Nos. 19-251, 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,
v.
XAVIER BECERRA,
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,
v.
XAVIER BECERRA,
ATTORNEY GENERAL OF CALIFORNIA,
Respondent.

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

BRIEF OF THE NONPROFIT ALLIANCE FOUNDATION, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, ASSOCIATION OF FUNDRAISING PROFESSIONALS, AND 123 NONPROFIT ORGANIZATIONS LISTED IN APPENDIX AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI CURIAE*[1]

The Nonprofit Alliance Foundation ("TNPAF") is a charity that works to promote, protect, and strengthen the philanthropic sector through education, coalition building and, when necessary, litigation. Representing the voice of hundreds of nonprofit organizations nationwide, TNPAF educates, informs, and unites the sector and the public in an increasingly complex fundraising and regulatory landscape. Donor privacy is critical to the success of the sector. A thriving nonprofit sector has the resources to meaningfully change the world.

People for the Ethical Treatment of Animals, Inc. ("PETA") is the largest animal rights organization in the world, with more than 6.5 million members and supporters. PETA is dedicated to ending the suffering of animals, particularly such suffering caused by the food industry, the clothing trade, laboratories, and the entertainment industry. PETA works through public education, cruelty investigations, research, animal rescue, legislation, litigation, and protest campaigns to educate and peacefully persuade people and governments to cease practices that involve cruelty to animals. PETA relies on contributions from individual donors to fund its charitable operations.

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[1] Counsel of record for all parties received timely advance notice of intent to file and consented to the filing of this brief. Sup. Ct. R. 37(2)(a). No part of this brief was authored by any party's counsel, and no person or entity other than *amici curiae* or their counsel funded its preparation or submission.

The Association of Fundraising Professionals ("AFP") is the largest community of charitable fundraisers in the world, representing more than 26,000 individuals and their respective organizations. AFP's mission is to advance all aspects of fundraising, including ethics, best practices, equity, research, certification, and advocacy. AFP's *Code of Ethics* is the only enforceable code in the profession. AFP also helped create *The Donor Bill of Rights*, which addresses the importance of donor privacy.

Amici, including the 123 nonprofit organizations listed in the appendix, represent organizations of various missions and sizes across the country who are affected by California's compelled disclosure of confidential donor information. Amici care passionately about ensuring donor privacy for all nonprofit organizations and their supporters. This Court's clarification that the First Amendment indeed requires the government satisfy strict scrutiny before collecting charities' donor lists will not only protect amici's and their donors' constitutional rights to associate and contribute to public discourse, but also allow the rich history of all charities' vital contributions to this country's character and culture to continue into the future.

SUMMARY OF ARGUMENT

In California, charities cannot register to engage in fully protected charitable speech unless they divulge the names, addresses, and contributions of their major donors. Cal. Code Regs. tit. 11, § 301. This compelled disclosure requirement violates the freedoms of speech and association under the First and Fourteenth

Amendments as enshrined in *NAACP v. Alabama ex rel. Patterson ("NAACP")*, 357 U.S. 449 (1958), and *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). The requirement chills the First Amendment rights of all charitable organizations, not just those before this Court.

Many donors prefer to give anonymously, meaning they prefer to keep their names, addresses, and contribution information private. Donors give anonymously for many reasons, such as family, religion, personal values, or manifestations of public hostility toward a particular cause or issue. From the *Federalist Papers* and the *Anti-Federalist Papers* to charitable giving in today's increasingly polarized society, the desire to remain anonymous in one's association and speech on certain political, religious, social, economic and cultural issues remains a cornerstone of First Amendment protection. Charitable organizations must honor donor intent, and they and their supporters should enjoy these indispensable freedoms in all jurisdictions.

Given the California Attorney General's established track record of numerous and regular inadvertent disclosures of the confidential donor information it collected en masse, the risk of loss of privacy is high. In light of these systematic failures to safeguard private donor information, the district court found the Attorney General's "inability to assure confidentiality increases the 'reasonable probability' that compelled disclosure of donors would chill Plaintiff's First Amendment rights. Donors and potential donors would be reasonably

justified in a fear of disclosure given such a context." 19-255 Pet. App. 63a.

As *NAACP* made clear, the disclosure of donor names to a political office of attorney general, which increases the risk of abuse of enforcement power, could be just as devastating as that office's leak of the confidential information to the media or to the public. With the political winds of state attorney general offices shifting from term to term, fears of threats, harassment, reprisals, and even political targeting by government[2] for advocacy on issues of social, economic, religious, and political importance shift as well, and such risks are especially worrisome for controversial issues unpopular at the time.

Because the disclosure mandate chills the First Amendment freedoms of all charities and their supporters, this Court should reverse the Ninth Circuit and facially invalidate the regulation.

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[2] *See, e.g.*, Kelly Phillips Erb, *Timeline of IRS Tax Exempt Organization Scandal*, FORBES (May 7, 2014)(involving political targeting of conservative "Tea Party" charitable organizations by IRS), https://www.forbes.com/sites/kellyphillipserb/2015/03/02/updated-timeline-of-irs-tax-exempt-organization-scandal/?sh=22d3f6c66a6b; *NAACP*, 357 U.S. at 452 (1958)(Attorney General demanded member list to run NAACP out of the state during Civil Rights Era).

ARGUMENT

I. An industry perspective on the charitable sector and donor privacy

Charities are fundamental to American civic life and are stronger in America than in most nations.[3]

The nonprofit sector is essential to our national fabric—without it, who would feed the needy, aid the poor, protect our animals, enrich our arts and cultural lives, and lead our nation's churches, mosques, and synagogues?[4] Grounded in the constitutional principles of freedom of association, freedom of speech, and freedom of religion, charities provide necessary services to those in need that our governments and for-profit entities cannot. *Id.* at 2.

