberts, J. concurring), and disregard petitioners' demand for broad relief that would threaten disclosure measures far beyond the narrow circumstances of this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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