NO. 19-255

IN THE

Supreme Court of the United States

THOMAS MORE LAW CENTER,

Petitioner,

v.

MATTHEW RODRIQUEZ, ACTING ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

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

REPLY BRIEF FOR PETITIONER THOMAS MORE LAW CENTER

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INTRODUCTION

The California Attorney General's attempt to rewrite history cannot undermine the district court's findings that his office (1) has no need to collect Schedule Bs absent a complaint about a specific charity, (2) can always obtain Schedule B information if a complaint arises, and (3) leaks private donor data like a sieve. The same is true of the district court's finding of a reasonable probability that disclosure will subject the Law Center's donors to threats and harassment. Those findings prove California's donor-disclosure precondition on fundraising is invalid, both facially and as-applied to the Law Center.

As to facial invalidity, the Law Center need not prove a "broad chilling effect" on all charities, contra Resp.Br.1, only a policy so imprecise "that in all its applications [it] creates an *unnecessary risk* of chilling free speech." *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 967–68 (1984) (emphasis added). That perfectly describes California's prophylactic demand. And the lack of any compelling need to mass collect Schedule Bs—and the more targeted ways to get donor data when necessary—means the policy fails strict scrutiny under *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958), and exacting scrutiny under *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam).

As applied, California trampels on the First Amendment. The record showed "a reasonable probability that disclosure of" the Law Center's donors "will subject [it] to threats" and "harassment." *Citizens United* v. *FEC*, 558 U.S. 310, 367 (2010) (cleaned up). Nothing more is required. Accordingly, the Court of Appeals should be reversed.

REPLY ARGUMENT

I. The California Attorney General's test for compelled-donor disclosure does not adequately protect First Amendment rights.

A. The proper test for evaluating a donor-disclosure precondition on fundraising is strict scrutiny.

1. Outside the electoral context, this Court requires the government to prove that its compelled-disclosure scheme is narrowly tailored to advance a compelling interest.

The Law Center's opening brief meticulously explained how this Court requires the government to justify compelled-disclosure rules via a "compelling" state interest and "narrowly tailored" means. TMLC.Br.26–29. The only standard incorporating both requirements is strict scrutiny. *Id.* at 28.

In response, the Attorney General asks the Court to apply the exacting-scrutiny standard from compelled-disclosure cases involving electoral processes, such as *Buckley* and *John Doe No. 1* v. *Reed*, 561 U.S. 186 (2010). Resp.Br.20–21. According to the Attorney General, *Buckley*'s exacting scrutiny applies to *all* disclosure mandates. Resp.Br.16, 26–27. But *Buckley* does not even control all disclosure rules *inside* the electoral context, let alone all disclosure rules *outside* it. *E.g.*, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 353 (1995). And the Court should not extend *Buckley* now.

To be clear, the *Buckley* and *NAACP* standards are different. *NAACP* requires a "compelling" government interest. 357 U.S. at 463. In election cases, *Buckley* merely requires a "substantial" one. 424 U.S. at 68. But see *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 786 (1978) (government's burden to show "compelling" interest under *NAACP*). The Attorney General tries to blur the two, relying on *Buckley*'s passing comment that the Court has applied exacting scrutiny "[s]ince *NAACP*." Resp.Br.20–21, 26–27 (citing 424 U.S. at 64–66). But the Court has more recently stressed that *NAACP*'s and *Buckley*'s standards are distinct. *Nixon* v. *Shrink Mo. Gov't PAC*, 528 U.S. 377, 387–88 & n.3 (2000) (contrasting *Buckley*'s laxer standard with *NAACP* and other free-association cases' stricter test); accord *id.* at 421 (Thomas, J., dissenting).

What's more, there are sound reasons for different standards. Deference and flexibility are hallmarks of the Court's election-law jurisprudence. *E.g.*, *Doe*, 561 U.S. at 195–96. But where the democratic process itself is *not* at stake—as here and in *NAACP*—First Amendment violations cannot be so easily excused. That is why this Court gave the State no latitude whatsoever in *NAACP*. Otherwise, in addition to supporter lists, the government could claim an interest in *any* prophylactic disclosure mandates—including phone, bank, and email records. The Constitution forbids government from haphazardly demanding such personal information. *Riley* v. *California*, 573 U.S. 373, 401 (2014); Ctr. for Equal Opportunity.Br.18.