In 2016, the nonprofit sector contributed an estimated $1.05 trillion to the United States economy, comprising 5.6 percent of our nation's gross domestic product (GDP). *The Nonprofit Sector in Brief 2019*, URBAN INSTITUTE, NATIONAL CENTER FOR NONPROFIT

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[3] *CAF World Giving Index* 5 (Oct. 2019), https://www.cafonline.org/docs/default-source/about-us-publications/caf_wgi_10th_edition_report_2712a_web_101019.pdf.

[4] Sarah Hall Ingram, Commissioner, Tax Exempt & Government Entities, Internal Revenue Service, Remarks Before the Georgetown University Law Center Continuing Legal Education: Nonprofit Governance-The View from the IRS (June 23, 2009), https://www.irs.gov/pub/irs-tege/ingram__gtown__governance_062309.pdf.

STATISTICS (June 4, 2020).[5] Charities recognized as exempt under § 501(c)(3) of the Internal Revenue Code accounted for $2.04 trillion in revenue and $1.94 trillion in expenses in 2016, which is approximately three-quarters of the revenue and expenses for the nonprofit sector as a whole. *Id.* Charities also accounted for "just under two-thirds of the nonprofit sector's total assets ($3.79 trillion)." *Id.*

Charitable giving by individuals was an estimated $309.66 billion in 2019 and amounted to approximately 70%[6] of total giving. *Giving USA 2020: Charitable giving showed solid growth, climbing to $449.64 billion in 2019*, GIVING USA (June 16, 2020).[7] Charitable giving by individuals remains "by far the biggest source of giving." *Id.* (internal quotations omitted). Total giving for 2019 climbed to $449.64 billion, up from $431.43 billion in 2018. *Id.* Increased individual giving is the primary reason for that growth. *Id.*

Preliminary measures suggest a significant increase in numbers of donors and dollars contributed for 2020. These funds support an enormous range of voluntary activities from providing health care, shelter, and food to providing public and private education at all levels.

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[5] *Available at https://nccs.urban.org/publication/nonprofit-sector-brief-2019#the-nonprofit-sector-in-brief-2019.*

[6] When giving by individuals through bequests is factored in, total individual giving increases.

[7] *Available at* https://givingusa.org/giving-usa-2020-charitable-giving-showed-solid-growth-climbing-to-449-64-billion-in-2019-one-of-the-highest-years-for-giving-on-record/.

These funds may also support unpopular causes or controversial issues of social, political, and economic importance in an increasingly polarized society. With increased polarization, many donors will not give without anonymity. Donor privacy is essential for continued growth in individual giving and the fundraising success of these charities.

A. Charitable solicitation and the building of a donor file are critical to the survival of our nation's nonprofit organizations and the success of their charitable, educational, or religious programs.

Many nonprofit organizations, including and especially those recognized as public charities exempt under § 501(c)(3), depend on charitable contributions from individuals to fund their educational, charitable, religious, or other exempt purposes. Other sources of support include gifts or grants from foundations and governmental entities and contributions from an organization's members. Gifts from individual donors represent the majority of charitable contributions made in the United States each year.

To raise funds and spread their message, nonprofit organizations engage in charitable solicitation activity through a variety of means, including, but not limited to, mail, email, website, social media, telephone, door-to-door, and distribution of leaflets or handbills. Charities engage in these activities not just to raise money but also to spread the organization's charitable message, create name recognition, and build a donor file. Each contact affords the charity the opportunity to

deliver vital messages raising awareness about their cause and heightening name recognition.

A donor file is a nonprofit organization's most valuable asset. It is a list of the organization's supporters and/or members. The donor file is the lifeline of the organization, a trade secret, and confidential, non-public information. Nonprofit organizations spend decades developing this asset. An organization's donor file includes its major donors, who are the largest contributors to the organization's cause. Major donors are critical to an organization's survival and success. Relationships with major donors require development and cultivation, and those relationships are built on trust and integrity.

Anonymous speech and association by organizations and their supporters has long been enshrined in our nation's history and values, even before their constitutional protection was guaranteed by the First Amendment. Generally, major donors do not want their name and association with a particular issue or cause in the hands of a political office of government or the public for three primary reasons: (1) loss of privacy, (2) if leaked to the public, others would solicit them and perhaps denigrate the organization (or the donor); and (3) the donor may not want his or her support of a particular cause or issue made known to the political office demanding it or to the public (for any number of reasons—e.g., family, religion, modesty, privacy, fear of reprisal personally or professionally, or harassment).

Likewise, nonprofit organizations do not want to divulge their donor list, including and especially their major donors, because it conflicts with their duty to

honor their donors' intent to remain anonymous, and they want to protect their most valuable asset and relationships. If such disclosure were compelled, there would be a "chilling effect" on the First Amendment rights of donors and organizations to speak and associate freely.

B. Charitable solicitation is fully protected speech under the First Amendment.

This Court has long held that the solicitation of charitable contributions is fully protected speech under the First and Fourteenth Amendments. *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 611 (2003); *Riley*, 487 U.S. at 796; *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961-62 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632 (1980).

As this Court explained in *Schaumburg*, charitable solicitation is fully protected speech because "charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Schaumburg*, 444 U.S. at 632. Charitable "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Id.* Accordingly, this Court has accorded heightened First Amendment protection to charitable solicitation. *Id.*

The First and Fourteenth Amendments protect Petitioners' freedom of speech and anonymous association in California and in all jurisdictions. U.S.

CONST. amends. I, XIV. The First Amendment does not protect only speech that is favored by the majority, nor does it eschew unpopular or controversial causes. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989)).

The right of nonprofits to engage in charitable solicitation without state charity regulators unduly burdening the exercise of their First Amendment freedoms is well settled in this Court and inextricably connected to that bedrock principle. *See Riley,* 487 U.S. at 789. Also well settled is the right of donors to associate anonymously with a charity's cause. *NAACP,* 357 U.S. at 463 (striking down Attorney General's demand for charity's member list as it sought to oust the charity from the state for political reasons); *Bates v. City of Little Rock*, 361 U.S. 516, 520-21, 524 (1960) (invaliding city's demand for NAACP's contributor list in politically targeted attack). The sentiments and tolerance of the majority may vary by state and by term as state charity regulators hold temporary political offices (e.g., attorneys general, secretaries of state, or other executives).

