

Nos. 19-251 & 19-255

IN THE
Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,
Petitioner,

v.

MATTHEW RODRIQUEZ,
Respondent.

THOMAS MORE LAW CENTER,
Petitioner,

v.

MATTHEW RODRIQUEZ,
Respondent.

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

**BRIEF OF THE CALIFORNIA ASSOCIATION OF
NONPROFITS AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

DANIEL HEMEL
UNIVERSITY OF CHICAGO
LAW SCHOOL
1111 East 60th Street
Chicago, IL 60637
(773) 834-3255
dhemel@uchicago.edu

ANNA-ROSE MATHIESON
Counsel of Record
CALIFORNIA APPELLATE
LAW GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700
annarose@calapplaw.com

Counsel for Amicus Curiae

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**BRIEF OF THE CALIFORNIA ASSOCIATION
OF NONPROFITS AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

The undersigned respectfully submits this amicus curiae brief in support of Respondent.¹

INTEREST OF AMICUS CURIAE

The California Association of Nonprofits (CalNonprofits) is a policy alliance of more than 10,000 member organizations that works to protect and enhance the ability of California's nonprofits to serve communities across the State. CalNonprofits submits this brief in order to share its members' unique perspective as both the subjects of the State's Schedule B reporting requirement and the beneficiaries of the California Attorney General's efforts to enhance public confidence in the nonprofit sector.

¹ All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Trust is the lifeblood of the nonprofit sector. Before members of the public will contribute their time and money to charity, they must trust that nonprofit organizations will apply those resources toward their stated missions. Before government agencies will partner with the nonprofit sector in the delivery of vital services, they must trust that nonprofit organizations will be faithful stewards of public funds. Until quite recently, most nonprofit organizations were organized as charitable trusts—a name that underscored the importance of public confidence. Even as organizational forms have evolved, the centrality of trust to charity has remained a constant.

In California, as in every other State, the Attorney General is the protector of the public's trust in the nonprofit sector. The Attorney General has a duty to ensure that assets contributed to charity are used in accordance with the purposes for which they were donated. The Attorney General also is charged with safeguarding the public against fraudulent and deceptive charitable appeals. The Attorney General's charitable trust protection duties date back to sixteenth century England, when the Crown's Attorney General wielded the sovereign's *parens patriae* power to protect subjects who were unable to defend themselves. Five centuries later and an ocean away, State Attorneys General across the United States still carry primary oversight and enforcement responsibility with respect to the nonprofit sector.

In order to execute these duties, the Attorney General needs to be able to identify donors who have made

substantial contributions to charities and the amounts they have given. Attorneys General in California and New York—the two States with the largest number of active charities—collect this information by requiring organizations to submit copies of their annual federal Form 990 series filings, including Schedule B, to a state registry. Schedule B reports the names, addresses, and total contributions of certain large-dollar donors, along with brief descriptions of any non-cash property that these donors contributed. For charities such as Americans for Prosperity Foundation and Thomas More Law Center that normally receive a substantial part of their support from the general public, Schedule B requires the organization to list only donors whose contributions within the taxable year equal or exceed the greater of \$5,000 or 2% of the organization’s total support.

By law, the California Attorney General must hold Schedule B information in confidence. 11 Cal. Code Reg. § 310(b). And it does. Schedule B is *not* available to the public through the Registry of Charitable Trusts website. *See* Cal. Dep’t of Justice, Registry Verification Search, <https://rct.doj.ca.gov/Verification/Web/Search.aspx> (last visited Mar. 28, 2021). Visitors who search for an organization there will find other Form 990 series filings, but not Schedule B. Schedule B is also *not* available to the public for in-person inspection. Visitors to the Attorney General’s Sacramento office can examine other nonconfidential Registry documents, but not Schedule B. The only report of anyone gaining unauthorized access to Schedule B information through the Registry comes from this litigation, when Petitioners hired a highly regarded data-acquisition expert and his information

technology company to circumvent the Registry's privacy safeguards. Even then, the expert and his team were able to access less than 1% of all confidential documents in the database. When the expert reported the breach to the California Department of Justice, the Department fixed the problem within 24 hours. There is, moreover, *no* evidence that *anyone* has been harassed, threatened, or defamed—or has suffered any other harm—as a result of any security breach involving Schedule B or any other confidential document in the Registry's history.

While protecting the confidential Schedule B from public view, the Attorney General uses Schedule B information to fulfill its own responsibilities as the protector of the public's trust in the nonprofit sector. The trial record reveals a range of oversight and enforcement purposes for which the Attorney General uses Schedule B information. For example:

- Schedule B information allows the Attorney General to identify and follow up with donors regarding the representations that charities made when soliciting contributions. That, in turn, allows the Attorney General to confirm that charities are using assets in accordance with their promises to donors. When the Attorney General determines that an organization is breaking its promises to donors, the Attorney General can intervene to ensure that gifts are applied to the charitable purposes for which they were given.
- Schedule B information aids the Attorney General in identifying donors who are using

charitable organizations for noncharitable ends (e.g., as passthroughs for gifts to family members and friends). When the Attorney General determines that donors are abusing the nonprofit form, the Attorney General can sue to recover diverted assets and redirect those assets toward charitable causes.

- Schedule B information allows the Attorney General to identify organizations that are inflating values of in-kind gifts in order to make their fundraising numbers look better than they are. The Attorney General’s string of successful enforcement actions against “gift-in-kind” schemes since 2015 is attributable in no small part to the Schedule B reporting requirement at issue here.

While the Schedule B reporting requirement has played a key role in the Attorney General’s nonprofit-sector enforcement efforts, the corresponding burden on Petitioners’ associational interests is modest. To appear on Thomas More Law Center’s Schedule B in 2018, a donor would need to have given more than \$31,000; for Americans for Prosperity Foundation, the threshold was more than \$341,000. This is very clearly *not* a demand that Petitioners reveal the identities of their “ordinary rank-and-file members.” *Cf. NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958).