That is why, for nearly 40 years, this Court has limited *Buckley* to the electoral context. *E.g.*, *Citizens United*, 558 U.S. at 366; *Buckley* v. *Am. Const. Law Found.*, 525 U.S. 182, 202 (1999); *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 92 (1982). The decision does not control elsewhere. *McIntyre*, 514 U.S. at 353. While California baldly asserts that *Buckley's* version of exacting scrutiny is "established," Resp.Br.22, that's true only in its established context.

Nothing in *Buckley* is to the contrary. *Buckley* allowed "disclosure requirements" that were "*essential* means of gathering the data necessary to detect violations of [campaign] contribution limit[s]," 424 U.S. at 67–68 (emphasis added), to protect "the free functioning of our national institutions," *id.* at 66. In contrast, 46 states have no donor-disclosure mandate and still regulate charities effectively. Ariz.Br.4–6. Whereas *Buckley* relied on *necessity*, California claims "efficiency." *E.g.*, Resp.Br.14, 17–18, 30, 43, 46. And claimed efficiency is insufficient to override First Amendment protections. *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972). So strict scrutiny applies.

2. Applying strict scrutiny to policies that infringe on associational rights tracks the Court's treatment of other First Amendment rights.

Subjecting the Attorney General's restriction on charitable fundraising to strict scrutiny is consistent with this Court's treatment of analogous First Amendment rights.

1. In *Knox* v. *Service Employees International Union, Local 1000*, 567 U.S. 298 (2012), this Court invalidated a union assessment against nonunion state employees. In evaluating the First Amendment violation, the Court rejected a balancing approach, emphasizing that "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id.* at 313–14 & n.3 (citing *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984), *Elrod* v. *Burns*, 427 U.S. 347, 363 (1976), and *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), among others). In other words, the Court applied strict scrutiny. In so doing, the Court did not rely on election-related cases; it turned to *Button*—a case involving the NAACP's associational rights.

2. California's donor-disclosure requirements are analogous to prior restraints on speech, which this Court subjects to the strictest scrutiny. Sen. McConnell.Br.5–10. This Court has already ruled that charitable fundraising merits First Amendment protection. *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Yet California requires donor disclosure as a precondition to fundraising. Such a policy fits "comfortably within this Court's understanding of prior restraints" and is presumed invalid. McConnell.Br.9.

3. Applying a strict-scrutiny standard here harmonizes *NAACP* and its progeny with the history of the Assembly Clause. As this Court recognized in *De Jonge* v. *Oregon*, 299 U.S. 353 (1937), the right to peaceably assemble "is a right cognate to those of free speech and free press and is equally fundamental." *Id.* at 364–65. Accordingly, "[o]nly the gravest abuses,

endangering paramount interests, give occasion for permissible limitation" of that right, and then only under "the narrowest range for its restriction." *Thomas* v. *Collins*, 323 U.S. 516, 530–31 (1945). *NAACP* relied on *De Jonge* and *Thomas* in establishing its strict-scrutiny framework. 357 U.S. at 460. It would make a hash of the First Amendment to give association rights less protection today. Becket Fund.Br.5–9, 13–23; Concerned Women.Br.5–15.

3. Strict scrutiny does not require victims of disclosure to prove harm beyond the disclosure itself.

The Attorney General says Petitioners must show a "significant burden on First Amendment rights." Resp.Br.36–41; accord U.S.Merits.Br.31–34 (encouraging remand for such a showing). But the burden is the risk caused by disclosure itself. *NAACP* made clear that "state action which *may* have the effect of curtailing the freedom to associate is subject to the closest scrutiny." 357 U.S. at 460–61 (emphasis added). And *Shelton* v. *Tucker* added that the result would be the same "[e]ven if there were no disclosure to the general public," especially when the "record contains evidence to indicate that *fear* of public disclosure is neither theoretical nor groundless." 364 U.S. 479, 486 (1960) (emphasis added). The constitutional concern is the "*possible* deterrent effect" that a disclosure requirement may impart, *NAACP*, 357 U.S. at 461 (emphasis added)—like the 50% drop in NAACP membership during the supporter-disclosure era. Accord Inst. for Free Speech.Br.12–15.

Petitioners do not have to show that public disclosure and its attendant harms will follow; *fear* of what might happen after the government takes private information is enough. Here, of course, Petitioners proved much more. California has a dismal confidentiality track record. TMLC.Br.14. And hackers access Schedule Bs with ease, just as they hacked databases in other California agencies. Nonprofit All.Br.32–33; Hispanic Leadership Fund Br.15–18. All donors have reason to dread California taking possession of their private information.

