No. 19-251

IN THE

Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

MATTHEW RODRIQUEZ, IN HIS OFFICIAL CAPACITY AS THE ACTING ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa St.
10th Floor
Los Angeles, CA 90017
(213) 443-3000

DEREK L. SHAFFER
Counsel of Record
WILLIAM A. BURCK
JOHN F. BASH
JONATHAN G. COOPER
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street N.W.
Suite 900
Washington, DC 20005
(202) 538-8000
derekshaffer@quinnemanuel.com

Counsel for Petitioner

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INTRODUCTION

California's opposition brief offers no defensible justification for its demand that tens of thousands of charities annually divulge the names and addresses of their major donors when more narrowly tailored options can readily achieve the State's asserted law-enforcement interests. California argues that its sweeping demand for donor information need not be narrowly tailored. But this Court's decisions in *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), refute that argument. At any level of heightened scrutiny, the First Amendment requires a showing of narrow tailoring.

California fails to make any such showing here. As the district court found after an extensive bench trial, California virtually never uses Schedule Bs to investigate suspected charitable fraud. In the ten years preceding trial, California could identify only five investigations in which it had used Schedule B. That it now contends there were ten, not five, makes no constitutional difference. In each of this vanishingly small number of instances, California could have obtained Schedule Bs through other, less intrusive means, like targeted audit letters or subpoenas. California offers no persuasive explanation why it could not use such alternative means to investigate complaints of charitable fraud by specific charities, rather than demand that tens of thousands of charities prophylactically file Schedule B each year to register.

Nor does California refute that its demand casts a chill on freedoms of speech and association for a host of private associations ranging far beyond Petitioner.

The 40 *amicus* briefs supporting Petitioners express the views of more than 250 organizations and 22 States that California's practice deters First Amendment freedoms and fails to serve any valid government interest in a meaningful way. Indeed, 46 States forgo any such practice without any apparent increase in charitable fraud. California likewise fails to defend its pervasive failure to keep confidential the donor information it collects, which magnifies this chilling effect. While California insists that its confidentiality lapses were minor and have been fixed, the district court discredited those self-serving assurances based on the evidence at trial, and they are not fairly debatable here. Indeed, California at this point does not even contest the district court's finding that prior representations and assurances of confidentiality by its officials contradicted the reality well known to them.

Given the needless chill posed to First Amendment rights, this Court should, as it did in *Shelton*, invalidate the State's sweeping disclosure demand as unconstitutional on its face. At a minimum, this Court should invalidate California's disclosure demand as applied to AFPF.

ARGUMENT

I. CALIFORNIA FAILS TO REFUTE THE NEED FOR NARROW TAILORING

A. At Any Level Of Heightened Scrutiny, Narrow Tailoring Is Required

California does not dispute that its intrusion on First Amendment rights triggers heightened scrutiny, but it insists nonetheless (Br. 23-26) that it need not show that its means are narrowly tailored to its ends.

This Court's decisions in *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960), and *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296-97 (1961), hold otherwise, and with good reason. Government can always invoke an end like law enforcement in the abstract, but it is far harder to show, as the First Amendment requires, that the end cannot be served by less intrusive means. California fails to make that showing here.

California seeks to evade the narrow-tailoring inquiry by asserting it must show only a "substantial relation" to its regulatory and law-enforcement interests, without regard to narrow tailoring. That is incorrect. The substantial-relation inquiry examines whether a disclosure demand sufficiently advances the government's asserted interest. *E.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464-65 (1958); *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960). The narrow-tailoring inquiry examines whether the state's interest could be accomplished through a less intrusive disclosure demand. *E.g.*, *Roberts v. Pollard*, 393 U.S. 14 (1968), *summarily affirming* 283 F. Supp. 248, 257 (E.D. Ark. 1968).

Shelton makes this distinction clear. There, this Court held that "there can be no question of the relevance of a State's inquiry into the fitness and competence of its teachers," and thus that Arkansas's disclosure statute stood in "contrast" to disclosure demands in *NAACP v. Alabama* and *Bates*, where the State had failed to show any such substantial relation at all. 364 U.S. at 485. Despite concluding in *Shelton* that the substantial-relation requirement was satisfied, the Court nonetheless invalidated the disclosure requirement for lack of narrow tailoring, holding that, "even though the governmental purpose

be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.* at 488.