The U.S. Constitution does not prohibit the Attorney General from collecting information about large-dollar donations in order to fulfill its trust-protection functions. There is no “per se rule” that forbids donor

disclosure “in a situation where the governmental interest would override the associational interest in maintaining such confidentiality.” *Cal. Bankers Ass’n v. Shultz*, 416 U.S. 21, 55-56 (1974). Here, the Attorney General has articulated an overriding interest in disclosure: access to basic information about large-dollar donations is essential to the Attorney General’s efforts to protect charitable assets and to protect the public from fraud and deception. Petitioners have not articulated an associational interest of comparable weight. The First Amendment protects the nonprofit sector from unreasonable governmental intrusions, but it does not give nonprofit organizations an invisibility shield.

ARGUMENT

I. The Attorney General Has a Vital Interest in Protecting Public Trust in the Non-profit Sector

This Court has subjected disclosure requirements to a standard of “exacting scrutiny.” *See Doe v. Reed*, 561 U.S. 186, 196 (2010). To survive exacting scrutiny, the government’s interest must be “one of vital importance.” *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion). The Attorney General’s interest here in protecting the public’s trust in the nonprofit sector certainly rises to that level.²

² While Americans for Prosperity Foundation acknowledges that the “exacting scrutiny” standard applies, AFPP Br. 20, Thomas More Law Center suggests that “exacting scrutiny” applies only to disclosure requirements in the campaign context

A. State Attorneys General have primary responsibility for nonprofit-sector oversight within the U.S. federalist system

State Attorneys General are responsible for protecting the public's trust in the nonprofit sector. This trust-protection responsibility consists of two principal components. First, Attorneys General are responsible for ensuring that assets entrusted to charities are applied to their intended use. Second, Attorneys General are responsible for protecting the citizens of their States from fraudulent and deceptive charitable appeals.

The Attorney General's role in protecting charitable assets traces back at least as far as sixteenth century England. *See* Austin Wakeman Scott et al., *Scott and Ascher on Trusts* § 37.3.10 (5th & 6th eds., 2020 Cum. Supp.). Under English common law, the charitable trust was the standard organizational form for eleemosynary activities. A charitable trust is one that benefits the general public or an indefinite number of people. Typically, the widely dispersed or as-yet-undiscovered beneficiaries of charitable trusts lacked the ability to protect themselves. The burden of enforcing charitable trusts thus fell upon the Attorney General

and a higher "strict scrutiny" standard applies to other disclosure mandates. TMLC Br. 31. Respectfully, this gets things upside-down. This Court has "long recognized" that "speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 443 (2015). Thomas More Law Center inverts that hierarchy when it suggests a lower standard for campaign finance-related disclosures than for other donor disclosure requirements.

as the repository of the Crown's *parens patriae* prerogative. See *Restatement of the Law, Charitable Nonprofit Organizations* § 5.01 cmt. a (Am. L. Inst. 2021). When the charitable-trust form crossed the Atlantic, the Attorneys General of the colonies and then the several States inherited this trust-protection responsibility from their Crown counterpart. See *id.*

In the twentieth century, the charitable corporation displaced the charitable trust as the dominant form for nonprofit organizations in the United States, but State Attorneys General have retained their central role as the protectors of charitable assets. See James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 *Emory L.J.* 617, 650 (1985); see also *In re L.A. Cnty. Pioneer Soc'y*, 257 P.2d 1, 6 (Cal. 1953) (noting that charitable corporations and charitable trusts are “subject to the same supervision by the Attorney General”). Under California law, the Attorney General has a duty to ensure that assets contributed to charity are used in accordance with the promises made to donors. See *In re Veterans Indus., Inc.*, 8 Cal. App. 3d 902, 919 (1970). This duty is all the more essential because in most cases, if the Attorney General does not act to halt the misuse of charitable assets, no one else will. See *Holt v. Coll. of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 935 (Cal. 1964) (“Since there is usually no one willing to assume the burdens of a legal action, or who could properly represent the interests of the trust or the public, the Attorney General has been empowered to oversee charities as the representative of the public, a practice having its origin in the early common law.”). A donor may have standing to sue a char-

itable corporation or trust for misuse of charitable assets in certain circumstances, but donor standing is of limited use when the donors are dispersed or dead. Dissenting directors or trustees also sometimes have standing, though this accomplishes little if the charity's fiduciaries are all in cahoots. Thus, while the Attorney General's authority is not exclusive, the Attorney General still has "primary responsibility" for enforcing the promises made to donors and protecting the interests of charitable beneficiaries. *See id.* at 936.

Over the course of the twentieth century, Attorneys General in most States took on a second responsibility with respect to the nonprofit sector: protecting the public from fraudulent and deceptive charitable appeals. *See Restatement of the Law, Charitable Non-profit Organizations* § 5.01 cmt. b.4. Courts—including this one—have consistently recognized that reasonable regulation of charitable solicitations lies squarely within the State's police power. *See, e.g., Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Gospel Army v. City of Los Angeles*, 163 P.2d 704, 713 (Cal. 1945). To facilitate oversight, most States require charities that solicit funds in the State to register with the Attorney General, Secretary of State, or other state-level consumer-protection authority or financial regulator. Cindy M. Lott et al., *State Regulation & Enforcement in the Charitable Sector* v, 41 app.B (Urban Inst. Sept. 2016), available at <https://www.urban.org/sites/default/files/publication/84161/2000925-State-Regulation-and-Enforcement-in-the-Charitable-Sector.pdf>. In California, charities that solicit funds in the State

must file annual reports with the Registry of Charitable Trusts, which the Attorney General oversees. Cal. Gov't Code § 12584.