What *NAACP* and *Talley* v. *California*, 362 U.S. 60 (1960), make clear is that proof of actual harm is unnecessary. Whereas the Ninth Circuit foreclosed a facial challenge to California's prophylactic disclosure scheme in *Center for Competitive Politics* v. *Harris*, 784 F.3d 1307, 1316 (9th Cir. 2015)—based on a purported absence of harm—"proof of such harm should have played no part in the analysis." Inst. for Free Speech.Br.20 (discussing cases). Donors' fear of California's disclosure "is neither theoretical nor groundless." *Shelton*, 364 U.S. at 486.[1]

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[1] The Attorney General suggests disclosure here is no more chilling than when charities submit Schedule Bs to the IRS. Resp.Br.37. For numerous reasons, that argument is wrong. TMLC.Br.53–57; AFPF.Br.45–47; Nat'l Taxpayers Union.Br.5–32; Ctr. for Equal Opportunity.Br.24–29. Among other things, the average donor understands that risk increases exponentially as more government actors hold private information, and the IRS's system of checks and security is radically stronger than California's.

4. The Court should reject the Attorney General's justifications for applying exacting scrutiny to a precondition on charitable fundraising.

The Attorney General errs by "reflexively" applying the *Buckley* standard here. Inst. for Justice.Br.22; Resp.Br.19. Whereas airing campaign-backers' identities was the government's goal in *Buckley*, 424 U.S. at 66–67, the Attorney General disclaims any interest in publicly exposing donors here, Resp.Br.9–10, 47–49.

The Attorney General wrongly claims that exacting scrutiny applies because his disclosure rule is an *indirect* restraint on First Amendment activity. Resp.Br.22–23, 45. *NAACP* and its progeny rejected a constitutional line between "direct" and "indirect" restrictions on free speech and association. *E.g.*, *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960); *NAACP*, 357 U.S. at 462. So have the Court's free-association cases more broadly. *E.g.*, *Healy* v. *James*, 408 U.S. 169, 183 (1972). And as explained in Section II.B. below, the Attorney General's policy *directly* burdens First Amendment rights. California makes it *illegal* for charities to speak and associate with 40 million people unless they turn over their Schedule Bs. It's wrong to say the disclosure rule "does not affect the content of any expression," Resp.Br.40, when refusal means *all* fundraising is banned. And the ramifications of California's prophylactic requirements are grim: charities risk exposing their donors to severe threats, TMLC.Br.5–6, or else they're barred from speaking to supporters in our most populous state, Inst. for Free Speech.Br.2–3; Pub. Interest Legal Found.Br.1.

The Attorney General and amici present his donor-disclosure mandate as mere historical charity regulation, akin to disclosures by closely regulated businesses. Resp.Br.29, N.Y.Br.3–4, 22–23, 27, 33–34. But the question is not whether states have a generic charitable-oversight interest; it is whether the First Amendment allows California's *means* of policing charities. Ctr. for Equal Opportunity.Br.18. And the State's suspicionless demand for Schedule Bs is freshly minted, J.A.419–21, and extraordinary, Ariz.Br.4–6. Moreover, charities are nothing like closely regulated businesses. Their trade is fully protected speech. *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). That sets them apart under the First Amendment and explains why this Court consistently overturns "prophylactic, imprecise, and unduly burdensome" speech-restricting measures targeting charities. *Id.* at 800. California's policy fails First Amendment scrutiny for many of the same reasons identified in *Riley*, *Munson*, and *Schaumburg*. Free Speech Coal.Br.31–36.

5. Exacting scrutiny's shortcomings are severe.

Because this Court has described "exacting scrutiny" in different ways, its meaning is unclear. Am. Ctr. for Law.Br.4–8. California envisions a sliding scale, depending on courts' subjective view of the harm. Resp.Br.21–22. This malleable approach (1) finds no support in the First Amendment's text, (2) reduces freedom of association to second-tier constitutional status, (3) offers no predictable rules, and (4) invites lower courts to replace heightened scrutiny with rational-basis review. Inst. for

Justice.Br.3–4; New Civ. Liberties All.Br.5; Legacy Found.Br.15–24. The Ninth Circuit's opinion proves all four. Pet.App.16a–25a.

Governments favor exacting scrutiny because its pliable standard allows for greater regulation and, in practice, relieves the state of its burden of proof. Resp.Br.29–30, 42, 48–50; U.S.Merits.Br.9–10. Lower courts treat disclosure rules as presumptively valid, dismiss facial challenges out of hand, and limit plaintiffs to as-applied claims. *E.g.*, Pet.App.16a–44a. This allows the government to shift the burden to individuals whose rights are diminished, Inst. for Justice.Br.22; Liberty Justice Ctr.Br.2–5, flipping on its head the First Amendment's burden of proof on the government, *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803 (2000); *Healy*, 408 U.S. at 184.