By recasting heightened scrutiny here as a requirement of "substantial relation" *without* narrow tailoring, California is effectively asking this Court to overrule *Shelton*. Doing so would mean that *any* disclosure requirement—no matter how overbroad—would be constitutional, so long as it substantially relates to the State's interest. In other words, the mere fact that the State's demand on aggregate does *something* to advance its ends would suffice to satisfy the inquiry, no matter how grossly disproportionate or how easily avoided the burden on First Amendment rights. Any such watered-down version of exacting scrutiny would be more like rational-basis review, where narrow tailoring is not required. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995). But California's conception is misconceived. Under this Court's precedents, California's demand must be narrowly tailored, and the State—not AFPF—bears the burden of "affirmatively establish[ing]" such tailoring. *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989); *accord In re Primus*, 436 U.S. 412, 432 (1978).

California likewise errs in suggesting (Br. 23-26) that a requirement of narrow tailoring would necessitate that California employ the "least restrictive means" of pursuing its interests. While "least restrictive means" demands a *perfect* fit between means and ends, and is seldom possible for government to demonstrate, narrow tailoring requires only a *close* fit, which government may be able to

satisfy on an adequate record. This Court has repeatedly recognized the distinction: "Even when the Court is not applying strict scrutiny, we still require 'a fit … that employs not necessarily the least restrictive means but … a means narrowly tailored to achieve the desired objective.'" *McCutcheon v. FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) (quoting *Fox*, 492 U.S. at 480).

For similar reasons, the United States errs in its about-face on the applicable standard of scrutiny. At the certiorari stage, the Government correctly recognized (Nov. 2020 Br. 10) that *Shelton* and *Louisiana v. NAACP* require "compelled disclosures to be narrowly tailored to the asserted governmental interest." The United States has since "reconsidered" (Mar. 2021 Br. 13) its position and now asserts that exacting scrutiny does not require narrow tailoring. But the holdings and reasoning of *Shelton* and *Louisiana v. NAACP* remain as clear and binding now as they were when the United States filed its invitation brief. Narrow tailoring is required.

B. The Campaign-Finance Precedents Do Not Alter The Analysis

Contrary to California's suggestion (Br. 26-28), *Buckley v. Valeo*, 424 U.S. 1 (1976), and the other election precedents do not dispel the requirement of narrow tailoring here. To begin with, *Buckley* confirms that the constitutionality of donor disclosure laws turns not only on the existence of a substantial relation to government ends but also on the closeness of the fit between means and ends. In upholding the compelled disclosure of the identities of political campaign contributors, the Court noted that this was the "least restrictive means" of advancing Congress's

objectives of combatting voter ignorance and candidate corruption. *Id.* at 68. But the Court did not opine on the standard of review in cases outside the electoral context, where any government interests in political integrity and transparency to the voting public are not germane.

Throughout an unbroken line of cases outside the electoral context, this Court has asked whether member or donor disclosure requirements are narrowly tailored to government interests in law enforcement or other ends. *E.g.*, *Shelton*, 364 U.S. at 488; *Louisiana v. NAACP*, 366 U.S. at 296-97. Alongside those precedents, this Court has always carefully distinguished its "precedents considering First Amendment challenges to disclosure requirements *in the electoral context*." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (emphasis added) (collecting cases); *see also* Br. of ACLU *et al.* as *Amici Curiae* (Mar. 2021) at 14-28; Br. of Congressman Sarbanes and Democracy 21 as *Amici Curiae* (Mar. 2021). Accordingly, the campaign-finance precedents have no bearing here.

II. CALIFORNIA FAILS TO DEFEND THE FACIAL CONSTITUTIONALITY OF ITS DISCLOSURE REQUIREMENT

A. California's Disclosure Demand Is Not Narrowly Tailored

Contrary to California's argument, its demand for Schedule B from tens of thousands of charities is not narrowly tailored to its regulatory or law-enforcement interests. California offers various arguments that its demand satisfies constitutional scrutiny, but none is

supported by the record against the backdrop of this Court's precedents.[1]

1. California's Disclosure Demand Is Not "Limited"

Contrary to California's suggestion (Br. 41), its disclosure requirement is sweeping, not "limited." Even if the average Schedule B lists only a handful of donors, California seeks to amass the names and addresses of thousands upon thousands of donors—many of whom do not even reside in California. *See* JA341 (over 60,000 charities renew their registration each year). And California's demand does in fact expose the identities of a significant number of donors in many instances; for example, the record shows that California publicly disclosed a Schedule B for Planned Parenthood listing "the names and addresses of hundreds of donors." JA40.