In addition to State Attorneys General, two federal agencies—the Internal Revenue Service (IRS) and the Federal Trade Commission (FTC)—hold important responsibilities for nonprofit sector oversight. But while the IRS polices some potential misuses of charitable assets, its ambit is much narrower than a State Attorney General's. The IRS intervenes, for example, in cases of private inurement and private benefit, *see, e.g., Educ. Assistance Found. for Descendants of Hungarian Immigrants in the Performing Arts, Inc. v. United States*, 111 F. Supp. 3d 34, 38 (D.D.C. 2015); *Korean-American Senior Mut. Ass'n, Inc. v. Comm'r of Internal Revenue*, No. 21829-17X, T.C. Memo 2020-129, 2020 WL 5414864 (T.C. Sept. 9, 2020), but it would have no basis for intervening when an organization applies funds to a different charitable purpose than the purpose for which a donor contributed. And the FTC—although it is empowered to act on its own to prevent unfair or deceptive acts or practices in or affecting commerce—almost always moves in tandem with State Attorneys General when it takes enforcement actions against nonprofit organizations.³ Although the IRS and the FTC play valuable roles, State

³ *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC, 38 States, and D.C. Act to Shut Down Massive Charity Fraud Telefunding Operation (Mar. 4, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-38-states-dc-act-shut-down-massive-charity-fraud-telefunding>; Press Release, Fed. Trade Comm'n, FTC Joins Four States in Action to Shut Down Alleged Sham Charity Funding Operation That Bilked Millions From Consumers (Sept. 16, 2020), <https://www.ftc.gov/news->

Attorneys General remain the chief custodians of the public's trust in the nonprofit sector.

B. Protecting the public's trust in the nonprofit sector is an interest of vital importance

By protecting the public's trust in the nonprofit sector, State Attorneys General vindicate an interest of the highest importance. Our economy, society, and democracy depend upon nonprofit organizations for their vitality. And nonprofit organizations rely ultimately on the public's trust.

The nonprofit sector is an engine of economic activity. Nationally, nonprofit organizations employ more than 12 million workers and account for nearly 6% of U.S. gross domestic product.⁴ In California alone, nonprofits employ more than 1.2 million people

events/press-releases/2020/09/ftc-joins-four-states-to-shut-down-alleged-sham-charity-operation; Press Release, Fed. Trade Comm'n, FTC, States Continue Fight against Sham Charities; Shut Down Operations That Falsely Claimed to Help Disabled Police Officers and Veterans (Mar. 28, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-states-continue-fight-against-sham-charities-shut-down>.

⁴ See U.S. Bureau of Labor Statistics, *Nonprofits Account for 12.3 Million Jobs, 10.2 Percent of Private Sector Employment, in 2016*, TED: The Economics Daily (Aug. 31, 2018), <https://www.bls.gov/opub/ted/2018/nonprofits-account-for-12-3-million-jobs-10-2-percent-of-private-sector-employment-in-2016.htm>; Nat'l Ctr. for Charitable Statistics Project Team, *The Nonprofit Sector in Brief 2019*, Urban Inst. (June 4, 2020), <https://nccs.urban.org/publication/nonprofit-sector-brief-2019>.

and generate nearly 15% of gross state product.⁵ Nonprofits are also key service providers, operating—for example—57% of all hospitals in the State and across the country.⁶ And the nonprofit sector is an important driver of knowledge and innovation: research at nonprofit institutions in California has played a key role in the development of everything from email to the latest COVID-19 vaccines.⁷

The nonprofit sector plays a central role in the formation and flourishing of communities. More than a quarter of adults—in California and nationwide—donate their time to nonprofits each year as volunteers, generating essential social capital.⁸ In addition, nonprofit organizations play a vital democracy-enhancing function. As Alexis de Tocqueville observed upon visiting the young United States nearly 190 years ago: “In democratic countries the science of association is

⁵ See Cal. Ass’n of Nonprofits & The Nonprofit Inst., *Causes Count: The Economic Power of California’s Nonprofit Sector* 6 (2019), available at <https://calnp.memberclicks.net/assets/docs/CausesCountDownloads/CausesCount-NewFindings-2019.pdf>.

⁶ See Kaiser Family Found., *State Health Facts: Hospitals by Ownership Type*, <https://www.kff.org/other/state-indicator/hospitals-by-ownership> (last visited Mar. 25, 2021).

⁷ See, e.g., Mike McDowall, *How a Simple ‘Hello’ Became the First Message Sent via the Internet*, PBS News Hour (Feb. 9, 2015), <https://www.pbs.org/newshour/science/internet-got-started-simple-hello>; *How Scripps Research Helped Map the Course for Today’s COVID-19 Vaccines*, Scripps Research (Dec. 23, 2020), <https://www.scripps.edu/news-and-events/press-room/2020/20201222-ward-covid.html>.

⁸ See Nat’l Ctr. for Charitable Statistics, *supra* note 4; AmeriCorps, *Volunteering in America: California*, <https://www.nationalservice.gov/serve/via/states/california> (last visited Mar. 25, 2021).

the mother science; the progress of all the others depends on the progress of that one.” Alexis de Tocqueville, *Democracy in America* 492 (Harvey C. Mansfield & Delba Winthrop eds./trans., Univ. of Chicago Press 2000) (1835). Nonprofit associations inculcate the civic virtues needed to sustain a free society, and they serve as critical counterweights to governmental power.

Yet the American approach to the nonprofit sector has never been totally laissez faire. A completely hands-off approach would be as devastating to the sector as an overbearing one. This is so for two reasons.

First, charitable fraud and misuse of charitable funds drain the nonprofit sector of resources. Every dollar diverted from charitable purposes is one fewer dollar available to meet community, national, and global needs. See Janet Greenlee et al., *An Investigation of Fraud in Nonprofit Organizations: Occurrences and Deterrents*, 36 *Nonprofit & Voluntary Sector Q.* 676, 677 (2007), available at https://www.researchgate.net/publication/249676796_An_Investigation_of_Fraud_in_Nonprofit_Organizations_Occurrences_and_Deterrents. The Attorney General’s enforcement efforts have the direct effect of boosting nonprofit-sector resources when the Attorney General recoups funds that a charity’s managers have siphoned off. See, e.g., Press Release, Cal. Dep’t of Justice, Attorney General Becerra Announces Settlement Against Deceptive Veteran Charity for Misleading Donors Through False Solicitations (Jan. 12, 2021), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-against-decep->

tive-veteran-charity (noting that the defendant organization and its former directors had agreed to “pay \$95,000 in restitution towards a legitimate tax-exempt charitable organization to ensure that veterans receive the donations that they are entitled to”). The Attorney General’s enforcement efforts also have a deterrence effect on individuals who might otherwise be tempted to engage in charitable fraud.

