

Nos. 19-251, 19-255

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**In The  
Supreme Court of the  
United States**

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AMERICANS FOR PROSPERITY FOUNDATION, *Petitioner*,  
*v.*

XAVIER BECCERA, in his official capacity as Attorney  
General of the State of California, *Respondent*,

— *and* —

THOMAS MORE LAW CENTER, *Petitioner*,  
*v.*

XAVIER BECCERA, in his official capacity as Attorney  
General of the State of California, *Respondent*.

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

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**Brief of Amici Curiae 24 Family Policy Organiza-  
tions Supporting Petitioners**

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## QUESTIONS PRESENTED

- 1) Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest (Petitioner Americans for Prosperity Foundation).
- 2) Whether exacting scrutiny or strict scrutiny applies to disclosure requirements that burden nonelectoral, expressive association rights (Petitioner Thomas More Center).
- 3) Whether California’s disclosure requirement violates charities’ and their donors’ freedom of association and speech facially or as applied to the Law Center (Petitioner Thomas More Center).

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**STATEMENT OF INTEREST<sup>1</sup>**

Amici 24 family policy organizations are the following allied, statewide nonprofit corporations organized under 26 U.S.C. 501(c)(3):

Center for Arizona Policy; Delaware Family Policy Council; Family Policy Alliance of Georgia; Indiana Family Institute; Family Policy Alliance of Idaho; Hawaii Family Forum; Family Policy Alliance of Kansas; The Family Foundation of Kentucky; Christian Civic League of Maine; Massachusetts Family Institute; Minnesota Family Council; Montana Family Foundation; Nebraska Family Alliance; New Hampshire Cornerstone Policy Research Action; Family Policy Alliance of New Jersey; Family Policy Alliance of New Mexico; New Yorker's Family Research Foundation; Family Policy Alliance of North Dakota; South Dakota Family Heritage Alliance; The Family Foundation of Virginia; Wisconsin Family Council, Inc.; Family Policy Institute of Washington; West Virginia Family Foundation; Family Policy Alliance of Wyoming; and the Family Policy Alliance.

Amici are Judeo-Christian religious organizations that promote research and education to encourage, strengthen and protect American families. They file this brief supporting both Petitioners in these cases because they are concerned with the growing

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties received timely notice of and have consented to the filing of this brief.

political trend to use government-compelled donor disclosure as a means of undermining the ability of nonprofits to engage in socially controversial issues by chilling donor association and financial support.

## SUMMARY OF THE ARGUMENT

In the consolidated cases below, the Ninth Circuit joined the Second Circuit to conclude that government-compelled nonprofit donor disclosure is subject to exacting scrutiny rather than strict scrutiny. App. 15a.<sup>2</sup> Specifically, while the First, Third, Fourth, Sixth, Tenth, and D.C. Circuits have required nonprofit donor disclosure laws to be narrowly tailored to serve a compelling state interest, the court below applied exacting scrutiny under this Court’s campaign finance jurisprudence, which holds that government-compelled campaign-related donor disclosure “requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest,” and that “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” App. 15a (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010), *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010), and *Davis v. FEC*, 554 U.S. 724, 744 (2008)). Under this less rigorous scrutiny, the court below held that California’s government-compelled nonprofit donor disclosure was constitutional as applied to Petitioners.

Nonprofits do not serve the same societal role as campaign-related entities. They provide a unique and vital public service to their communities by effectively identifying and meeting local needs with expertise and combined resources that any one individual cannot provide, in a manner more expedient than government organizations. This

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<sup>2</sup> For ease of reference, all appendix citations in this brief reference the appendix submitted by Petitioner Americans for Prosperity Foundation, No. 19-251.

critical social role benefits from donor anonymity—where donors for a variety of important reasons do not wish to be publicly known—allowing nonprofits to focus their time and resources on the mission of the organization. Without donor anonymity, both nonprofits and donors suffer irreparable First Amendment harm: donors are chilled from speaking and associating with nonprofits through their donations. Additionally, nonprofits, which are often on small budgets already, lose meaningful revenue and thus their ability to fulfill their public interest goals. Communities in need suffer as a result.

The Court should grant review of these cases to clarify the proper legal standard for nonprofit donor disclosure.

## ARGUMENT

### **I. These Cases Raise the Exceptionally Important Question of Whether Nonprofit Donor Disclosure Should Be Subject To The Highest Constitutional Scrutiny, Warranting Review.**

#### **A. Nonprofits Play A Vital Role in Civil Society.**

The United States is a generous society. In 2018, Americans gave \$427.71 billion to charity,<sup>3</sup> with the total private giving from individuals, foundations, and businesses \$390.05 billion.<sup>4</sup> Individual giving represents the lion share of private giving, totaled an

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<sup>3</sup> Giving USA, *Giving USA 2019: Americans Gave \$427.71 billion to charity in 2018 amid complex year for charitable giving*, Giving USA (June 18, 2019), <https://givingusa.org/giving-usa-2019-americans-gave-427-71-billion-to-charity-in-2018-amid-complex-year-for-charitable-giving/>.