Since *NAACP*, states know well that compelled disclosure of an organization's member or donor names and addresses stifles those individuals' ability to "pursue their collective effort to foster beliefs, which they admittedly have the right to advocate" and "may

induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *NAACP*, 357 U.S. at 463. There are many reasons donors choose to give anonymously, and this is even more critical today in the wake of increased cybersecurity concerns and botched enforcement scandals that target certain groups because of political affiliation or ideology.

C. Charitable speech is highly regulated under the many states' schemes of prior restraint with significant filing burdens and costs.

If a charity intends to engage in charitable fundraising activity in any state requiring registration prior to the solicitation of charitable contributions, it must register with that state's attorney general's office or other state charity regulatory official, before it begins soliciting. Presently, 39 states and the District of Columbia broadly require nonprofits to register before soliciting any funds, and to renew their registrations annually.

Charities who solicit nationally may have to file dozens of annual reports, campaign reports, and renewal filings each year, all of which are due at different times throughout the year and require

significant filing fees,[8] thereby driving up the cost of compliance. Some states' annual report filings require a mere copy of the IRS Form 990[9]—a nonprofit's annual information return filed with the IRS—for the most recent fiscal year end. Other states require a more lengthy annual report in addition to the Form 990 and a financial audit prepared by a certified public accountant. Except for California, New York, and New Jersey, all states that require a copy of the Form 990 do not require the Schedule B to the Form 990.

D. California's compelled disclosure of confidential donor information violates the First Amendment rights of all charity registrants and their major donors.

While most state charity registration laws require nonprofit organizations to file Form 990 with their registration filings, no state required the names and

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[8] The estimated filing fees alone for a nonprofit registrant to engage in charitable solicitation nationally is $5,000 annually. The total estimated cost to register with the assistance of an outside registration service provider exceeds $12,000 per year.

[9] Most tax-exempt organizations, including charities, must file the Form 990 information return annually with the IRS. 26 U.S.C. § 6033(a)-(b). Form 990, Schedule B, requires organizations to report the name, address, and amount given by their largest donors. However, to protect donor privacy, the IRS recently discontinued its requirement that non-§501(c)(3) organizations, including social welfare and advocacy organizations, report the names and addresses of donors on Schedule B. 26 C.F.R. § 1.6033-2(a)(2)(ii)(F). Some organizations, such as churches, and small charities reporting less than $50,000 in annual revenue, do not have to file a 990. 26 C.F.R. § 1.6033-2(g).

addresses of an organization's contributors—whether on Schedule B or otherwise—as a condition of registration to engage in fully protected speech until California began doing so in 2010.

To be clear, California's Supervision of Trustees and Fundraisers for Charitable Purposes Act ("the Act"), Cal. Gov. Code §§ 12580, *et seq.*, does not expressly require nonprofit organizations to file Schedule B or any other list of major donors. Rather, it requires nonprofits soliciting in the state to register with the Attorney General and to file annual and periodic reports. Cal. Gov. Code §§ 12581, 12582.1, 12584-86. The Act leaves the content of those reports to the discretion of the Attorney General. Cal. Gov. Code §§ 12586-87. By rule, the Attorney General requires charities to file a copy of "Internal Revenue Service Form 990 . . . together with all attachments and schedules as applicable, in the same form as filed with the Internal Revenue Service." Cal. Code Regs. tit. 11, § 301 (2020).

As Petitioners explained, for many years, the California Attorney General did not require charities to submit Form 990s with Schedule B. The Attorney General's Office "abruptly changed course" in 2010. 19-255 Pet. 5. In 2010, the Attorney General started demanding "the thousands of nonprofits fundraising in California submit their Form 990s along with all attachments, including Schedule B, as part of their annual reports." *Id.* It was not until 2020 that the Attorney General actually amended its regulation to require "attached schedules" of the Form 990 as filed with the IRS. *Compare* Cal. Code Regs. tit. 11, § 301

(2019). The Act itself remains silent as to the compelled disclosure requirement, and the requirement directly conflicts with the First Amendment, this court's precedents, the Internal Revenue Code's nondisclosure rules, and best practices.

II. This Court's precedents require strict scrutiny to analyze California's compelled disclosure of major donors as a precondition to engaging in protected speech.

For the last 60 years, this Court has applied strict scrutiny to compelled disclosures that burden free speech and association outside the election context, including and especially mandates that nonprofit organizations' turn over their confidential donor lists. *NAACP*, 357 U.S. at 465. *NAACP* and its progeny confirmed the First Amendment requires states to provide charities and their donors the proper "breathing space" that "First Amendment freedoms need . . . to survive," *NAACP v. Button ("Button")*, 371 U.S. 415, 433 (1963), and that government may regulate in this area only if it has a "compelling" interest and "only with narrow specificity." *Id.*

To quote an amicus submission at the certiorari stage, "[t]his is a case about charitable solicitations," Br. of Institute for Justice, at 4, and not campaign finance disclosures in the election context. California's challenged practice of requiring disclosure of a charity's major donors has nothing to do with electioneering.

The 115,000[10] nonprofit organizations subject to this unconstitutional burden on speech and association do not engage in electioneering. In fact, § 501(c)(3) prohibits charities from engaging in activities to support or oppose candidates for elective public office.

A. The Ninth Circuit erred in applying the wrong level of scrutiny to protected speech and association.

The Ninth Circuit applied the wrong level of First Amendment scrutiny to analyze California's compelled disclosure requirement. Applying the test for "exacting scrutiny" that this Court has limited to campaign finance disclosures in the election context, the Ninth Circuit ignored *NAACP*, which sets forth the correct strict scrutiny standard applicable in this charitable speech case, and erroneously concluded that California's compelled disclosure requirement is constitutional as applied.