Second, and as importantly, charitable fraud and the misuse of charitable funds at a single charity can have sector-wide ripple effects. The nonprofit sector appears to be subject to its own version of Gresham’s law: the bad charities drive out the good. See Joel L. Fleishman, *Public Trust in Not-for-Profit Organizations and the Need for Regulatory Reform*, in *Philanthropy and the Nonprofit Sector in a Changing America* 172, 177 (Charles T. Clotfelter & Thomas Ehrlich eds., Ind. Univ. Press 1999). Oversight and enforcement by State Attorneys General serve not only to remedy and deter the diversion of funds at particular organizations but to protect trust in the sector as a whole against the threat posed by fraud, deception, and misallocation of charitable assets.

Experience confirms that scandal at individual charities can have deleterious effects on sector-wide trust. For example, reports in late 2001 that the American Red Cross planned to use donations to its September 11 relief fund for long-term projects unrelated to the terrorist attacks appear to have precipitated a stark drop in public confidence in charitable organizations. See Paul C. Light, *To Give or Not to Give: The Crisis of Confidence in Charities 2* (Brookings Inst. Dec. 2003), available at <https://www.brookings.org>

ings.edu/wp-content/uploads/2016/06/rw07.pdf (noting that the percentage of Americans saying they had “a lot” of confidence in charitable organizations fell from 25% in July 2001 to 18% in May 2002, while the percentage saying they had no confidence rose from 8% to 17%); Paul C. Light, *How Americans View Charities: A Report on Charitable Confidence, 2008*, at 1 (Brookings Inst. Apr. 2008), available at https://www.brookings.edu/wp-content/uploads/2016/06/04_nonprofits_light.pdf (noting that nearly seven years after the American Red Cross controversy, confidence in the charitable sector “has yet to recover”).

Declines in public confidence in the nonprofit sector have immediate implications for charitable contributions. A recent study examining press reports of malfeasance at nonprofit organizations and U.S. charitable giving per capita over a 41-year span finds that nonprofit scandals, as measured by media coverage, have a negative, statistically significant, and substantively meaningful effect on giving. Mark S. LeClair, *Reported Instances of Nonprofit Corruption: Do Donors Respond to Scandals in the Charitable Sector?*, 22 *Corp. Reputation Rev.* 39, 44-47 (2019). And the negative impacts go beyond dollars and cents: lower public trust in the nonprofit sector is also associated with reduced rates of volunteering. See Woods Bowman, *Confidence in Charitable Institutions & Volunteering*, 33 *Nonprofit & Voluntary Sector Q.* 247, 266 (2004), available at <https://journals.sagepub.com/doi/pdf/10.1177/0899764004263420>. Public confidence is particularly important for a sector that relies upon 8.8 billion volunteer hours contributed by U.S. adults each year. Nat’l Ctr. for Charitable Statistics

Project Team, *The Nonprofit Sector in Brief 2019*, Urban Inst. (June 4, 2020), <https://nccs.urban.org/publication/nonprofit-sector-brief-2019#the-nonprofit-sector-in-brief-2019>. Trust in the nonprofit sector also potentially affects the willingness of federal, state, and local governments to partner with nonprofit organizations in the delivery of services. See Beth Gazley & Jeffrey L. Brudney, *The Purpose (and Perils) of Government-Nonprofit Partnership*, 36 *Nonprofit & Voluntary Sector Q.* 389, 404-07 (2007).⁹

In sum, public trust serves to sustain the critically important nonprofit sector. State Attorneys General form the first and last line of defense against threats to that public trust. The Attorney General’s vital interest in nonprofit-sector oversight and enforcement ought to satisfy any standard of judicial scrutiny.

II. California’s Schedule B Reporting Requirement Is Substantially Related to the State’s Important Interest in Preventing Charitable Fraud and the Misuse of Charitable Funds

The “exacting scrutiny” standard for disclosure requirements demands not only a “sufficiently im-

⁹ In the short term, exposure of charitable fraud and the misuse of charitable funds may challenge public confidence in the nonprofit sector. But over the long term, rooting out misconduct will no doubt strengthen the sector’s public trust. *Cf. Yale Book of Quotations* 465-66 (Fred Shapiro ed., Yale Univ. Press 2006) (“You can fool all of the people some of the time; you can fool some of the people all the time, but you can’t fool all the people all the time” (noting and questioning attribution to Abraham Lincoln)).

portant governmental interest” but also a “substantial relationship between the disclosure requirement and . . . [the] governmental interest.” *Reed*, 561 U.S. at 196 (quotation marks omitted). California’s Schedule B reporting requirement more than meets that test.

A. Access to Schedule B substantially aids the Attorney General in its efforts to protect the public’s trust in the nonprofit sector

In order to protect charitable assets and to protect the public from fraudulent and deceptive charitable appeals, the Attorney General needs to know the identities of large-dollar donors and the amounts that they gave. The Attorney General uses that information for a range of investigative purposes, including (a) following up with donors to determine whether their contributions are being used in accordance with representations made by the charity, (b) identifying instances in which large-dollar donors are using charities as passthroughs for noncharitable purposes, and (c) catching charities that seek to mislead the public about their finances (e.g., by falsely claiming large-value in-kind gifts).

One example of the Attorney General’s use of Schedule B that emerged at trial involved a nonprofit organization that raised funds after Hurricane Katrina to assist animal victims of the storm. AFPP JA 312. The Sacramento-based Noah’s Wish took in more than \$8 million after telling potential donors that contributions would go toward Katrina-related efforts, but it spent only \$1.5 million of that amount on Katrina-related relief. Press Release, Cal. Dep’t of

Justice, Attorney General Brown Distributes \$4 Million for Animals of Katrina-Ravaged Area (Aug. 17, 2007), https://oag.ca.gov/system/files/attachments/press_releases/2007-08-17_Attorney_General_Brown_Redistributes_Katrina_Animal_Shelter_Funds_1_.pdf. Tipped off by a complaint, the Attorney General launched an investigation. Comparing Schedule B (which showed an inflow of funds around the Katrina campaign) to the organization's public financial statements (which claimed that the vast majority of the organization's assets remained unrestricted), the Attorney General's office "realized there was a really serious problem." AFPP JA 312 (testimony of Belinda Johns, former Senior Assistant Attorney General for the Charitable Trusts Section).