In *Shelton*, this Court rejected an argument similar to California's. There, Arkansas required teachers to report all associational connections over the previous five years. 364 U.S. at 480. An individual teacher might disclose only a handful of associations—for example, plaintiff Ernest T. Gephardt disclosed membership in only two

[1] Disavowing the need for narrow tailoring, California asserts that its demand is constitutional simply because it is "substantially related to the State's regulatory and law enforcement interests." That is legally misconceived (*see supra* Part I), but, regardless, the district court correctly ruled (Pet. App. 43a-48a) and the record confirms that there is no "substantial relationship" between California's blanket demand and its asserted law-enforcement interests. Any "substantial relationship" must be more than merely conceivable—it must be factually supported.

organizations, the Arkansas Education Association and the American Legion. *Id.* at 484. Yet the Court invalidated the disclosure requirement on its face because Arkansas could not justify its sweep across all teachers. *Id.* at 490. The same holds here.

2. California Virtually Never Uses Schedule Bs To Investigate Wrongdoing

California also errs in attempting to escape (Br. 29-35) the district court's factual finding (Pet. App. 55a) that California "virtually never uses [Schedule Bs] to investigate wrongdoing." Contrary to California's argument (Br. 35), the district court applied the correct legal standard (*see supra* Part I), but even if it had applied an incorrect legal standard, that would cast no doubt on the court's factual findings. As the district court found, California failed to identify "even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts." Pet. App. 47a. That conclusion is amply supported.

California effectively concedes that it does not use the vast majority of Schedule Bs it collects, stating (Br. 30) that it reviews a charity's Schedule Bs only *when a complaint comes in* for that charity. According to California (Br. 43), there are, at most, only 50 to 100 complaints per month (or 600-1,200 per year), which is a tiny fraction of the 118,000 registered charities (JA361), and of the 60,000 that renew their registration annually (JA341). Even if each complaint corresponded to a separate charity, that still leaves California without any occasion to use tens of thousands of Schedule Bs it seeks to collect.

Nor does California uniformly review a charity's Schedule B upon receiving a complaint. JA403-04; ER1681.[2] Indeed, for months, California unilaterally suspended the uploading of Schedule Bs received by the Registry. ER863-65; *see also* ER910. Throughout that time, there was no "outcry from the attorney general's office or from anywhere else that they didn't have access to important tax documents that they needed." JA365-66; ER912-13.

The record makes clear why California does not generally review Schedule Bs upfront. Most (if not all) of the information that it claims to seek in Schedule Bs for policing fraud is found in other forms that California collects through annual registration requirements—such as Form 990, Schedule L (interested-party transactions), Schedule M (gifts in-kind), and audited financial statements. *See, e.g.*, ER1061, 1787; SER983;[3] TMLC Pet. App. 55a; Br. of Nat'l Taxpayers Union *et al.* as *Amici Curiae* (Mar. 2021) at 10-14.

More fundamentally, review is distinct from use. When a complaint is filed, California may glance at all the files it possesses about a charity, including Schedule Bs, but it does not follow that California *uses* Schedule Bs with any regularity. Only a small percentage of complaints turn into investigations—there were about 540 investigations over the 10 years preceding trial in this case. And of those 540

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[2] "ER" citations refer to the excerpts of record filed with the Ninth Circuit at Dkt. 13 (Nov. 23, 2016).

[3] "SER" citations refer to the supplemental excerpts of record filed with the Ninth Circuit at Dkt. 23 (Jan. 20, 2017).

investigations, the district court found that California's investigators used Schedule Bs in only "five instances." Pet App. 45a. That is indeed "virtually never"—whether compared to the 60,000 charities that annually renew their registrations or to the 540 investigations over the course of a decade.

California challenges (Br. 33) the 5-out-of-540 figure, claiming it had evidence of "ten" investigations, rather than "five," and that there may have been fewer than 540 investigations. Even if that were correct, however, it would not change the fundamental point: California virtually never uses the tens of thousands of Schedule Bs that it seeks to collect. Ten charities are still less than 0.01% of registered charities.