Further, the Ninth Circuit declined to hear petitioners' facial challenge because it felt it was bound by the same erroneous test and conclusion that it reached in an earlier case challenging the same disclosure requirement. 19-251 Pet. App. 39a-40a (citing *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1315-17 (9th Cir. 2015)). The Ninth Circuit ignored the substantial trial records before it and rewrote the facts to support its decision. *See* 19-255

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[10] Attorney General's Guide for Charities, CAL. DEP'T OF JUSTICE, CHARITABLE TRUSTS SECTION 1 (Jan. 2019), https://www.oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf.

Pet. App. 109a (Ikuta, J., dissenting from the denial of rehearing *en banc*, joined by Callahan, Bea, Bennett, and R. Nelson, JJ.); Br. of Free Speech Coalition, et al., at 10 n.10. As the five dissenting judges in the *en banc* proceeding noted, the Ninth Circuit stated its review of these cases was for "clear error"; however, instead, it developed its own version of the facts contrary to the manifest weight of the evidence before it, ignored Petitioners' arguments, and evaded the facial challenge.

B. Both the *NAACP* line of cases and the *Riley* line of cases in the charitable speech and association contexts require strict scrutiny in this case.

As the Institute for Justice explained well in its amicus brief at the certiorari stage, "[w]hen reviewing laws that burden charitable solicitation or require charities to disclose to the government facts about their private associations, this Court has consistently applied the very highest level of judicial scrutiny, upholding those burdens only if they are *narrowly tailored* to serve a *compelling government interest*." Br. of Institute for Justice, at 18-19 (emphasis added); *Riley*, 487 U.S. at 788-89; *NAACP*, 357 U.S. at 463. Importantly, the Institute for Justice also clarified the varying parlance in some of these charitable speech cases over the years:

> the Court has called this standard "exacting scrutiny," but the elements of this standard are synonymous with what this Court has elsewhere called "strict scrutiny." *Compare Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015) ("We

> have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest."), *with Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) ("[C]ontent based restrictions on speech . . . can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (internal quotation marks omitted)) . . . In charitable-solicitation cases, this Court has used "exacting scrutiny" synonymously with strict scrutiny.

Br. of Institute for Justice, at 19, 21.

Lower courts across the country have long followed this Court's precedents, subjecting prophylactic rules that unduly burden charitable solicitation to strict First Amendment scrutiny. *Id.*; *Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 212 (5th Cir. 2011)(applying strict scrutiny to Texas law regulating charitable solicitation); *Planet Aid v. City of St. Johns*, 782 F.3d 318, 328-29 (6th Cir. 2015)(applying strict scrutiny to ordinance regulating charitable solicitation); *Nat'l Fed'n of the Blind v. Norton*, 981 F. Supp. 1371, 1373 (D. Colo. 1997)(applying strict scrutiny to Colorado Charitable Solicitations Act). If there was any doubt as to the controlling standard of First Amendment scrutiny in charitable solicitation cases, this Court resolved that in *Reed* and clarified

that strict scrutiny is the rule in charitable speech cases.[11]

III. California's compelled disclosure requirement fails strict scrutiny, and because it is overly broad in its application to all charities, it is facially unconstitutional.

Overbroad regulations are facially unconstitutional because they are not narrowly tailored to further the state's asserted interest. *Munson*, 467 U.S. at 968-69. "Where, as here, a statute imposes a direct restriction on protected First Amendment activity and where the statute's defect is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Id.* Such statutes are facially unconstitutional because "every application" creates "an impermissible risk of suppression of ideas." *Forsyth Cty. v. Nationalist Movement,* 505 U.S. 123, 129-30 (1992); *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984); *see also Broadrick v.*

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[11] Under *Reed*, laws that target charitable solicitation are content-based because they regulate based on subject matter and/or topic of charitable speech. *See Reed,* 135 S. Ct. at 2230; *Planet Aid*, 782 F.3d at 328-29 (pre-*Reed* but reaches the same conclusion required under a *Reed* analysis). Content-based regulations of speech are subject to strict scrutiny. *See id., Riley*, 487 U.S. at 795. *Reed* thus affirmed longstanding prior precedent applying strict scrutiny to charitable solicitation laws and explained how and why we got there.

Oklahoma, 413 U.S. 601, 612 (1973). Such is the case here.

A. The disclosure requirement is overbroad such that in all its applications the statute creates an unnecessary risk of chilling free speech.

The California Attorney General's prophylactic rule requiring disclosure of confidential donor information on Schedule B by all nonprofit registrants in California is not limited in its application to Americans for Prosperity and Thomas More Law Center. The California disclosure requirement applies to all 115,000[12] (or more) charities registered to solicit charitable contributions in California as of 2019, including most amici.

Because the disclosure mandate unduly burdens "these indispensable liberties" of speech and association, *NAACP*, 357 U.S. at 461, and creates an unnecessary risk of chilling free speech and association in all its applications to charities not before the Court, *Munson*, 467 U.S. at 968-69, this Court should reverse the Ninth Circuit's decision and facially invalidate the compelled disclosure requirement.

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[12] *Supra* n.10.

B. The compelled disclosure of charities' confidential donor information fails strict scrutiny and is facially overbroad because it risks the suppression of ideas and association in all possible applications.

California's requirement that charities disclose their major donors on Schedule B to register to solicit charitable contributions in the state fails strict scrutiny because it is not narrowly tailored to further a compelling state interest. The state asserts its interest lies in protecting the public from charitable fraud. However, the compelled disclosure of confidential donor information from all 115,000 charities registering to engage in protected speech in California, including major donors outside the State of California, has no substantial relationship to preventing fraud in California. It does nothing to prevent fraud. *Id.* at 967.