The Attorney General asks the Court to ignore exacting scrutiny's faults based on his promise to use donors' names and addresses responsibly. Resp.Br.5–10; accord N.Y.Br.23. "But the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*." *United States* v. *Stevens*, 559 U.S. 460, 480 (2010). Though the State may say it is here to help, Resp.Br.29, 42, the Attorney General is an elected official with partisan bents. Nonprofit All.Br.4, 10; Goldwater Inst.Br.22. It is unreasonable to expect donors to trust him. J.A.360–64. And those who litigate against the state, like the Law Center, "may have *the most* to fear from government retaliation." Elec. Frontier.Br.22.

Applying exacting scrutiny here will invite other preemptive disclosure mandates. Inst. for Free Speech.Br.11–12. Free association will pay the price. Once charities turn over donor information, there is no way to control how 50 states use it. *Id.* at 5. Technology allows the government to catalog citizens' affiliations and beliefs. *Id.* at 26. *NAACP* recognized a "vital relationship between freedom to associate and privacy in one's associations" precisely to prevent such government intrusion. 357 U.S. at 462.

B. At a minimum, compelled-disclosure schemes must be narrowly tailored.

California does not dispute that exacting scrutiny requires narrow tailoring. Resp.Br.24–26; accord U.S.Merits.Br.21; Law Scholars.Br.16–21. It merely quibbles over degree. Resp.Br.24. But narrow tailoring under exacting scrutiny is a least-restrictive-means test in this context. TMLC.Br.32.

In *Buckley*, the Court thought *NAACP*'s "strict test" necessary because of the substantial danger compelled disclosure poses for First Amendment rights. 424 U.S. at 66. It nonetheless modified that test given the weighty governmental interests in elections. *Ibid.*; accord TMLC.Br.29. But the Court made no mention of altering *NAACP*'s narrow-tailoring requirement. The Court explained that disclosure requirements generally are the "*least restrictive means* of curbing the evils of campaign ignorance and corruption." *Id.* at 32. Tellingly, the Court only discussed the First Amendment harm, having already concluded that electoral-disclosure requirements were the least restrictive means. *Buckley*, 424 U.S. at 71–72, 74.

Only one year later, the Court cited *Buckley* as authority that "less restrictive" means cannot be available if a state infringes on associational rights. *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 467 (1977). *Buckley*'s progeny confirm this. Congressman Sarbanes.Br.11; Chamber of Commerce.Br.12–14. The Court has upheld disclosure requirements in the electoral context by looking only to the government's interests and the corresponding First Amendment harms. *McConnell* v. *FEC*, 540 U.S. 93, 196–97 (2003); accord Campaign Legal Ctr.Br.26. For instance, *McConnell* had no need to assess narrow tailoring because *Buckley* had already established the per se rule that disclosure is the least restrictive means in the electoral context. TMLC.Br.32.

John Doe, U.S.Merits.Br.23, is not to the contrary. In reference to the tailoring prong, *Doe* cited *Buckley* and dispatched with the analysis in three paragraphs. 561 U.S. at 196, 198–99. The Court concluded the disclosure requirement "promote[d] transparency and accountability in the electoral process," *id.* at 199, conforming to *Buckley*. Even under exacting scrutiny, then, California's donor-disclosure regime must be the least restrictive means.

II. California's nationwide precondition on charitable fundraising is facially invalid.

A. The mandate's flawed premise creates an unnecessary risk of chilling speech.

In some contexts, "[f]acial challenges are disfavored." Resp.Br.28 (citing *Wash. State Grange* v. *Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008)). Those contexts include "premature interpretation of statutes" based on "factually barebones records" and "anticipat[ing] a question of constitutional law" before necessary, thereby preventing duly enacted laws "from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 450–51.

None of these concerns apply here. A well-developed record shows California is already enforcing a mandate with a "fundamentally mistaken premise" that "creates an unnecessary risk of chilling free speech." *Munson*, 467 U.S. at 966–68. And the mandate is not a vague statute but an inflexible, bureaucratic demand with an undisputed meaning. Facial relief is appropriate.

1. The lack of nexus between a charity's commitment to donor privacy and the likelihood it will commit fraud is dispositive.

The statutory flaw in *Munson* was "that in all its applications it operate[d] on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.* at 966. There was "no nexus between the percentage of funds retained by the fundraiser and the likelihood that the solicitation

[was] fraudulent." *Riley*, 487 U.S. at 793. Thus, it was facially invalid. *Munson*, 467 U.S. at 968.