In any event, the record supports the district court's factual finding. JA399-401; *see also* JA397-99 (California's investigators, who kept a log of "important documents" for their investigations, could find only a single entry mentioning Schedule B). California asserts (Br. 32-33 n.13) that the district court improperly excluded evidence of additional purported investigations. But California did not include any such evidentiary exclusion in its statement of issues appealed to the Ninth Circuit (9th Cir. Br. 4-5), and for good reason. For those investigations, California (i) had refused to produce key information in discovery on the grounds of privilege; and (ii) presented a witness who lacked personal knowledge of the investigations. ER1014-15; SER1132-36. A party cannot use privilege as a shield to prevent discovery and then rely on the withheld information as a sword to prove a defense. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir.

1992); *cf. United States v. Rylander*, 460 U.S. 752, 758 (1983). Nor can a witness testify when he lacks "personal knowledge of the matter," Fed. R. Evid. 602, or "fill[ ] the gaps in [his] memory with hearsay or speculation," 27 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE EVIDENCE §6023 (2d ed. 2007).[4]

In any event, thousands of charities (including AFPF) did not file Schedule Bs with California *for years*. Pet. App. 44a; JA316 (at least "half or two-thirds" of charities were not filing Schedule Bs as of 2010). As the district court correctly observed, "[t]he only logical explanation for why AFP[F]'s 'lack of compliance' went unnoticed for over a decade"—and why California ignored that thousands of charities were not filing Schedule Bs—"is that the Attorney General does not use the Schedule B in its day-to-day business." Pet. App. 45a.

California emphasizes (Br. 31-32) a handful of investigations in which Schedule Bs supposedly proved useful. But AFPF has never disputed that

[4] One *amicus*, the California Association of Nonprofits, incorrectly contends (Br. 23-24) that California was supposedly precluded "during the Americans for Prosperity Foundation trial" from introducing other evidence of investigations in which California supposedly used Schedule B. The only citation offered is from the *Thomas More Law Center* trial (citing TMLC ER510-11). Moreover, the witness proposed to testify only about investigations where she "look[ed]" at Schedule Bs, TMLC ER510, which does not undermine the district court's finding that California virtually never *uses* Schedule Bs. ("TMLC ER" citations refer to the excerpts of record filed with the Ninth Circuit in *Thomas More Law Center v. Becerra*, Nos. 16-56855 & 16-56902 (9th Cir.) at Dkt. 17 (July 10, 2017).)

Schedule Bs may, in rare instances, aid investigations. What is more, the specific examples that California cites support AFPF's position. In each example, Schedule B ostensibly was used to corroborate claims only *after* a complaint had been filed, and California either could or did obtain Schedule B through means other than upfront collection. *E.g.*, ER575, 678-79, 702-11, 1022-23.

Similarly, *amicus* California Association of Nonprofits cites (Br. 18-19) an example in which California supposedly used Schedule B to "contact individual donors" to facilitate an investigation. But in that example (which is not in the trial record), the cited press release[5] states only that, "[*t*]*hrough its investigation*," California "obtained a list of California residents who donated"—*i.e.*, California obtained California-specific donor information (different from the nationwide information found on Schedule B) after the investigation had begun.

3. California Has Narrower Alternatives

California likewise fails in its denial (Br. 41-46) that there are any readily available and practicable alternatives to its blanket disclosure demand. The record makes clear that California did not even consider such alternatives: when asked at trial whether her office ever "considered any alternative to an across-the-board demand for Schedule Bs," Tania Ibanez, who supervises the Registry as the Senior Assistant Attorney General in charge of the

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[5] *See* https://oag.ca.gov/news/press-releases/brown-reaches-settlement-charity-burn-victims-over-deceptive-fundraising-tactics.

Charitable Trust Section, testified: "We have not." JA420-22.

