Nos. 19-251 & 19-255

# In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

*Petitioner*,

v.

XAVIER BECERRA,

*Respondent.*

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

## SUPPLEMENTAL BRIEF FOR RESPONDENT

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(*Additional caption listed on inside cover*)

THOMAS MORE LAW CENTER,

*Petitioner*,

v.

XAVIER BECERRA,

*Respondent*.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**CASES**



**STATUTES**

## TABLE OF AUTHORITIES
## (continued)

**Page**



**OTHER AUTHORITIES**

## ARGUMENT

Federal law requires certain charities to report the names of their major donors to the Internal Revenue Service on form Schedule B as part of their annual return. California requires charities operating within the State to file the exact same Schedule B form, on a confidential basis, with the California Attorney General's Registry of Charitable Trusts for similar regulatory oversight purposes. The invitation brief filed by the United States defends the federal reporting mandate. But it argues that California's parallel requirement is unconstitutional and that petitioners' challenges to that requirement warrant this Court's review. Those arguments are not persuasive.

1. The United States principally contends that the court of appeals applied the wrong standard of scrutiny. U.S. Br. 8-19. But it is difficult to see any material difference between the standard embraced by the United States and the one applied below. According to the United States, "compelled disclosures that carry a reasonable probability of harassment, reprisals, and similar harms are subject to exacting scrutiny." *Id.* at 7. Exacting scrutiny, in turn, calls for "a form of narrow tailoring" (*id.*) that requires "'the strength of the governmental interest [to] reflect the seriousness of the actual burden on First Amendment rights'" (*id.* at 9); that demands a means-ends fit that is "'reasonable'" but not "'perfect'" (*id.* at 16); and that ensures that the compelled disclosure does "not sweep significantly more broadly than necessary to achieve [a] substantial governmental interest" (*id.* at 12). *See also id.* at 9 (compelled disclosure requirements are valid where "the public interest in disclosure outweighs the harm") (internal quotation marks and ellipses omitted). The United States also asserts that "narrow tailoring is to

some degree implicit in the requirement that the governmental interest in the compelled disclosure be 'legitimate and substantial'" because "it is difficult to demonstrate a 'substantial' interest in a broad disclosure scheme when narrower disclosures would be sufficient." *Id.* at 10-11.

The court of appeals held that California's Schedule B filing requirement is subject to "'exacting scrutiny,'" and it understood exacting scrutiny in the same way as the United States. Pet. App. 15a.[1] It recognized that the "strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (internal quotation marks omitted). It examined whether the State's chosen approach swept too broadly. *See id.* at 19a-23a, 29a. And it determined that concerns about overly broad regulation are part and parcel of the substantial-relationship test. *See id.* at 15a-16a (requirement "that the State employ means 'narrowly drawn' to avoid needlessly stifling expressive association" is not "distinguishable from the ordinary 'substantial relation' standard").

The United States ignores the overlap between the court of appeals' approach and its own and asserts that the lower court erred in declining to require an adequate means-ends fit. U.S. Br. 16. But what the court of appeals declined to adopt was "the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny," including the requirement that "the state . . . choose the least restrictive means of accomplishing its purposes." Pet. App. 16a; *see also* Opp. 6,

[1] Citations to the petition and appendix submitted by the Americans for Prosperity Foundation are to "Pet." and "Pet. App." respectively. Citations to the petition submitted by the Thomas More Law Center are to "Law Center Pet."

14-15. And the United States itself agrees that strict scrutiny and its "particularly stringent form of narrow tailoring" do not apply to information-reporting requirements like the one at issue here. *See* U.S. Br. 16.

2. The United States is also incorrect in contending that California's Schedule B requirement fails exacting scrutiny. *See* U.S. Br. 19-22. It acknowledges that States have compelling interests in regulating charities operating within their borders. *Id.* at 20. It asserts that California does not make use of Schedule Bs to advance those interests, *see id.*, but it ignores that legal and audit staff in the Attorney General's Office routinely review Schedule Bs when assessing complaints against charities. C.A. Dkt. 9-3 (Excerpts of Record 559); C.A. Dkt. 9-5 (ER 969, 996-997).[2] The United States also overlooks the extensive record evidence showing the ways in which Schedule B information allows the Attorney General to determine whether charitable entities are misusing charitable assets or otherwise violating the law. Pet. App. 17a-23a; Opp. 22-24. By identifying the donor, the amount of the contribution, and the type of donation received (cash or in-kind), the form provides information that can indicate misappropriation or misuse of charitable funds and can help state investigators determine whether the organization and its donors are engaging in self-dealing. Pet. App. 17a-23a; *see also* C.A. Dkt. 9-3 (ER 574-575, 577-579); C.A. Dkt. 9-4 (ER 715-718); C.A. Dkt. 9-5 (ER 1011-1014, 1058-1061). Those appear to be the same reasons why the United States itself requires charities to "prophylactic[ally]" submit a Schedule B to the IRS each year. U.S. Br. 21; *see also*

[2] Citations to "C.A. Dkt." are to Ninth Circuit case number 16-55786.

*id.* at 14 (arguing that federal donor-reporting requirement was adopted "to 'facilitate meaningful enforcement' of 'new self-dealing rules and other provisions' regulating organizations that choose to claim tax-exempt status") (quoting H.R. Rep. 91-413 (1969)).