Similarly here, the only premise that *might* explain California's donor-disclosure regime—that charities who refuse to disclose donors are more likely to commit fraud—is one even California does not defend. Charities have countless reasons for protecting donors' privacy. The Law Center reasonably fears disclosure would subject its donors to retribution. TMLC.Br.44–50. Accord AFPF.Br.49–53; China Aid.Br.3; Citizen Power Initiatives.Br.7; Am. Legislative Exch.Br.2–6; ACLU.Br.3. And donors may "simply object to disclosing information to the State." Inst. for Free Speech.Br.24–25 (ten types of deterred donors); Nonprofit All.Br.8 (reasons donors want privacy); J.A.188–90 (donors worry about being "inundated" with charitable requests).

That the mandate "in some of its applications" might deter charities that would commit fraud from soliciting in California "is little more than fortuitous." *Munson*, 467 U.S. at 966. "It is equally likely," really far *more* likely, "that the [mandate] will restrict First Amendment activity" by charities with perfectly innocent reasons for protecting donors. *Id.* at 967. To survive a facial challenge, the relevant distinction is "between regulation aimed at fraud and regulation aimed at something else in the hope that it [will] sweep fraud in during the process." *Id.* at 969–70. California's indiscriminate aim sets a host of innocent charities in its sights.

2. Claimed efficiency concerns are not compelling interests, nor do they excuse a lack of narrow tailoring.

California spends pages detailing ways it *could* use Schedule Bs. Resp.Br.7 (to cross-reference donor information); *id.* at 8 ("*can* also help track in-kind donations") (emphasis added); *id.* at 30 ("*can* help provide a 'roadmap'") (emphasis added). This speculation does not change two undisputed, dispositive facts: (1) investigators only ever consult a charity's Schedule B *after* they receive a complaint, and (2) after a complaint, investigators always can obtain Schedule B information through targeted means. California so conceded through its own witnesses' testimony. J.A.294–95, 457, 462–63, 465, 467; Pet.App.54a–57a, 66a–67a, 126a–27a; AFPF S.E.R.986, 992. And it does not argue otherwise here.

Instead, California insists these alternatives would be less efficient than hoarding a trove of Schedule Bs. Resp.Br.18, 29–30, 42, 43, 46. As the district court found, California's "primary" claimed "advantage of the Schedule B is one of convenience and efficiency." Pet.App.55a–56a, 66a.

But claimed convenience and efficiency are not compelling reasons to suppress speech. *Riley*, 487 U.S. at 795. Nor is "mere convenience" a good excuse for failing narrow tailoring. *McCullen* v. *Coakley*, 573 U.S. 464, 486 (2014). "To meet [that] requirement," California "must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 495. California's own evidence proved it "has a myriad of

less-burdensome means available to further [its] interest[s].” Pet.App.67a. Even if those alternatives are “not the most efficient means,” “the First Amendment does not permit the State to sacrifice speech for efficiency.” *Riley*, 487 U.S. at 795.

B. California’s attempts to avoid *Munson* and *Riley* fall short.

In a single paragraph, California takes two shots at distinguishing *Munson*. Resp.Br.38–39. Both fail. First, California says its mandate survives scrutiny unless “in *all* its applications” it prevents charities from speaking. *Id.* at 38. But in *Munson*, this Court rejected a similar—though stronger—argument. There, the limitation on solicitation costs included a waiver for charities that could show it would effectively prevent them from fundraising. 467 U.S. at 952, 963. Maryland argued the statute was not subject to facial attack “because, with the waiver,” it was not “substantially overbroad.” *Id.* at 964. This Court was “not persuaded.” *Ibid.*

Rejecting a facial challenge may be “appropriate in cases where, despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.” *Id.* at 964–65 (cleaned up). But *Munson* was “not such a case” because it lacked that “core of easily identifiable and constitutionally proscribable conduct.” *Id.* at 965–66. The waiver may have “decrease[d] the number of impermissible applications of the statute, but it [did] nothing to remedy the statute’s fundamental defect.” *Id.* at 968. So there was “no reason to limit challenges to case-by-case ‘as applied’ challenges.” *Id.* at 965 n.13.