The record likewise refutes California's contention (Br. 42) that targeted audit letters and subpoenas would be impracticable because they "entail delays and commitment of resources." In *every* investigation of a charity, California issues an audit letter asking for many documents, including Schedule Bs. AFPF Opening Br. 34. Thus, once an investigation begins, using audit letters to obtain Schedule Bs entails no additional "delay" or "commitment of resources" beyond the baseline. Nor does California need Schedule B on hand *before* deciding whether to launch an investigation, as it wrongly insists (Br. 34). As the record shows, Schedule B is *never* the document that either triggers or obviates an investigation. JA77, 396-97, 417-18, 433. To the contrary, California regularly decides to investigate a charity without reviewing—or even possessing—its Schedule B. JA403-04. As the district court found, California not only *initiates* investigations without Schedule B, it successfully *completes* them. Pet. App. 47a. It is therefore no surprise that California did not collect Schedule Bs from thousands of charities for the years preceding a 2010 policy change by the Senior Assistant Attorney General in charge of charitable trusts enforcement. JA314-16, 404-05.

The practices of nearly every other State confirm that pre-investigation collection of Schedule Bs is unnecessary. The *amicus* brief in support of Petitioners filed by Arizona and 21 other States explains (Br. 5-6) that, in the rare instances when those States need donor information, they obtain it through "traditional tools like compliance audits and

subpoenas based on particularized suspicion of wrongdoing." Even the *amicus* brief in support of Respondent filed by New York, 15 other States, and the District of Columbia concedes (Br. 11) that only 4 of the 50 States (California, Hawaii, New Jersey, and New York) "require charities to report their Schedule Bs as a matter of course," while all other States "use other means to obtain information about significant donors."[6]

Bereft of evidentiary support to justify its blanket disclosure demand, California speculates (Br. 43) that an audit letter or subpoena may cause a charity to "hide or tamper with evidence" that is already on file with the IRS. But the record fails to reveal even a single example of such mischief. To the contrary, California's lead attorney and lead investigator for charity supervision testified that they could not specify any instance in which a charity ever hid or tampered with a Schedule B after receiving an audit letter. JA67-69, 405-06, 418-19. They also testified that they always send "an audit letter requesting documents" towards the *outset* of any investigation so that "the charity is alerted very early on in the process"—something they would never do were they genuinely concerned about tipping off charities or triggering tampering. JA66-67; *see also* JA204, 411,

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[6] These *amici* set up (Br. 21-26) a straw man that this case threatens all "[u]niform regulatory reporting requirements." Not so. AFPF takes issue only with California's blanket requirement that all charities disclose the names and addresses of their major donors. AFPF's argument does not encompass, for example, financial-disclosure requirements, *see* AFPF Opening Br. 38, nor does it encompass particularized requests for Schedule Bs from particular charities of concern.

418. Review of First Amendment facial challenges considers "actual fact," *Virginia v. Hicks*, 539 U.S. 113, 122 (2003), not "fanciful hypotheticals," *United States v. Williams*, 553 U.S. 285, 301 (2008).

B. California's Disclosure Demand Significantly Burdens First Amendment Rights

California similarly errs in its repeated arguments (Br. 36, 38, 40-41, 47-49) that its disclosure demand does not chill the exercise of First Amendment rights because it supposedly keeps Schedule Bs confidential. That is incorrect both legally and factually. Legally, public disclosure is not necessary to chill First Amendment rights. *Shelton*, 364 U.S. at 486. Needless divulgence of donor identities to government officials alone suffices to discourage donor contributions and chill associational liberty, and thus triggers heightened review. And factually, the record refutes California's contention.

1. California Did Not Rectify Its Pervasive Confidentiality Lapses

California cannot square its representations and assurances of confidentiality with the incontestable trial evidence that showed the State's repeated and serious breaches. As the district court found, California's "pervasive, recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the Attorney General's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry." Pet. App. 52a.

Amicus California Association of Nonprofits misdirects in its attempt (Br. 28-30) to downplay

California's pervasive confidentiality lapses. It asserts (Br. 28) that the Schedule Bs that California posted on the Registry's public website "were not viewable to visitors clicking through the Registry website." But that is false. As the trial evidence established, Schedule Bs were "clickable"—*i.e.*, "any member of the public could have accessed them" simply by clicking the link to the document on the Registry's website. ER388.