California's interests in policing fraud and self-dealing, moreover, outweigh any minimal burden on petitioners' associational interests. *See* Opp. 22-24. The United States argues that California's Schedule B requirement could lead to reprisals if donors' names were revealed to the public. *See* U.S. Br. 19. But Schedule B forms submitted to the state Registry are confidential. *See* Cal. Code Regs. tit. 11, § 310(b). While the State's regulatory prohibition on disclosing Schedule Bs does not itself prescribe sanctions for employees who mishandle or take the forms (*see* U.S. Br. 3), other provisions of state law do, *see, e.g.*, Cal. Gov't Code § 6200. Furthermore, the evidence before Judge Real at trial did not support any claim that California's requirement could lead to public harassment or other negative consequences. *See* Opp. 10, 21. The United States asserts that the district court's findings about the risk of public disclosure were "not clearly erroneous" (U.S. Br. 19), but it does not address the contrary evidence in the record—or explain why the court of appeals, after carefully reviewing the evidence, erred in reaching a contrary conclusion, *see* Pet. App. 34a-38a.

This Court's decisions addressing demands for membership information from the NAACP involved circumstances quite different from this one. *See* U.S. Br. 21-22. In those cases, government officials demanded disclosure of the organization's rank-and-file members at the height of the civil rights movement—in some cases, for disclosure to the public—in the face

of uncontroverted evidence that revelation of members' identities would lead to violence and other reprisals. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Bates v. City of Little Rock*, 361 U.S. 516 (1960). In view of the historical context, it is no surprise that those disclosure demands had nothing at all to do with the governments' purported regulatory interests. [3] Such sweeping and pretextual demands for membership lists are not analogous to a state (or federal) requirement that entities enjoying tax-exempt status provide regulators with limited information about their major donors on a confidential basis, to advance compelling law enforcement and regulatory interests.

c. Finally, the United States fails in its attempt to distinguish its own Schedule B requirement from California's. *See* U.S. Br. 7, 17-18. According to the United States, the IRS Schedule B requirement is constitutional because it is "imposed as a condition of voluntary participation in a tax-benefit program" (*id.* at 8)—that is, because charities must report their major donors in order to obtain an exemption from federal taxation, *id.* at 14. But the same is true in California. *See* Cal. Rev. & Tax. Code § 23703(b)(1) (charity's tax-exempt status "shall be revoked" if it fails to submit required filings to the state Registry). The fact that the California Attorney General's Office is not the

[3] *See Bates*, 361 U.S. at 525-527 (public disclosure of members' names not relevant to application of local tax ordinance that turned not on earnings or income but on nature of the organization's activities); *NAACP*, 357 U.S. at 464-465 (similar with respect to state business-qualification law); *see also Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 547-558 (1963) (rejecting compelled public disclosure of names of NAACP members in investigation into alleged Communist infiltration where there was "no semblance of" nexus between NAACP and "subversive activities").

state tax-collection agency and does not perform a role identical to the IRS is not relevant. *See* U.S. Br. 17-18. Under California law, agencies that administer tax exemptions coordinate with the Attorney General's Office in overseeing charitable entities, *see* Cal. Gov't Code § 12594; and the California Attorney General is responsible for conducting many of the same sorts of oversight and investigative functions that the IRS is tasked with performing at the federal level. *See* Pet. App. 17a-19a; Cal. Gov't Code § 12598; 26 U.S.C. §§ 501(c)(3), 4941, 4958; U.S. Br. 14. There is no reason why California's choice of how to organize its taxing and oversight responsibilities should make any difference to the constitutional analysis. *Cf. Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 364 (2009) ("immaterial how the State allocates funding or management responsibilities between the different levels of government" in determining whether state restriction on local government employers violates the First Amendment).[4]

The United States is correct in asserting (at 22) that California's Schedule B requirement applies to certain charities that are not exempt from state tax. *See* Cal. Gov't Code § 12585; Cal. Code Regs. tit. 11,

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[4] The Eleventh Amendment cases cited by the United States are not on point. *See* U.S. Br. 18 (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997); *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994)). Those cases considered whether an entity should be regarded as an instrumentality of a State for purposes of the State's immunity from suit. *Regents*, 519 U.S. at 429-431; *Hess*, 513 U.S. at 47-49. Here, in contrast, the question is whether a state requirement is "imposed as a condition of administering a voluntary governmental benefit program or similar administrative scheme." U.S. Br. 12. Nothing in the answer to that question turns on the State's internal governance structure.

§ 301. The same is true of the IRS's Schedule B requirement as well. *See* 26 U.S.C. § 6033(d).

3. The United States identifies no other persuasive reason for certiorari. It declines to embrace petitioners' theory that the decision below implicates a "stark" (Pet. 28) or "deep and mature" (Law Center Pet. 35) conflict of authority. It argues only that there is "tension" between the decision below and a handful of circuit decisions from the 1980s involving different sorts of disclosure requirements. U.S. Br. 24. Its brief, however, does not respond to the many reasons why those same cases provide no reason for this Court to grant review. *See* Opp. 16-20.

As for the significance of the question presented, the United States principally contends that the question is important because "California is the most populous State in the union." U.S. Br. 23. That is, of course, indisputable; but it does not distinguish this case from any case involving a California law or policy. The United States fails to identify any real-world harm to charities or their donors arising from California's requirement that charities provide the State, on a confidential basis, the same limited information they already report to the IRS.

## CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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