So too here. California argues the mandate cannot be substantially overbroad because some charities may not be chilled. Resp.Br.1, 17, 28, 38–39. But that argument mistakenly assumes charities who comply have *not* experienced any chilling. Inst. for Free Speech.Br.24–25. It wrongly considers voluntarily disclosing charities because the policy does no "work" as "applied" to them. *City of Los Angeles* v. *Patel*, 576 U.S. 409, 419 (2015) (making the same point about consent to warrantless searches). And it "does nothing to remedy" the mandate's "fundamentally mistaken premise" that a charity's commitment to donor privacy is "an accurate measure of fraud." 467 U.S. at 966, 968.

Second, California says *Munson* is distinguishable because the statute there "directly" restricted speech. Resp.Br.38. But California's mandate is no less direct than the restrictions this Court struck down in *Munson*, *Schaumburg*, and *Talley*.

In *Munson*, the challenged statute "only" prohibited charities from paying fundraisers "more than 25% of the amount raised." 467 U.S. at 950. By California's logic, the statute did not "prohibit speech or association," it just imposed limitations on how much charities could pay their fundraisers.

Applying its earlier decision in *Schaumburg*, this Court rejected that argument. *Id.* at 959–69. *Schaumburg* concluded that because a similar "percentage limitation restricted the ways in which charities might engage in solicitation activity" that ceiling "was a direct and substantial limitation on protected activity." *Id.* at 960 (cleaned up). *Munson* held the same, despite the waiver. *Id.* at 962.

Similarly, in *Talley*, the challenged ordinance only prohibited the distribution of handbills to the extent those responsible for them refused to "print[ ] on them the names and addresses of the persons who prepared, distributed or sponsored them." 362 U.S. at 63–64. By California's logic, that ordinance only imposed a disclosure requirement "aimed at providing a way to identify those responsible for fraud." *Id.* at 64. This Court held the opposite. *Ibid.*

Likewise here, California "bars all [solicitations] under all circumstances" by charities "that do not [disclose] the names and addresses" of their major donors to the State. *Ibid.* "There can be no doubt" that such a requirement "would tend to restrict freedom to [solicit] and thereby freedom of expression." *Ibid.* So like the now-defunct restrictions described above, California's mandate is "void on its face." *Id.* at 65.

California's sidestepping of *Riley* also fails. According to the Attorney General, cases like *Riley* blessed disclosure requirements as less restrictive alternatives. Resp.Br.45. But *Riley* merely suggested that government may "require fundraisers to disclose certain financial information to the State," 487 U.S. at 795, and then make that data public, *id.* at 800. That's because there is no harm in that disclosure, which mirrors the information contained in the Form 990 itself (without Schedule B). Not so for the very real harm caused by disclosing confidential donor information.

C. Even under exacting scrutiny, requiring pre-complaint donor disclosure as a precondition on fundraising is facially unconstitutional.

The Attorney General liberally detours from the Joint Appendix, characterizing his witnesses' conclusory statements as fact. *E.g.*, Resp.Br.30–32. Such reliance on trial *evidence* rather than *findings* invites improper appellate factfinding. While a reviewing court may review historical facts under the clearly erroneous standard, it may not credit evidence contrary to the trial court's plausible fact-finding. *Anderson* v. *City of Bessemer*, 470 U.S. 564, 573 (1985). Otherwise, every federal bench-trial judgment would be subject to appellate second-guessing.

The Attorney General cannot now dispute the district court's findings of historical fact. *Hernandez* v. *New York*, 500 U.S. 352, 367 (1991) (plurality). This is especially so because the self-contradictory statements by California's high-level personnel made the factual contest one of credibility. *Anderson*, 470 U.S. at 575. "[W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Ibid.*

As the United States recognized in its cert. stage brief, none of the district court's findings are "clearly erroneous." U.S.CVSG.Br.19. Thus, the Law Center prevails under any standard. *Id.* at 19–22.[2]

1. Ample evidence supports the district court's finding that pre-complaint donor disclosure is not substantially related to policing fraud.

After a bench trial, the district court was "left unconvinced that the Attorney General's collection of Schedule B forms substantially assists the investigation of charitable organizations." Pet.App.54a. And the court based that conclusion on its own findings of historical fact—each of which supports facial relief and is supported by the record.

i. California never uses charities' Schedule Bs pre-complaint.

- Investigators only review Schedule Bs *after* they receive a complaint. J.A.462–63, AFPF S.E.R.992; Resp.Br.8, 16–17, 30, 33. They do not ever perform random audits to check for fraud using Schedule Bs. AFPF S.E.R.986.
- Since no one ever filed a complaint against the Law Center, California monitored it for years without ever requiring it to file its Schedule B. Pet.App.54a, J.A.266–67.