<sup>4</sup> Brice McKeever, *The Nonprofit Sector in Brief*, National Center for Charitable Statistics (Jan. 3, 2019), <https://nccs.urban.org/project/nonprofit-sector-brief>.

estimated \$292.09 billion, with foundation giving a comparatively distant second, totaling \$75.86 billion, and bequest giving and corporate giving totaling \$39.71 billion and \$20.05 billion, respectively.<sup>5</sup>

The result is a robust nonprofit sector. In 2015, there were approximately 1.56 million nonprofits registered with the IRS.<sup>6</sup> These nonprofits contributed an estimated \$985.4 billion to the United States economy that same year, comprising 4.5% of the United State's GDP.<sup>7</sup> Of these registered nonprofits, 501(c)(3) organizations account for just over three-quarters of the revenue—\$1.98 trillion—and expenses—\$1.84 trillion—of the nonprofit sector as a whole.<sup>8</sup> They also represented just under two-thirds of the nonprofits sector's total assets—\$3.67 trillion.

So what qualifies a nonprofit organization as “nonprofit”? “A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.”<sup>9</sup> In exchange, “[l]arge classes of nonprofits receive special treatment in almost all areas in

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<sup>5</sup> *Giving USA 2019*, *supra* note 3. An estimated 25.2% of adult Americans also volunteered in 2016, contributing an estimated 8.7 billion hours, valued at approximately \$187.4 billion. *McKeever*, *supra* note 4.

<sup>6</sup> *McKeever*, *supra* note 4.

<sup>7</sup> *McKeever*, *supra* note 4.

<sup>8</sup> *McKeever*, *supra* note 4.

<sup>9</sup> Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale L. J.* 835, 838 (1980). Nonprofits are not barred from earning profit—it is the distribution of those profits that is restricted, “retained and devoted in their entirety to financing further production of the services that the organization was formed to provide.” *Id.* at 838.

which federal legislation impinges upon them significantly, including corporate income taxation, Social Security, unemployment insurance, the minimum wage, securities regulation, bankruptcy, antitrust, unfair competition, copyright, and postal rates.”<sup>10</sup>

The sectors in which nonprofits “are most common—education, research, health care, the media, and the arts—are vital elements in the modern economy.”<sup>11</sup> Because of their inability to keep any of their profits, nonprofits can provide much-needed public goods with the assurance that a connection between the donor and the public good exists.<sup>12</sup>

Indeed, nonprofits serve a valuable function for individuals who want to give back to their neighbors and communities. Nonprofits are more adept and better able than individual donors to identify needy populations and to contact groups that are less or even inaccessible: “Direct cash donations may work when the individuals in need are obvious—such as after a hurricane, when almost everyone is a victim—but [individual donors] have no way to reach some of the most vulnerable groups.”<sup>13</sup> They provide

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<sup>10</sup> Hansmann, *supra* note 9, at 836-37 (citing I.R.C. § 501(c)(3); 42 U.S.C. § 410(a)(8)(B)(1976); I.R.C. §§ 3306(b)(5)(A), (c)(8); 29 U.S.C. § 203(r)(1976); 29 C.F.R. § 779.214(1979); 15 U.S.C. § 77c(a)(4)(1976); 11 U.S.C.A. § 303(a)(West Supp. 1979); 15 U.S.C.A. §§ 44, 45 (West Supp. 1979); 17 U.S.C. §§ 110, 111(a)(4), 112(b), 118(d)(3)(1976); 39 U.S.C.A. § 3626(West Supp. 1979)).

<sup>11</sup> Hansmann, *supra* note 9 (discussing in depth why these categories of nonprofit giving exist).

<sup>12</sup> See Hansmann, *supra* note 9, at 851.

<sup>13</sup> *Why are charities still necessary?*, World Economic Forum (Nov. 17, 2015), <https://www.weforum.org/agenda/2015/11/why->

economies of scale and scope, consolidating overhead costs to provide goods and services for less than an individual would pay.<sup>14</sup> Nonprofits possess institutional knowledge and can employ workers with knowledge and expertise targeted to the goals of the nonprofit.<sup>15</sup> And nonprofits are able to convert monetary contributions into educational opportunities where it is knowledge, not money, that underlies a community need.<sup>16</sup>

Nonprofits can also be considerably more responsive to the needs of those they serve than governmental organizations.<sup>17</sup> Nonprofits are subject to more market discipline because there are competing producers, while governmental organizations have the effect of reducing, if not eliminating, choice among market suppliers.<sup>18</sup> And while government organizations tend to be sluggish and costly due to bureaucracy resulting from hierarchies necessary to ensure accountability, nonprofits are expected to be responsive by their donors in pursuing their mission and are directly held accountable to them.<sup>19</sup>

But perhaps most crucially, the one-size-fits-most approach employed by government is not effective:

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are-charities-still-necessary/.