In the Noah's Wish case, the organization quickly settled on terms that ensured that remaining funds would be used for Katrina-related efforts, including (among other projects) rebuilding a storm-ravaged animal shelter in Slidell, Louisiana. *See id.*; Mutual Settlement Agreement & Release Between the People ex rel. Brown, Noah's Wish, Inc., & Terry Crisp (July 17, 2007), *available at* https://oag.ca.gov/system/files/attachments/press_releases/2007-08-17_Final_Signed_Settlement_Agreement.pdf.

In other cases, the Attorney General uses contributor lists to contact individual donors and determine whether a charity made specific promises when soliciting funds. For example, the Orange County-based Association for Firefighters and Paramedics solicited contributions from donors across the State and across the country under the pretense that it would direct their dollars to burn victims, fire departments, and paramedics "within a reasonable radius of your area

so that the impact of your donation can be felt close to home.” Press Release, Cal. Dep’t of Justice, *Brown Reaches Settlement with Charity for Burn Victims Over Deceptive Fundraising Tactics* (Sept. 28, 2010), <https://oag.ca.gov/news/press-releases/brown-reaches-settlement-charity-burn-victims-over-deceptive-fundraising-tactics>. Instead, the organization used 80% to 90% of the donations to cover fundraising expenses, assisted burn victims only in one part of the State, and gave nothing to fire departments or paramedics. *Id.*

Starting from the organization’s contributor list, the Attorney General sent out questionnaires to donors in order to determine what exactly the organization’s telemarketers had promised in individual conversations. *Id.* The investigation culminated in a \$100,000 settlement with the organization and its officers; that money was then used to assist burn victims across the State and to reimburse the Attorney General’s investigative costs. *See Settlement Agreement & Order, People v. Ass’n for Firefighters & Paramedics, Inc.*, No. 30-2009 (Cal. Superior Ct. Orange Cnty., filed Sept. 21, 2010), *available at* https://oag.ca.gov/system/files/attachments/press_releases/n1994_60559593.pdf.

The Attorney General also uses Schedule B in order to identify instances in which a donor is using a charity as a passthrough for noncharitable ends. For example, the Attorney General sued L.B. Research and Education Foundation as well as several of its officers and substantial contributors in 2009 for breach of fiduciary duty, among other counts; one of the allegations in the complaint was that organization had paid a \$25,000 grant to a California artist as a quid

pro quo for a \$25,000 contribution from the artist's friend (the trial record refers to the grantee as the donor's "girlfriend"). Complaint at 8-9, 13, *People v. L.B. Research & Educ. Found.*, No. BC 421250 (Cal. Superior Ct. L.A. Cnty., filed Sept. 8, 2009), *available at* https://oag.ca.gov/system/files/attachments/press_releases/n1799_lbresearch.pdf; AFPPF JA 415. The Schedule B showed the \$25,000 contribution from the donor to the organization; the list of grants on the organization's Form 990 showed the corresponding grant to the donor's friend/girlfriend. AFPPF JA 415. Ultimately, the Attorney General reached a settlement agreement under which it recovered the funds that had been diverted from the organization's charitable purpose as well as the Attorney General's own investigative costs. Settlement Agreement, *People v. L.B. Research & Educ. Found.*, No. BC 421250 (Cal. Superior Ct. L.A. Cnty., filed Dec. 4, 2009), *available at* https://oag.ca.gov/system/files/attachments/press_releases/n1840_document.pdf; Press Release, Cal. Dep't of Justice, Brown Halts UCLA Professor's Use of Charitable Funds for Personal Business Ventures (Dec. 4, 2009), <https://oag.ca.gov/news/press-releases/brown-halts-ucla-professors-use-charitable-funds-personal-business-ventures>.¹⁰

¹⁰ As a number of commentators have noted, Schedule B filings also contained evidence relevant to the "Varsity Blues" scandal, in which donors used a sham charity called Key Worldwide Foundation to effectively purchase spots for their children at selective colleges and universities. Key Worldwide Foundation's Schedule B would have revealed the identities of the parents who made large payments to the organization. See Adam Looney, *It Took 6 Years To Uncover the College Admissions Scandal, Here's What the IRS and Congress Can Do Better Next Time*,

Schedule B has played a particularly important role in the Attorney General’s efforts against so-called “gift-in-kind” schemes. AFPP JA 433-34. In a gift-in-kind scheme, an organization seeks to inflate its revenue and minimize its reported overhead and fundraising-expense ratios by claiming that it has received large noncash gifts, which must be reported and described on Schedule B. In many of these cases, charities claim these large gifts even though they never take ownership of the property in question (acting instead as a mere conduit for goods shipped by other donors to other donees). See Cal. Dep’t of Justice, *Gifts-in-Kind Donations: How They Can Be Used To Deceive* (n.d.), available at <https://oag.ca.gov/sites/all/files/ag-web/pdfs/charities/publications/gik-schemes.pdf>. Starting from Schedule B and then following up with

Brookings Inst. (Mar. 28, 2019), <https://www.brookings.edu/blog/up-front/2019/03/28/it-took-6-years-to-uncover-the-college-admissions-scandal-heres-what-the-irs-and-congress-can-do-better-next-time> (“In Schedule B enforcement authorities have a list of all the parents who funneled bribes through the charity . . .”). Moreover, Key Worldwide Foundation claimed that it had made grants to a number of other nonprofit organizations; those organizations’ Schedule B filings would have revealed that Key Worldwide did not in fact make the grants in question. See Lloyd Hitoshi Mayer, *Could a More Robust IRS Have Nipped the Varsity Blues Scandal in the Bud?*, Chron. of Philanthropy (Mar. 15, 2019), <https://www.philanthropy.com/article/could-a-more-robust-irs-have-nipped-the-varsity-blues-scandal-in-the-bud> (noting that a cross-check of the Schedule Bs of the ostensible grantees could “have revealed that KWF’s returns were inaccurate”).

the ostensible donor, the Attorney General can determine whether the purported gift ever actually happened.