[2] It is perplexing that the United States now says in its post-administration-change brief that the case should be remanded for more factfinding. U.S.Merits.Br.34. The dispositive facts for the district court's permanent injunction are established.

ii. Even post-complaint, Schedule Bs have limited value.

- As the district court correctly found, the Registry's supervising investigative auditor since 2001, Steven Bauman, "confirmed that auditors and attorneys seldom use Schedule B when auditing or investigating charities." Pet.App.55a.
- Bauman and his audit team identified only five investigations in roughly 540 cases where they recalled using Schedule Bs. Pet.App.55a, J.A.459–60. The Attorney General challenges the district court's interpretation of that testimony. Resp.Br.33. But Bauman confirmed the interrogatory asked for ten examples, he told his team to "review records" and "answer this interrogatory," and they only "came back with five." AFPF J.A.399.
- Bauman himself only remembered using a Schedule B in one investigation during that ten-year period. S.E.R.160. And he could have completed it without it. J.A.461.
- Two witnesses claimed they used Schedule Bs "all the time." Resp.Br.30. But the district court rightly construed that testimony as "nothing more than a convenience and general usage of Schedule B." Pet.App.55a–56a. One witness clarified she just used them to help decide whether to open an investigation. AFPF J.A.413. The other could only identify one specific case where she used a Schedule B. AFPF S.E.R.1000–02, 1009.

- Bauman could not recall a single time a “Schedule B [had] ever been used [as] the triggering document” to open an investigation. J.A.457; S.E.R.159–60.

This evidence establishes a “want,” not a “need,” for prophylactic Schedule B collection.

2. Ample evidence supports the district court’s finding that pre-complaint disclosure is not narrowly tailored.

The district court also found “that the testimony of multiple lawyers within the Attorney General’s office clearly indicate[d] that the Attorney General could have achieved its end by more narrowly tailored means.” Pet.App.57a. That’s right.

i. California can get Schedule Bs post-complaint via other means.

- At trial, the Attorney General conceded investigators “could issue subpoenas or audit letters.” J.A.294–95.[3] “There are other ways to get the information.” J.A.295. They just may not be “as efficient.” *Ibid.*
- Investigators can also just ask. Bauman knew of no case where his Section asked a charity for a Schedule B and did not receive it. J.A.465.

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[3] The Attorney General touts a major investigation of fraudulent fundraising by bogus cancer charities as proving the need for Schedule Bs. Resp.Br.32. But there, the relevant Schedule Bs were obtained by targeted subpoena. Ariz.Br.5.

- Investigators also can obtain Schedule Bs directly from the IRS if they need them. AFPF E.R.592–93; TMLC Ex.919 at 8, 11, 13–14; 26 U.S.C. 6104(c).

ii. California can get the information it needs post-complaint from other sources.

- The record reflects "numerous other means" to obtain the information California wants. Pet.App.56a. These include Form 990 itself, its other schedules, and audited financial statements. J.A.267–68; Pet.App.57a. Accord Nat'l Taxpayers Union.Br.10–14 (discussing plentiful non-Schedule B information).
- The Section also can simply ask the charity how much particular donors gave without demanding the entire Schedule B. J.A.467.

There is no need to burden First Amendment rights when targeted requests and other sources—many already in California's possession—do the job. The pre-complaint disclosure policy fails even exacting scrutiny.

III. California's compelled-disclosure policy is also invalid as applied.

A. To prevail on its as-applied challenge, the Law Center need only show a reasonable probability that disclosure will subject its donors to persecution.

The Attorney General mistakes the as-applied legal standard. Resp.Br.18, 48–49. Under *Buckley*, plaintiffs are exempt from a mandatory disclosure requirement if they "show only a *reasonable probability* that the compelled disclosure of" donors' "names will subject them to threats, harassment, or reprisals from either Government officials or private parties." 424 U.S. at 74 (emphasis added). Accord *Doe*, 561 U.S. at 201; *Citizens United*, 558 U.S. at 367. Potential for harassment is enough.

California focuses on different matters, including whether (1) donors' information "would be exposed to public view," (2) donors would face "reprisals," and (3) donors would be deterred from contributing. *E.g.*, Resp.Br.18, 49. In short, the State demands proof of *actual* public exposure, harm, and deterrence. It then ups the ante, declaring the Law Center must show likely "reprisals from the public" exclusively against its "major donors." Resp.Br.47. *Buckley* held no such thing. 424 U.S. at 74.