Equally problematic, the requirement operates on the assumption that every registering charity is guilty of fraud until proven innocent. Such prophylactic rules burdening charitable speech have consistently been stricken by this Court as facially overbroad. *Schaumburg*, 444 U.S. at 637 (invalidating broad, prophylactic rule burdening charitable speech, and noting that treatment of all charities as if they are suspected of fraud is constitutionally impermissible); *Riley*, 487 U.S. at 800 (striking down "prophylactic, imprecise, and unduly burdensome rule" governing charitable solicitation where "more benign and narrowly tailored options are available"); *Button*, 371 U.S. at 438 ("broad prophylactic rules in the area of

free expression are suspect. Precision of regulation must be the touchstone. . . .").

Further, the state admitted, and the district court found, that charities' confidential donor information is not necessary to register the 115,000 charitable organizations applying to engage in a fully protected speech activity, and that the requirement is merely one of convenience. 19-255 Pet. App. 66a. The amicus brief of 14 other states confirms that such private, confidential data is not needed to carry out a state's registration process. Br. of Arizona, et al., at 8, 10.

Donor information is equally unnecessary for the Attorney General's enforcement of the state's charitable solicitation laws. *Id.* In fact, the district court found that "the attorney general was hard pressed to find a single witness who could corroborate the necessity of Schedule B forms in conjunction with their office's investigations." 19-251 Pet. App. 44a. To that end, the district court found that out of 540 investigations of charitable fraud over ten years, the Attorney General's Office had used Schedule B information in only five cases, and even then admitted it could have obtained the same data in other more narrowly tailored ways, such as through its subpoena power. *Id.* at 45a.

Attorneys overseeing such investigations further testified that successful investigations can be completed without Schedule B and that the same information can be obtained through less restrictive means. 19-255 Pet. App. 57a. The "testimony of multiple lawyers within the attorney general's office clearly indicate that the attorney general could have

achieved its end by more narrowly tailored means." *Id.* Finding, therefore, that it is "indeed possible for the attorney general to monitor charitable organizations without Schedule B," *id.* at 54a, the attorney general is limited in pursuing its interests "by means which do not 'broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Id.* at 56a. The disclosure requirement thus fails the narrowly tailored prong in all possible applications. 19-255 Pet. 28.

In addition, the district court spent significant time noting the numerous inadvertent disclosures of confidential donor information by the attorney general in contravention of the privacy protections afforded by the First Amendment, I.R.C. § 6104, and assurances from that office that steps were in place to prevent disclosure. 19-251 Pet. App. 51a-53a; 19-255 Pet. App. 52a, 58a, 61a-62a. "[T]aken in the context of a proven and substantial history of inadvertent disclosures," the district court found "this inability to assure confidentiality increases the 'reasonable probability' that compelled disclosure of Schedule B would chill Plaintiff's First Amendment rights. Donors and potential donors would be justified in a fear of disclosure given such a context." 19-255 Pet. App. 62a-63a.

Because the compelled disclosure fails strict scrutiny; and it is overbroad in its chilling of First Amendment freedoms, this Court should reverse the Ninth Circuit and facially invalidate the mandate. Charities should not be forced to file an as-applied challenge and prove threats, harassment, and reprisals

to free themselves of California's unconstitutional burden on their First Amendment rights to speak freely and associate anonymously. *Munson*, 467 U.S. at 965 n.13 ("there is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face and therefore in all its applications falls short of constitutional demands."). That superfluous requirement of hundreds of individual legal challenges[13] defies the very purpose and protection of the freedom of speech and association and directly conflicts with this Court's precedent in the *Riley* line of charitable solicitation cases.

C. California's compelled disclosure of major donors conflicts with charities' best practices and a longstanding regulatory framework that protects donor privacy.

Protecting the privacy of donors is paramount to any nonprofit organization; it ensures that donors feel secure in entrusting them with their identities and their private contributions and support for particular causes or issues. The possibility of repeat donations gives charities a strong incentive to stringently protect donor information, including and especially from overreaching demands of political offices that regulate charitable solicitation.

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[13] Requiring each charity to bring an individual as-applied challenge redirects charitable assets from furthering the organization's exempt purposes to instead defending the constitutional freedoms denied each organization not before the Court.

1. Charities, organizations that rate charities, and fundraising professionals have established best practices and rules providing for donor privacy and its protection.

Best practices adopted by the nonprofit sector encourage charities to implement and maintain privacy policies and a Donor Bill of Rights that sets the standards for the organization's fundraising activities and ensures that donor intent is honored.

For example, Boardsource, a leader in best practices and board governance training, explains that a Donor Bill of Rights "outlines the donor's right to receive proper recognition, gain access to the organization's financial statements, obtain information on how funds are being distributed, *and stay anonymous if desired.*" *Financial and Fundraising Issues-FAQs*, BOARDSOURCE (emphasis added), https://boardsource.org/resources/financial-fundraising-issues-faqs/. Boardsource confirms that some donors simply prefer to give anonymously, and it lists the benefits to anonymous giving. Id. In its *Handbook of Nonprofit Governance*, Boardsource advises "[w]hen a donor wishes to remain anonymous, the organization must respect the donor's wishes . . . ." BOARDSOURCE, *The Handbook of Nonprofit Governance* 174 (2010).[14]

The Association of Fundraising Professionals publishes a Donor Bill of Rights and Code of Ethics to guide nonprofits in fundraising activities. The Donor

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[14] *Available at* http://gife.issuelab.org/resources/19261/19261.pdf.

Bill of Rights states donors have the right "to be assured that information about their donations is handled with respect and with confidentiality to the extent provided by law." *The Donor Bill of Rights*, ASSOCIATION OF FUNDRAISING PROFESSIONALS, https://afpglobal.org/donor-bill-rights.

Independent Sector, another respected leader in industry best practices, says the following on the subject of donor privacy:

> Donor privacy is a critically important principle for nonprofit organizations. It enables potentially controversial or less popular causes to receive financial support from individuals without posing a public risk to donors. Currently, 501(c)(3) charitable organizations and 501(c)(4) social welfare organizations are permitted to protect the privacy of their donors and prevent them from being made public.

Donor Disclosure, INDEPENDENT SECTOR, http://independentsector.org/policy/policy-issues/donor-disclosure/.