California similarly errs in insisting (Br. 11, 47, 48 (citing ER897-88)) that it adopted "new confidentiality protocols" before trial that solved its pervasive lapses, as testified to by the Registrar, David Eller. The district court considered and rejected this testimony. Pet. App. 52a-53a. As the district court noted, Mr. Eller "conceded" in his testimony "that the Registry has more work to do before it can get a handle on maintaining confidentiality." Pet. App. 52a (citing JA367); *see generally* JA366-88 (Mr. Eller testifying to systemic confidentiality lapses); JA422-31 (Ms. Ibanez testifying to vast gaps in confidentiality protections). Indeed, despite California's additional measures, even "the day before this trial," AFPF's expert identified 38 confidential Schedule Bs publicly posted on the Registry's website. Pet. App. 52a (citing ER383-88).

Extensive trial evidence further confirmed that California's approach to confidentiality remained defective. To take a few examples: (i) California's protocols for storing Schedule Bs do not meet the IRS's rigorous confidentiality conditions and protocols for safeguarding electronic tax-return information, JA333-38; (ii) California leaves the "vast majority" of paper processing and scan preparation to seasonal

and student employees responsible for much of the problem, JA346; (iii) California entrusts Schedule Bs to third-party vendors for processing and storage without ensuring that vendors maintain confidentiality, JA370-78; (iv) California expects charities themselves to "check the website to make sure" their confidential information is not inadvertently posted, JA351-52, even though the Registry does not notify charities when new documents are posted, SER1026; (v) California recognizes undisclosed exceptions to its "confidentiality" protocols that allow disclosure to "a member of the public pursuant to the California Public Records Act," "the State Archives as a record that has sufficient historical or other value," or the University of California or other "nonprofit or educational institution," JA430-31; (vi) California does not notify any affected charities or donors if their confidential information is made public, JA324-25, 344-45; and (vii) California has never disciplined employees responsible for the pervasive confidentiality breaches that the district court found, JA320-23, 348-49; 422-23, 429.[7]

In sum, the district court was well justified in finding that California's "current confidentiality

[7] For the first time, California now asserts (Br. 10 (citing Cal. Gov't Code §19572)) that it can punish employees under a statute that purportedly "authorizes discipline for negligent, intentional, or dishonest conduct by state employees that harms the public service." Yet California has never disciplined any employee—under §19572 or otherwise—for California's pervasive disclosures of Schedule B. Moreover, multiple California officials testified that inadvertently disclosing confidential donor information is not "grounds for formal discipline." JA321; *see also* JA348-49, 422-31.

policy"—even with the new protocols—"profoundly risks disclosure of any Schedule B the Registry may obtain from AFP[F]" as it "cannot effectively avoid inadvertent disclosure." Pet. App. 53a. Indeed, in the subsequent Thomas More Law Center trial, the district court found that, despite further steps California had taken "[s]ince the conclusion of the *AFPF* litigation," California still "cannot assure that documents will not be inadvertently disclosed," and "this inability to assure confidentiality increases the 'reasonable probability' that compelled disclosure of Schedule B would chill Plaintiff's First Amendment rights." TMLC Pet. App. 62a-63a.

2. California's Disclosure Demand Burdens All Charities

California further errs in maintaining (Br. 36-37) that only "controversial" charities have reason to fear California's inability to keep Schedule B confidential. The prospect of government officials or courts scrutinizing whether a particular charity's work is "controversial" itself raises First Amendment problems and cannot be squared with precedent holding that "*all* legitimate organizations are the beneficiaries of these protections." *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 556 (1963) (emphasis added). Nor have the disclosure cases ever made such a distinction. In *Shelton*, for instance, although many organizational ties that teachers had to disclose were uncontroversial, *see* 364 U.S. at 484, the Court found the statute facially unconstitutional because it pressured teachers to "avoid any ties which might displease" the State, *id.* at 486.

In any event, California is wrong. Mandating disclosure of Schedule Bs unconstitutionally chills

First Amendment freedoms for *all* charities and their donors—including but not limited to the large number whose positions may turn out to be controversial at a particular time and place. The risk that donor identities will be needlessly disclosed to government (or carelessly leaked by government to the broader public) discourages charitable support by *any* donor who wishes to remain anonymous, even when donating to "non-controversial" charities.