Gift-in-kind schemes have been a top enforcement priority for the Attorney General in recent years. In 2015, the California Attorney General, along with the FTC and counterparts in the other forty-nine States and the District of Columbia, entered into a \$75 million settlement agreement with the perpetrators of a gift-in-kind scheme involving supposed cancer charities. See Complaint, *Fed. Trade Comm'n v. Cancer Fund of Am., Inc.*, No. 2:15-cv-00884-NVW (D. Ariz., filed May 18, 2015); Stipulation re Order for Permanent Injunction and Monetary Judgment, *Fed. Trade Comm'n v. Cancer Fund of Am.*, No. 2:15-cv-00884-NVW (D. Ariz., filed Mar. 29, 2016). A year later, the Attorney General announced that it “currently has open investigations wherein Schedule B has provided significant information related to inflated noncash donations.” Final Statement of Reasons—Proposed Amendment to Cal. Code Regs. tit. 11, §§ 310, 312, 999.1 (July 8, 2016), *available at* <https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/final-statement-reasons-07082016.pdf>. Since then, the Attorney General has announced actions against at least five organizations over gift-in-kind fraud.¹¹

¹¹ See Press Release, Cal. Dep't of Justice, Attorney General Becerra Secures Judgment Against “National Cancer Coalition” for False Financial Reporting Scheme (Mar. 12, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-secures-judgment-against-national-cancer-coalition>; Press Release, Cal. Dep't of Justice, Attorney General Becerra Announces

In evaluating the evidence in the trial record, it bears emphasis that for most of the period covered by the trial record, the Attorney General did *not* have access to a complete set of Schedule Bs for organizations in the Registry. Prior to 2010, thousands of charities active in California renewed their annual registrations without submitting their Schedule B. AFPP Pet. App. 10a. From August 2010 until June 2015, the Attorney General sent approximately 8,000 deficiency letters informing organizations of their incomplete filings. AFPP Pet. 7; AFPP JA 277-79.¹² At the time of the Americans for Prosperity Foundation trial in February and March 2016, the Attorney General had been working with a substantially complete set of Schedule B filings for—at most—a matter of months.

Nonetheless, when Americans for Prosperity Foundation asked the Attorney General to identify ten investigations in which it had relied on Schedule B, the Attorney General came back with ten (five of which were not yet public). AFPP JA 398-99; Resp. Br. 33. And when the Attorney General, during the Americans for Prosperity Foundation trial, sought to

\$410,000 Settlement with Giving Children Hope, After the Charity Engaged in a Misleading Reporting Scheme (Jan. 29, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-410000-settlement-giving-children-hope-after>; Press Release, Cal. Dep't of Justice, Attorney General Becerra Files Lawsuit Against Charity for Misleading Solicitations and Reporting Scheme (May 30, 2019), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-files-lawsuit-against-charity-misleading-solicitations>.

¹² The Attorney General submitted its first deficiency notice to Thomas More Law Center in March 2012 and to Americans for Prosperity Foundation in March 2013. TMLC Pet. App. 163a; AFPP Pet. App. 11a, 42a.

introduce additional examples of investigations in which it had used Schedule B, the Foundation's counsel objected. The following exchange ensued:

THE COURT: Sustained. We're not talking about everybody else, we're talking about the person here who is the plaintiff Schedule B is a Schedule B, or whatever it is. We're talking here about the Schedule B to this plaintiff.

[ATTORNEY GENERAL'S COUNSEL]: I'm sorry, Your Honor. Just to be clear: If these examples don't involve plaintiff, you would -- I should not ask about them?

THE COURT: That's right.

TMLC ER 510-11. Petitioners highlight the small number of examples in the trial record of investigations in which the Attorney General used Schedule B. *See* AFPP Br. 19; TMLC Br. 13. But that small number reflects the fact that Petitioners—and the district court—prevented the Attorney General from introducing further examples.

B. Ex-post retrieval of Schedule B is no substitute for ex-ante reporting

Petitioners cannot seriously dispute the fact that access to information about large-dollar donations is substantially related to the Attorney General's important interest in protecting the public's trust in the nonprofit sector. Petitioners suggest, though, that the Attorney General could obtain the same information through less intrusive means by requesting or subpoenaing an organization's Schedule Bs *after* the launch of an investigation. AFPP Br. 34-39; TMLC

Br. 42-43. In support of this suggestion, Americans for Prosperity Foundation asserts that “requesting Schedule B through audit letters and subpoenas has *never* tipped anyone off in a way that frustrated or undermined the ensuing audit or investigation.” AFPF Br. 35-36.

In fact, the Senior Assistant Attorney General for the Charitable Trusts section testified at trial that an organization had fabricated board minutes after receiving an audit letter. TMLC ER 1111. The district court, however, disallowed further discussion of that episode. *See* TMLC ER 1111 (“THE COURT: Counsel, it is very interesting, but it’s not anything with this. Let’s find out about donors and their privacy. That’s what this case is about.”). Moreover, the risk of evidence tampering is *not* the only reason for ex-ante collection of Schedule B information. Nonprofit-sector enforcement is a race against the clock. Obtaining Schedule B through audit letter or subpoena allows more time for organization managers to spend down charitable assets or transfer funds beyond law enforcement’s reach. *Cf.* Mutual Settlement Agreement & Release Between the People ex rel. Brown, Noah’s Wish, Inc., & Terry Crisp 1-2 (noting that more than \$2.5 million of funds raised for Katrina-related relief had been spent on other purposes by the time the Attorney General intervened).

It is true that many other Attorneys General do not require charities active in their State to file Schedule Bs with a state registry. But this Court has never held that state regulatory requirements are subject to a least-common-denominator criterion. Such a standard would be inconsistent with core federalism values. *See New State Ice Co. v. Liebmann*,

285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . .”).

Notably, the two States with the largest number of nonprofit organizations active within their borders—California and New York—are also two of the States that impose a Schedule B reporting requirement. See Brice McKeever, Nat’l Ctr. for Charitable Statistics, *Active & Reporting Public Charities by State*, Urban Inst. (Aug. 27, 2018), <https://nccs.urban.org/publication/active-and-reporting-public-charities-state>; *Citizens United v. Schneiderman*, 882 F.3d 374, 382-83 (2d Cir. 2018). These are also, not coincidentally, two of the States whose nonprofit-sector enforcement efforts are widely recognized as most robust. See, e.g., James J. Fishman, *Stealth Preemption: The IRS’s Nonprofit Corporate Governance Initiative*, 29 Va. Tax. Rev. 545, 556 (2010) (identifying California and New York as two of three States—along with Massachusetts—which have displayed “vigor” in “correcting abuses involving fraudulent charitable solicitation and charitable trusts”).