The California Attorney General's Office also publishes its own *Attorney General's Guide for Charities*, which sets forth best practices for nonprofits that operate or fundraise in California. *See Attorney General's Guide for Charities*, *supra* n.10. The Guide states: "Find out what practices the fundraising professional implements to protect donor privacy, and who is responsible for performing security data breach notification as required by law." *Id.* at 71.

Ironically, the California Attorney General's best practices require nonprofits to know whose responsibility it is to provide notification of security data breaches, yet the Attorney General failed to notify any of the 1,800 charities whose confidential donor information was leaked by that office when it inadvertently published Schedule Bs on its website. 19-251 Pet. 9. Nor did the Attorney General notify any of the charities whose confidential Schedule Bs were made searchable on its website due to a security data breach. *Id.* Also, ironically, the Attorney General's failure to notify individuals whose personally identifiable information was released violated California's own data breach notification law. Cal. Civ. Code § 1798.

Best practices also require charities to invest in adequate cybersecurity measures. Charities are well-versed in the need to "assess the risks of a data security breach, and protect...data from unauthorized disclosure." *Cybersecurity for Nonprofits*, NAT'L COUNCIL OF NONPROFITS, https://www.councilofnonprofits.org/tools-resources/cybersecurity-nonprofits. Best practices require nonprofit organizations to implement data protection, management, and security standards respecting donor privacy to ensure the confidentiality of donor information and to protect against cybersecurity threats.

In addition to best practices, charities are "graded" by various rating organizations and watchdog groups based on a myriad of criteria, including how donor information is handled and secured. These rating organizations and watchdog groups directly influence

how potential donors spend their money by informing the public about which charities are more "worthy" to donate to based on how well they implement industry best practices. Accordingly, every charity stands to lose part or all of its donor database (and potential future donors) if it garners a negative review or rating for failure to implement best practices regarding donor privacy and cybersecurity measures.

For example, Charity Navigator's methodology for ranking a nonprofit organization under industry best practices takes into account a charity's privacy policy, and the desire of donors to have their information kept confidential. *How Do We Rate Charities' Accountability and Transparency?*, CHARITY NAVIGATOR, https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1093. Potential harms from disclosure of donor information "can be minimized if the charity assures the privacy of its donor lists." *Id.*

Similarly, CharityWatch reports on a charity's privacy policy as an informational benchmark for potential donors. *See Our Charity Rating Process*, CHARITYWATCH, https://www.charitywatch.org/our-charity-rating-process. It grades a charity based on the strength of its privacy policy and provides donors with a clear picture of how well a charity protects its confidential donor information. *Id.* Watchdog organizations like Charity Navigator and CharityWatch require charities to protect donor privacy.

To succeed in the marketplace of ideas, charities must safeguard the confidential information of their

supporters, including and especially their major donors.

2. Federal tax laws protect donor information from disclosure to the public and to the states.

The Internal Revenue Code requires that Form 990 filers make their returns available to the public upon request, with one important exception: Schedule B. *See* 26 U.S.C. § 6104(d)(3)(A)(exempting charities from having to disclose "the name or address of any contributor"); 26 C.F.R. § 301.6104(d)-1(b)(4)(ii)("the term annual information return *does not include the name and address of any contributor to the organization*")(emphasis added); I.R.S. Notice 88-120, 1988-2 C.B. 454 (the requirement to make an annual information return available to the public "applies to an exact copy of the original Form 990 and all schedules and attachments filed with the Internal Revenue Service *except that the required disclosure does not include the names and addresses of contributors to the organization*")(emphasis added). Charities thus "must publicly disclose most of their tax return, *see* 26 U.S.C. § 6104(d)(1), but they are 'not required to publicly disclose their donors.'" 19-251 Pet. 6 (quoting *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014)(plurality opinion); 26 U.S.C. § 6104(d)(3)(A). As Petitioners explained, "a charity's Form 990 is public, but its Schedule B is not." *Id.*; 19-255 Pet. 7.

Moreover, under 26 U.S.C. §§ 6104(b) and 6104(c)(3), Congress forbids the IRS from disclosing the "name or address of any contributor" listed on Schedule B to anyone, including to state regulators. 19-255 Pet.

6-7; 19-251 Pet 6. Violations of this nondisclosure rule result in significant civil and criminal penalties. *Id.*

As petitioners explained, the legislative history surrounding the relevant federal statutory protections precluding disclosure of donor information is grounded in the constitutional interest of protecting donor privacy. "Congress explicitly provided for donor privacy 'because some donors prefer to give anonymously' and because 'requir[ing] public disclosure in these cases might prevent the gifts.'" 19-251 Pet. 6 (quoting S. Rep. No. 91-552, at 53 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2081).

3. States have successfully registered charities to solicit charitable contributions for decades without the need for donor disclosure.

Unlike the IRS, which already polices charities for potential self-dealing, excess benefit transactions (including those with substantial contributors),[15] related party transactions, improper loans, expenditures, and accounting for all things including non-cash charitable contributions, the states do not have analogous tax rules to enforce—certainly not in the context of charitable solicitation. States do not need Schedule B information, and California admits it has no routine use for it. Br. Arizona, et al., at 10. Indeed, for more than thirty years, all states that regulate charitable solicitation proved they were able to successfully do so without "demanding unfettered

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[15] *See* I.R.C. § 4958.

access to the private details of charities' associations with their donors." Br. of Institute for Justice, at 2.

Indeed, some states, such as Florida, which has a strong interest in protecting donors from fraud, expressly protect donor information from disclosure to state government by statute. Under Fla. Stat. § 496.407(2)(a), a charity that submits its Form 990 with its annual registration renewal "may redact information that is not subject to public inspection pursuant to 26 U.S.C. s. 6104(d)(3) before submission." Not only is confidential donor information not needed for state charitable solicitation registration, charities can, and best practices dictate they should, refuse to provide confidential donor information to state political offices, such as the attorney general, absent compulsory process.