NAACP confirms this. This Court reversed a state court's discovery order based on the "*reasonable likelihood* that the [NAACP] through diminished financial support and membership *may be* adversely affected if production is compelled." 357 U.S. at 459–60 (emphasis added). The Court's First Amendment analysis was grounded on disclosure's "possible"

deterrent effect. *Id.* at 460–62. It demanded no proof that First Amendment harm *would* result. And the analysis applies equally to disclosure not made "to the general public." *Shelton*, 364 U.S. at 486; New Civ. Liberties.Br.9–10.

Given our nation's history of officials "abusing disclosed information to target and harass disfavored voices and political rivals," this minimal proof burden makes sense. Protect the 1st.Br.4–5. By arguing the Law Center must show likely reprisals against donors *specifically* listed on Schedule Bs, Resp.Br.47, California urges the kind of "unduly strict" proof requirement *Buckley* rejected. 424 U.S. at 74.

B. The Law Center satisfies the reasonable-probability test.

California fails to grapple with the voluminous record revealing public hostility, harassment, threats, and violence directed against Law Center donors, clients, and staff. TMLC.Br.44–50. The district court rightly held this evidence satisfied the as-applied, reasonable-probability test. Pet.App.61a. The Law Center easily meets that standard.

Buckley draws no distinction between evidence of past or present harassment. 424 U.S. at 74; contra Resp.Br.50 n.18. The record shows why: harassment and threats follow a person and her associates. The ISIS fatwa against Pamela Geller also condemned those who protected her, such as the Law Center. TMLC.Br.47. And amici provide numerous examples of harm happening years after an associational tie was formed. Goldwater Inst.Br.30–31; Pac. Legal Found.Br.13–14; Proposition 8.Br.17.

California says there's no risk of Schedule B public disclosure. Resp.Br.47–48. That's legally irrelevant and defies the record. The Attorney General's well-documented problems, TMLC.Br.14, AFPF.Br.39–42, caused the district court to find that "[d]onors and potential donors would be reasonably justified in a fear of disclosure." Pet.App.63a. No wonder, since California *still* cannot guarantee confidentiality. J.A.290, 295. An as-applied exemption is appropriate.

C. The lack of criminal penalties illustrates California's lack of seriousness about the dangers of disclosure.

Recognizing the dangers of donor disclosure, California points to two general statutory sections that it newly says penalize release of Schedule B information. Resp.Br.10. Neither is availing.

The first section applies only to state "officer[s]," Cal. Gov't Code § 6200, *i.e.* "created by the Constitution or authorized by some statute" and "clothed with a part of the sovereignty of the state," *Bom* v. *Superior Court*, 257 Cal. Rptr. 3d 276, 294 (Cal. Ct. App. 2020). But California entrusts students, seasonal workers, and contractors to process sensitive Schedule B information. TMLC.Br.11. And it is doubtful that even the Attorney General's fulltime employees are "officers." See *People* v. *Rosales*, 27 Cal. Rptr. 3d 897, 901 (Cal. Ct. App. 2005). Equally concerning, section 6200 applies to officers that "[s]teal, remove, or secrete," "[d]estroy, mutilate, or deface," or "[a]lter or falsify" records. Cal. Gov't Code § 6200. Nowhere does it discuss the release of confidential information.

The second provision provides for employee discipline for vague violations such as "[i]nefficiency," "[i]mmorality," and "drunkenness on duty." Cal. Gov't Code § 19572. Being drunk on duty is a far cry from releasing sensitive information. And section 19572 has no criminal penalties and does not even require termination. Cal. Gov't Code § 19570.

Case law and the record flatly contradict the Attorney General's assertion that the section authorizes discipline for negligence. Resp.Br.10. For an employee to "neglect" her duty, she must act "intentionally, designedly and without lawful excuse." *Peters* v. *Mitchell*, 35 Cal. Rptr. 535, 541 (Cal. Ct. App. 1963). The Attorney General's witness confirmed that discipline was not appropriate for inadvertent disclosures. J.A.472–73. Not a single employee received any discipline—even an informal warning—for doing so. J.A.492–93. And under the Attorney General's policies, "inadvertent error" does not even result in "disciplinary proceedings" or "punishment." J.A.471.

California's scheme pales next to the federal regime, which applies to all employees and contractors, 26 U.S.C. 7213(a)(1), includes felony penalties, 26 U.S.C. 7213(a)(1), and an individual cause-of-action, Ctr. for Equal Opportunity.Br.27 (citing 26 U.S.C. 7431). While the Law Center need not prove California *will* disclose, it is easy to see why donors would be chilled, no matter which charity they support.

CONCLUSION

For the foregoing reasons, and those stated in Petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APRIL 2021

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