III. The Low Risk that the Identities of Large-Dollar Donors Will Be Disclosed Inadvertently Does Not Impose a Substantial Burden on Petitioners’ First Amendment Rights

The exacting scrutiny standard requires the Court to consider not only the strength of the governmental interest but also the “actual burden” on Petitioners’

freedom of association. *See Reed*, 561 U.S. at 196 (“To withstand [exacting] scrutiny, ‘the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.’”). In this case, the burden on Petitioners’ rights is a very low risk that members of the public might gain unauthorized access to information about the identities of a subset of large-dollar donors. The State’s strong need for access to Schedule B overwhelmingly outbalances that low risk.

To be clear, Amicus is strongly committed to protecting the legitimate privacy interests of nonprofit donors. *See* CalNonprofits, CalNonprofits Policy Framework (Feb. 2017), <https://calnonprofits.org/public-policy/policy-framework> (recognizing “the importance of the right to privacy for donors and other constituencies”). Donors trust that nonprofit organizations will not reveal donors’ identities to the general public without donor permission; that trust would be undermined if donors’ names leaked out. *See, e.g.*, CalNonprofits, Principles for Responsible Crowdfunding, <https://calnonprofits.org/33-advocacy/709-principles-for-responsible-online-crowdfunding> (last visited Mar. 25, 2021) (“All parties must protect the integrity of the relationship between donors and nonprofits. . . . Anything that jeopardizes that trust threatens the generosity of giving and the work nonprofits do for the common good.”). But a larger threat to the nonprofit sector—both immediately and in the long run—comes from charitable fraud and the misuse of charitable funds. The Attorney General’s oversight and enforcement efforts—facilitated by access to Schedule B—play an important role in mitigating that larger threat.

A. The fact that Petitioners' expert gained access to less than 1% of the Registry's confidential documents ought to be understood

While the security breach at the Registry of Charitable Trusts ought not be excused, it also ought not be exaggerated. *Contra* AFPF Br. 40 (“Schedule B information is effectively available for the taking”); TMLC Br. 14 (“California leaks confidential information like a sieve”). To put the breach in fuller context:

- The Schedule Bs in question were not viewable to visitors clicking through the Registry website or running Google searches. Petitioners retained an expert—Dr. James T. McClave, the chief executive officer of Info Tech, Inc.—to circumvent the Registry’s privacy safeguards. McClave is a PhD statistician with decades of experience in computerized detection techniques, and Info Tech is a company that “focuses on the development of computerized tools to assist in the acquisition and analysis of data,” working—in particular—with “large, complex, databases.” Expert Report of Dr. James T. McClave at 2 (TMLC D. Ct. Doc. #59). Dr. McClave and his associates did gain unauthorized access to a subset of Schedule Bs in the Registry, but there is no suggestion in the record that anyone else did.
- Dr. McClave testified that he and his associates gained access to approximately 2,200 confidential documents in the Registry’s database (not all of which were Schedule Bs). TMLC JA 423.

At the time, the Registry housed approximately 370,000 confidential documents. TMLC JA 284. Thus, the confidential filings accessed by Dr. McClave and his team represent less than 1% of the total.

- A California Department of Justice employee discovered in October 2015 that a hacker could theoretically harvest nonpublic documents from the Registry by creating an algorithm to generate document ID numbers that match a certain pattern and sequence. TMLC JA 405-06. The Department promptly fixed the problem. TMLC JA 433. Contrary to the dissent below, Dr. McClave did *not* testify that “[h]e was readily able to access every confidential document in the registry.” AFPP Pet. App. 92a. Dr. McClave repeated the fact that a California Department of Justice employee had identified and addressed a vulnerability affecting confidential documents. TMLC JA 432-33. Dr. McClave also testified that when he and his team tested the Registry to see if those confidential documents could be accessed via the vulnerability that the Department employee identified, “they were all gone.” TMLC JA 433.
- The particular vulnerability exploited by Dr. McClave and his associates was not unique to the Registry. According to Dr. McClave, Citi-Bank and Delta Airlines—as well as other large and sophisticated companies—have suffered similar problems. TMLC JA 431-32.
- Every time the Attorney General was alerted of a breach, the relevant filings were removed

from public view within 24 hours. TMLC JA 426.

- There is no evidence that *anyone* has been harassed, threatened, or defamed, or has suffered any other harm as a result of any security breach at the Registry. TMLC JA 296.

The fact that Petitioners' expert gained unauthorized access to less than 1% of confidential documents in the Registry's database also ought to be considered in the context of other potential vulnerabilities affecting Petitioners and their donors:

- Petitioners must file their Schedule Bs with the IRS, and they do not challenge this requirement. The IRS, in 2012, inadvertently sent the Schedule B filed by the National Organization for Marriage to a member of the media, who then forwarded it to a prominent pro-LGBTQ rights group. (The National Organization for Marriage advocates for laws defining marriage as between a man and a woman.) *See* Mackenzie Weinger, *IRS Pays \$50K in Confidentiality Suit*, Politico (June 24, 2014), <https://www.politico.com/story/2014/06/irs-nom-lawsuit-108266>. The IRS also has accidentally posted the Schedule B of the Republican Governors Association Public Policy Committee on a public website. *See* Paul Abowd, *IRS 'Outs' Handful of Donors to Republican Group*, Ctr. for Public Integrity (Apr. 4, 2013), <https://publicintegrity.org/politics/irs-outs-handful-of-donors-to-republican-group>. Petitioners are correct that “[t]he IRS takes seriously its duty to protect

confidential information.” AFPP Br. 46. But even the IRS is not perfect.