IV. Effects on Charities

Because California's compelled disclosure requirement violates donor privacy, it causes irreparable harm to nonprofit fundraising and to the nation's charitable sector.

A. California demonstrably failed to protect the confidential donor information in its custody.

California's track record on the confidentiality of donor information—whether on Schedule B or otherwise—is downright alarming. The district court identified numerous failures by the California Attorney General's office to protect confidential donor information. The Attorney General's "inability to keep confidential Schedule Bs private is of serious concern,"

as it "systematically failed to maintain the confidentiality" of such forms. 19-251 Pet. App. 51a. The Attorney General's failures here amounted to far more than isolated incidents. Rather, "the amount of careless mistakes made by the Attorney General's Registry is shocking." *Id.*

In particular, at one point the Attorney General's office allowed 1,800 Schedule Bs to be available for public access on its official website. *Id.* at 123a. This included the names and addresses of thousands of donors, all of which were meant to be kept private. Even the Attorney General's investigation of the matter admitted "posting that kind of information publically could be very damaging" to many of the organizations at issue. *Id.* at 52a.

The district court also was unmoved by the Attorney General's remedial steps in the wake of this breach. "Once a confidential Schedule B has been publically disseminated via the internet, there is no way to meaningfully restore confidentiality." *Id.* at 53a. There is no way to claw it back. The Attorney General's assurances of updated confidentiality practices were "irreconcilable" with the "pervasive, recurring pattern of uncontained Schedule B disclosures." *Id.* at 52a. In light of the Attorney General's history of "completely violating" the confidentiality of Schedule Bs, its "assurances that a regulatory codification of the same exact policy will prevent future inadvertent disclosures rings hollow." 19-255 Pet. App. 62a.

Further, the Attorney General admitted that its registry "is underfunded, understaffed, and underequipped when it comes to the policy surrounding

Schedule Bs." 19-251 Pet. App. 52a. "Underfunded, understaffed, and underequipped" are hardly three adjectives synonymous with effective protection of confidential information. It is doubtful that donors would be comforted by knowing that their confidential information is being processed and held under such paltry conditions. *Id.*

It should be noted that these breaches of confidentiality by the Attorney General's office did not happen in a vacuum. They come in an era when cyber hacks of governmental organizations and corporations alike are increasingly common. Massive data breaches involving Equifax, Yahoo!, Capital One, Target and Sony have made headlines, and put the confidential data of millions at risk.[16] Recent security breaches of California's government agencies are no exception. These include the breach of the California Employment Development Department,[17] resulting in losses of

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[16] *Equifax Data Breach Settlement*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement (last visited Feb. 12, 2021); Brett Molina, *Capital One data breach: A look at the biggest confirmed breaches ever*, USA TODAY (Jul. 30, 2019), https://www.usatoday.com/story/money/2019/07/30/capital-one-data-breach-among-biggest-ever/1865821001/; Andrea Peterson, *The Sony Pictures hack, explained*, WASH. POST (Dec. 18, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/12/18/the-sony-pictures-hack-explained/.

[17] Josh Lyle & Mike Bunnell, *EDD fraud could cost average California family thousands of dollars, said Rep. Tom McClintock*, ABC10.COM (Feb. 15, 2021), https://www.abc10.com/article/money/edd-fraud-cost-taxpayers-rep-mcclintock/103-a10a297c-04c2-44e3-b712-46fe88a02b2f.

billions of dollars in unemployment insurance claims, and a breach of the California Department of Motor Vehicles, resulting in the exposure of millions of Californians' private information.[18] Given the current climate, where it is becoming harder and harder to protect confidential information, the requirement to disclose donor information of Schedule B presents a massive risk of loss of privacy. This makes unpopular charities and those who advocate with respect to controversial issues especially vulnerable in our increasingly polarized community.

This massive risk, when coupled with the Attorney General's systemic failures to actually protect confidential information, is particularly egregious because the Attorney General's office rarely uses Schedule Bs to conduct its responsibilities pertaining to charitable organizations. The Attorney General "does not use the Schedule B in its day-to-day business," and "seldom use[s] Schedule B when auditing or investigating charities." 19-251 Pet. App. 45a.

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[18] *Security Breach May Have Exposed Millions Of California DMV Vehicle Registration Records*, CBS SF (Feb. 17, 2021), https://sanfrancisco.cbslocal.com/2021/02/17/security-breach-exposes-millions-of-california-dmv-vehicle-registration-records/.

B. The threat of misuse looms larger when the states have no routine need for information on individual donors to enforce their charitable solicitation laws.

The record is clear: the Attorney General has no genuine need for Schedule Bs. The office routinely conducts successful investigations into charitable organizations without the need for a Schedule B. The record "lacks 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." 19-251 Pet. App. 47a (admitting Schedule B used in only five of 540 investigations over ten years). Even in the five instances where a Schedule B was used, (a) it was unclear whether they were even un-redacted Schedule Bs, and (b) the relevant information in such Schedule Bs "could have been obtained from other sources." *Id.* at 45a.

Further, the state listed each Petitioner "as an active charity in compliance with the law" for ten years, accepting its annual registration for each of those years without Schedule B. *Id.* at 42a; 19-255 Pet. App. 52a. The Attorney General cannot reasonably claim it has a genuine need for Schedule Bs given how seldom it actually uses the form.

In addition, fourteen states with laws regarding charitable solicitation have agreed there is no routine need for information about individual donors to enforce such laws. *See* Br. of the State of Arizona, et al., at 10. These states note that 47 states and the District of

Columbia are able to effectively supervise charities in (or soliciting in) their jurisdiction without requiring confidential donor information, and that the "lack of donor disclosure requirements has not prevented them from exercising oversight of non-profits that solicit donations within their jurisdictions and investigating, prosecuting, and deterring fraudulent activities." *Id.* at 6-7. Furthermore, if the need to acquire an organization's donor information emerges, then the states are free to seek a targeted subpoena pursuant to their investigative powers. *Id.* at 7.