As the Court has recognized, "there are a significant number of persons who support causes anonymously." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 166 (2002). They do so for many reasons—some because of fear of reprisals, others out of a desire to preserve privacy, and still others out of religious conviction. *Id.* at 166-67. Expert testimony at trial confirmed that a "major reason" that donors desire anonymity—"in addition to the religious and spiritual" reasons—is that they "do not want to be harassed by other people coming to their houses, calling them on the phone bothering them or their children for additional contributions." ER517-18; *see also* ER521-22.

The organizational *amicus* briefs filed in support of Petitioners confirm as much, as their signatories span a vast range from the possibly controversial (*e.g.*, the ACLU, the NAACP Legal Defense and Educational Fund, and the Council on American-Islamic Relations) to the incontestably benign (*e.g.*, Feeding America – Eastern Wisconsin, Food for the Poor, and The National Children's Cancer Society). California's argument (Br. 36-37) that these supposedly noncontroversial charities should be

unconcerned is belied by the fact that they joined as *amici* in support of Petitioners.

Nor would any attempt to parse such organizations into the "controversial" and "non-controversial" be workable. Many Catholic charities, for example, are primarily engaged in assistance to the poor, but the Catholic Church takes positions on abortion and other issues that some deem controversial. Would they be subject to a First Amendment rule barring mandatory disclosure only for controversial charities? And although Asian Americans Advancing Justice may not have seemed especially controversial when California improperly posted its Schedule B before 2013 (JA425-26; SER432-33), revelation of its donors could, sadly, be a life-or-death issue in 2021.

3. California's Arguments About The IRS And FTB Are Inapposite

California similarly errs in its argument (Br. 37, 52-53) that its disclosure requirement imposes no burden on First Amendment rights because Schedule B is separately disclosed to the IRS. Even assuming the IRS can ultimately satisfy exacting scrutiny based on national tax collection imperatives and far more considered narrow tailoring than California employs (as reflected in a statutory framework enacted by Congress), there can be no doubt that nonprofits *are burdened* by having to submit Schedule B to the IRS in the first place. The IRS itself has acknowledged that it must "balance the IRS's need for the information for tax administration purposes against the burden and risks associated with reporting of the information." 85 Fed. Reg. 31959, 31965-66 (May 28, 2020). The IRS further acknowledges that, for those

organizations no longer required to file Schedule B, it can "efficiently administer the internal revenue laws through examinations of specific taxpayers." *Id.* at 31966.

California also misplaces reliance (Br. 37) on the observation that charities separately disclose Schedule B to the California Franchise Tax Board ("FTB"). California did not make this argument before the district court or Ninth Circuit, and with good reason: California is mistaken. Tax-exempt charities in California generally must file Form 199 with the FTB. Charities with gross revenues over $50,000 (and all private foundations) must fill out Part II of Form 199, which does not require submission of Schedule B.[8] California cites (Br. 37) Cal. Code Regs. tit. 18, §23772(a)(2)(B)(II), which provides that, as an "[a]lternative" to completing Part II, a charity may *choose* to file its Form 990 and accompanying schedules. But that is not mandatory. As another alternative, a charity may submit a copy of the report it submits to the California Attorney General (the RRF-1, which replaced the CT-2, *see* SER144), which does not require submission of Schedule B.[9] *See* Cal. Code Regs. tit. 18, §23772(a)(2)(B)(I). There is no evidence in the record that AFPF or other charities submit Schedule Bs to the FTB.

Because California's disclosure demand is not narrowly tailored to California's asserted law-

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[8] *See* https://www.ftb.ca.gov/forms/2020/2020-199.pdf.

[9] *See* https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/charitable/rrf1_form.pdf.

enforcement interest, it should be struck down facially, and, contrary to the United States' latest suggestion (Mar. 2021 Br. 27-35), there is no reason to remand for further proceedings. This Court should reverse the Ninth Circuit's judgment and remand with instructions to enter a permanent injunction against enforcement of the Attorney General's facially unconstitutional demand for Schedule Bs.

III. CALIFORNIA CANNOT REFUTE THE UNCONSTITUTIONALITY OF ITS DISCLOSURE DEMAND AS APPLIED TO AFPF

At a minimum, the record here warrants as-applied relief, which California fails (Br. 47-54) to refute. As the district court found, AFPF demonstrated a reasonable probability of threats, harassment, and reprisals. Pet. App. 48a-49a. As the district court also found, that probability is magnified by the profound risk of public disclosure from California's confidentiality lapses. Pet. App. 53a. Those findings more than suffice to justify an as-applied exemption from California's demand.