- Petitioners’ donors also must disclose noncash contributions of more than \$500 in order to claim income tax deductions for their gifts. See Internal Revenue Service, *2020 Instructions for Schedule A A-12* (Jan. 4, 2021), available at <https://www.irs.gov/pub/irs-pdf/i1040sca.pdf>. The IRS revealed in 2015 and 2016 that cybercriminals gained access to return information for as many as 700,000 individual income taxpayers. See Laura Saunders, *IRS Says Cyberattacks on Taxpayer Accounts More Extensive Than Previously Reported*, Wall St. J. (Feb. 26, 2016), <https://www.wsj.com/articles/irs-says-cyberattacks-on-taxpayer-accounts-more-extensive-than-previously-reported-1456514909>.
- In a number of states, donors must disclose noncash gifts over \$500 in order to claim state charitable contribution deductions. Like the IRS and the California Attorney General, State tax administrators take data privacy seriously. But state tax databases have been subject to hacks as well. See, e.g., Eric Chabrow, *Stolen Password Led to South Carolina Tax Breach, Bank Info Sec.* (Nov. 20, 2012), <https://www.bankinfosecurity.com/stolen-password-led-to-south-carolina-tax-breach-a-5309>.
- Charitable contributions almost always will generate records at the donor’s and donee’s financial institutions, whether the donation is by

check, credit card, or brokerage account transfer. Numerous U.S. and multinational financial institutions—including Bank of America, Capital One, Citigroup, Equifax, HSBC, JPMorgan Chase, Morgan Stanley, and TD Ameritrade—have been the subjects of major data breaches in recent years. Carnegie Endowment for Int’l Peace, *Timeline of Cyber Incidents Involving Financial Institutions*, <https://carnegieendowment.org/specialprojects/protectingfinancialstability/timeline> (last visited Mar. 25, 2021).

- Charitable organizations’ own donor databases are not 100% secure. In 2020, Blackbaud—which provides cloud computing services to more than 45,000 nonprofit organizations and government institutions—revealed that cybercriminals had gained access to donor information at nonprofits that it serves. See Paul Clolery, *Some Donor Data Accessed in Blackbaud Hack*, NonProfit Times (Sept. 29, 2020), https://www.thenonproffitimes.com/npt_articles/breaking-some-donor-data-accessed-in-blackbaud-hack.

Petitioners make much of the fact that California officials will not *guarantee* that a security breach will never happen again. See, e.g., TMLC Br. 3, 14. But of course California officials will not guarantee that: No database is 100% secure. California officials simply recognize the reality of our computerized age.

B. The Schedule B reporting requirement affects only a small number of large-dollar donors to Petitioners

California requires nonprofit organizations that solicit funds in the State to file their full federal tax returns with the Registry, but it does not require organizations to share donor information beyond what federal law demands. To evaluate the burden on Petitioners' First Amendment rights, the Court therefore must consider the scope and limits of the federal mandate.

Federal law requires section 501(c)(3) charitable organizations to report the names and addresses of donors who give at least \$5,000 within the taxable year on the confidential Schedule B. 26 U.S.C. § 6033(a)(3), (b)(5); 26 C.F.R. § 1.6033-2(a)(2)(ii)(F). But if an organization normally receives at least a third of its total support from government grants plus contributions from the general public, the Schedule B requirement applies only to donors who contribute at least \$5,000 *or more than 2% of the organization's total support*, whichever is greater. 26 C.F.R. § 1.6033-2(a)(2)(iii)(A). Americans for Prosperity Foundation and Thomas More Law Center both normally receive at least a third of their total support from the general public. Both organizations therefore need to disclose only contributors who account for more than 2% of total contributions. For a donor to cross that 2% threshold, she would need to have given more than \$31,000 in 2018 to Thomas More Law Center or more than \$341,000 to Americans for Prosperity Foundation. See Internal Revenue Service, *Form 990: Return of Organization Exempt from Income Tax: Thomas More Law Ctr.* 1 (2018), available at <http://bit.ly/>

2018TMLC990; Internal Revenue Service, *Form 990: Return of Organization Exempt from Income Tax: Am. for Prosperity Found.* 1 (2018), available at <http://bit.ly/2018AFPF990>.

The Schedule B reporting requirement is thus readily distinguishable from other donor disclosure mandates that this Court has struck down as unconstitutional. The contrast with *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, a case repeatedly invoked by Petitioners, is particularly stark:

- While Alabama sought to compel the NAACP to disclose the names and addresses of all of its members in the State, California seeks only the identities of large-dollar donors whose gifts account for more than 2% of Petitioners' total (necessarily, no more than 49 per organization). *See NAACP*, 357 U.S. at 464 (noting that NAACP “has urged the rights solely of its ordinary rank-and-file members”). For Petitioners, this means donors who have given tens or hundreds of thousands of dollars within a year.
- While Alabama specifically targeted the NAACP, 357 U.S. at 452, the California Attorney General is enforcing a generally applicable requirement, and there is *no* evidence that the Attorney General picked out Petitioners for selective enforcement. Indeed, Petitioners did not receive deficiency letters until (at the earliest) the third year of the Attorney General's initiative to enforce the Schedule B reporting requirement.

- Most importantly, while the membership rolls at issue in *NAACP* had no “substantial bearing” on Alabama’s ability to enforce its laws, *NAACP*, 357 U.S. at 464, access to Schedule B is vital to the Attorney General’s efforts to protect the public’s trust in the California nonprofit sector.

Petitioners describe this case and *NAACP v. Alabama ex rel. Patterson* as “indistinguishable.” TMLC Br. 3; *see also* AFPP Br. 30 (suggesting that a ruling for California “would be tantamount to abdicating *NAACP v. Alabama*”). Little could be further from the truth. California’s Attorney General seeks Schedule B information in order to protect the public’s trust in the nonprofit sector. To liken that effort to Alabama’s harassment of the NAACP is to misunderstand the vital role that public trust in the nonprofit sector plays in California and across our society.

CONCLUSION

To ensure that the nonprofit sector in and beyond California can continue to thrive, Amicus urges this Court to affirm the decision below.

Respectfully submitted,

DANIEL HEMEL
UNIVERSITY OF CHICAGO
LAW SCHOOL
1111 East 60th Street
Chicago, IL 60637
(773) 834-3255
dhemel@uchicago.edu

ANNA-ROSE MATHIESON
Counsel of Record
CALIFORNIA APPELLATE
LAW GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700
annarose@calapplaw.com

March 2021