For example, the states highlight an occasion where all 50 states "joined in a civil enforcement action in Arizona against four sham cancer charities and the individuals who ran them." *Id.* at 7. California's Attorney General used this action as an example of one of the few times that a Schedule B was used in an investigation. However, the Schedule B was obtained via a targeted subpoena, and not pursuant to any annual registration filing. *See id.* This further shows how little the Attorney General actually needs to enforce its Schedule B requirement against all registered charities.[19]

Because the Attorney General has such little actual use for Schedule Bs, a reasonable person might ask, "If they do not need the information to enforce solicitation laws, then why do they want it?"

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[19] Requiring the Attorney General to seek a subpoena to acquire a Schedule B would better protect the rights of the charitable organizations, giving them a fair opportunity to resist such subpoena within the confines of the judicial system.

C. Since California adopted this practice, two other states have followed; and more will likely follow suit, even though there is no need for such information.

If the Court affirms the Ninth Circuit's decision, more states may follow California's lead. Br. of United States, at 23. New York and New Jersey have already done so. Were more states to require an unredacted Schedule B, the already substantial chance that the confidential donor information of myriad charities will be inappropriately made available to the public will only increase.

Given California's abysmal track record, if other states follow its lead, it is unreasonable to expect donor information to remain confidential. With data breaches of even national security and high-level corporate data becoming increasingly common, how can we expect regulators' storage of charities' confidential data on their websites (and off) to remain secure?

If the Ninth Circuit's decision is not reversed, the record makes clear that major donor names likely will be exposed. That will result in donors' reluctance to give and/or pirating by other groups. Some organizations have already decided not to solicit contributions in California, New York, and New Jersey for fear of harassment or reprisal, and expanded collection of such data only increases the risk of a loss of privacy.

Compelled disclosure of charitable organizations' major donors by state attorneys general is destructive not only to civil liberties, but also to charities' ability to

raise funds to support their causes. As Philanthropy Roundtable explained, "[d]onor anonymity is too important a First Amendment right to be sold at so cheap a price." Br. of Philanthropy Roundtable, et al., at 18.

CONCLUSION

For the reasons stated above, this Court should reverse the Ninth Circuit's decision and find the donor disclosure requirement facially unconstitutional.

Respectfully submitted,

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APPENDIX
List of *Amici*

AHC Inc.
American Leadership Forum – Great Valley Chapter
America's Promise Alliance
Amyloidosis Foundation
Animal Legal Defense Fund
Animal Welfare League of Arlington
Association of Fundraising Professionals (AFP) – NYC Chapter
AFP – Westchester NY
AFP – NW Ohio Chapter
AFP – Hampton VA Chapter
Association of the Miraculous Medal
Aura Home Women Vets
Avenidas
Bashor Children's Home
Best Friends Animal Society
Bethesda Lutheran Communities Inc.
Brothers of the Christian Schools – Dist. of Eastern North America
Busted Halo
Catholic Charities of La Crosse
Catholic Medical Mission Board
Central Florida Council, BSA
Central West Ballet
Charity Navigator
Chesapeake Bay Foundation
Children to Love International
Children's Museum of Evansville
Christian Appalachian Project
Chronic Disease Fund
Community Foundation of South Lake County Inc.

Concordia University – Nebraska
Concordia University – St. Paul
Congregation of the Mission – Western Province
Congregation of the Sacred Hearts – US Province
Connecticut Humane Society
Council for Advancement and Support of Education (CASE)
Defenders of Wildlife
Disabled American Veterans
Divine Word College
Doctors Without Borders/Medecins Sans Frontieres
Early Learning Focus
Edmundite Missions
Empower Hope
Farm Sanctuary
Feeding America – Eastern Wisconsin
Food for the Poor
Franciscan Sisters OLPH
Fuller Center for Housing of Greater New York City
Global Outreach International
Global Wildlife Conservation
Good Days
Heritage University
Historic Districts Council
Humane Society of Charlotte
Humane Society of Utah
Immaculate Heart Retreat Center
Inprint
Institute for Community Living
Institute of the Blessed Virgin Mary – US Province
International Rescue Committee
International Society for Animal Rights
Kappa Alpha Educational Foundation
KUAC Friends Group – NPR

Legionaries of Christ
Loaves & Fishes, Inc.
Lowville Food Pantry, Inc.
Marketing EDGE
Mercy For Animals
Messianic Vision, Inc.
Miracle Flights
Missionary Sisters of the Most Sacred Heart of Jesus
Montgomery County Family YMCA
NARAL Pro-Choice North Carolina
National Cancer Assistance Foundation
National Tuberous Sclerosis Association, Inc.
National Wildlife Federation
Nonprofit Connect
Nonprofit Financial Sustainability Foundation
Nonprofit Leadership Alliance
Operation Food Search
Ourganda
Pacific Crest Trail Association
Paralyzed Veterans of America
Pathfinder International
PBS Reno
PETA Foundation
Pi Kappa Alpha Foundation
Pioneers – USA
Potomac Conservancy
Rising Ground, Inc.
Salesian Missions
Sigma Nu Educational Foundation
Society of the Divine Word – Chicago Province
Society of the Little Flower
Southern Poverty Law Center
Southfield School
Southwest Chicago Christian School Association

St. Benedict's Prep
St. Labre Indian School
Students for Live of America
Support Our Aging Religious (SOAR!)
Switch 4 Good
Syria Shriners
The Animal Defense Partnership
The Good Food Institute, Inc.
The Haven of Transylvania County
The Marist Brothers
The National Children's Cancer Society
The Nature Conservancy
The Nonprofit Alliance
The Workers Circle
Tri Delta Foundation
Trinity Missions
United States Catholic Mission Association
University of Illinois
UrbanPromise Wilmington
Virginia Museum of Natural History Foundation
Western Tidewater Free Clinic, Inc.
Winona Community Foundation
Wisconsin Right to Life
Women's Sports Foundation
YMCA of Rock River Valley
Zeta Psi Educational Foundation
Zionist Organization of America