Contrary to California's contention (Br. 50-51), AFPF need not "prove that 'chill and harassment [are] directly attributable to the specific disclosures from which the exemption is sought.'" *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101 n.20 (1982) (quoting *Buckley*, 424 U.S. at 74). This Court has rejected demands for such a showing, and held that it suffices, for example, for an organization to submit "specific evidence of past or present harassment of members due to their associational ties." *Buckley*, 424 U.S. at 74.

AFPF has more than satisfied that flexible evidentiary standard here. As California concedes (Br. 51), AFPF supporters face "hostile responses ... including threats and illegal acts by members of the public" due to their associational ties. California suggests (Br. 51) that these threats and illegal acts were limited to AFPF *staff members* as distinct from *donors*. That is incorrect: As the district court found (Pet. App. 49a), ample trial evidence shows that AFPF *donors* specifically face threats, harassment, and reprisals. *See, e.g.*, JA249-50, 269, 294-95. The risks and stakes are especially high for Schedule B donors, who are "the major lifeline of [AFPF's] funding" and chilling of whom would be "devastating." JA261.

Nor is California correct in asserting (Br. 51) that AFPF's evidence of donor chill is limited to "unsubstantiated hearsay testimony from its own employees." To the contrary, an AFPF donor testified that he "considered stopping funding or providing support to [AFPF]" because "of the resulting threats on my life, boycotts on my business." JA294. He testified that the only reason he continued to give despite the threats is that it is now "too late" to protect his privacy, so the harm was "already done." JA295. Additionally, AFPF elicited expert testimony that "[t]here would be a chilling effect" if California's disclosure demand were upheld. JA300-02. And extensive evidence from AFPF officials confirms that AFPF has "left a lot of money … on the table" because of donors' fear of disclosure. SER1108-09; *see also* ER197, 306-08, 310, 334, 337-38; SER1079, 1101-02, 1115-17.

Under the flexible evidentiary standard of *Brown* and *Buckley*, no more is required. In California's view

(Br. 51), establishing chill requires direct testimony from individuals who were dissuaded from donating due to fear of reprisal should their contributions be made known. But AFPF need not "come forward with witnesses who are too fearful to contribute but not too fearful to testify about their fear." *Brown*, 459 U.S. at 101 n.20 (quoting *Buckley*, 424 U.S. at 74). That would require would-be donors to sacrifice anonymity, thereby opening themselves up to the very harms that chilled their donations in the first place. Such an unforgiving standard would defy this Court's precedents, which permit "flexibility in the proof of injury" precisely to prevent such harsh results. *Id.* (quoting *Buckley*, 424 U.S. at 74). California's standard would be especially misplaced in *this* case, where concerned donors would be exposing their identities to the very government that proved incapable of abiding by its confidentiality assurances. Notably, the United States, disagreeing with California, confirms the flexibility of the evidentiary standard. Mar. 2021 Br. 18-19, 34.

Finally, California fails in its effort (Br. 51-52) to wave away, as "principally vague hearsay statements," AFPF's evidence that California officials have targeted it and its supporters. That evidence was properly admitted at trial. AFPF Opening Br. 51-52; *see also* Proposed Post-Trial Findings of Fact, D. Ct. Dkt. 177-1 (Mar. 14, 2016) ("PFOF") ¶¶400-12. Some of the evidence comes from California's own officials. JA201-02, 415-16; *see also* PFOF ¶¶413-20 (compiling examples of how California sought to harass AFPF and retaliate against it through improper discovery in this lawsuit). Ample evidence thus confirms that AFPF and its donors have reason

to fear being singled out by California officials solely because of their associational beliefs.

At a minimum, therefore, entry of as-applied relief is appropriate.

CONCLUSION

The judgment should be reversed or vacated with direction to enter judgment for Petitioner.

Respectfully submitted,

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
865 S. Figueroa St.
10th Floor
Los Angeles, CA 90017
(213) 443-3000

DEREK L. SHAFFER
Counsel of Record
WILLIAM A. BURCK
JOHN F. BASH
JONATHAN G. COOPER
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street N.W.
Suite 900
Washington, DC 20005
(202) 538-8000
derekshaffer@quinnemanuel.com

Counsel for Petitioner

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