<sup>14</sup> *Why are charities still necessary?*, *supra* note 13.

<sup>15</sup> *Why are charities still necessary?*, *supra* note 13.

<sup>16</sup> *Why are charities still necessary?*, *supra* note 13.

<sup>17</sup> Jeremy Biberdorf, *Why Charity Is More Important Than Ever*, Int'l Policy Digest (July 11, 2017), <https://intpolicydigest.org/2017/07/11/charity-important-ever/> (“charities are, in fact, even more important than governmental agencies when it comes to affecting change and aiding vulnerable communities”).

<sup>18</sup> Hansmann, *supra* note 9, at 895.

<sup>19</sup> Hansmann, *supra* note 9, at 895.

“There are many unique struggles facing distinct populations, .... [Nonprofits] can focus their resources on the specific demographics and issues that demand the most attention. This allows for a more effective approach to solutions and less wasted expenditure of resources where they are not needed.”<sup>20</sup> And while nonprofits can be politically influenced, “they are not married to political causes” and are “therefore more capable of achieving a positive impact.”<sup>21</sup>

In addition to “providing critical services that contribute to economic stability and mobility,” nonprofits often have leaders who are the “voice of the people they serve.”<sup>22</sup> And they have strong community relationships and local knowledge, often making them best suited to understanding their communities’ needs and best able to find ways to meet them.<sup>23</sup> Nonprofits are a vital component of American society.

### **B. Nonprofits And Their Donors Benefit From Donor Anonymity.**

Because nonprofits cannot sell equity shares, they must “rely largely on donations, retained earnings, and debt for capital financing.”<sup>24</sup>

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<sup>20</sup> Biberdorf, *supra* note 17.

<sup>21</sup> Biberdorf, *supra* note 17 (“When you are unhindered by the bureaucracy of political affiliation, you are free to make the change.”).

<sup>22</sup> Naomi Camper, *A Strong Nonprofit Sector is Key to Thriving Communities*, The Aspen Institute (Mar. 7, 2016), <https://www.aspeninstitute.org/blog-posts/a-strong-nonprofit-sector-is-key-to-thriving-communities/>.

<sup>23</sup> Camper, *supra* note 22.

<sup>24</sup> Hansmann, *supra* note 9, at 876.

Numerous reasons exist for donors, large and small, to desire privacy. Some donors give for religious reasons and so give privately recognizing the spiritual reward such giving provides versus those accompanied by public acclaim (a principle many religious traditions teach).<sup>25</sup> Some donors may be reserved and uncomfortable with the recognition that often accompanies charitable giving.<sup>26</sup> Some donors may not want to create expectations of similar, future gifts, or subject themselves to a deluge of appeals from other entities observing their philanthropic behavior.<sup>27</sup> Some donors may not want to be subject to disapproval by others as to the mission of the charitable recipient or their giving behavior in general, or to subject their children to unwelcome attention.<sup>28</sup> Some donors may, out of

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<sup>25</sup> Robert F. Sharpe, *Behind Closed Doors: The Rise of Anonymous and Private Giving*, Sharpe Group (Aug. 1, 2009), <https://sharpenet.com/give-take/behind-closed-doors-rise-anonymous-private-giving/>; See also *Protecting Donor Privacy: Philanthropic Freedom, Anonymity and the First Amendment*, Philanthropic Roundtable, at 3-4, [https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy\\_white\\_paper.pdf](https://www.philanthropyroundtable.org/docs/default-source/default-document-library/protecting-philanthropic-privacy_white_paper.pdf) (last visited Sept. 24, 2019) (discussing how different religious traditions exhort anonymous giving).

<sup>26</sup> Sharpe, *supra* note 25; see *Protecting Donor Privacy*, *supra* note 25, at 6 (discussing the philanthropy of Pittsburgh banker Charles L. McCune, who gave anonymously because of his distaste for publicity).

<sup>27</sup> Sharpe, *supra* note 25; see *Protecting Donor Privacy*, *supra* note 25, at 6 (discussing how George Eastman's \$10 million contribution to MIT was anonymous because he wanted to avoid more requests for funding).

<sup>28</sup> Sharpe, *supra* note 25. See, e.g., Alec Torres, *Mozilla Employees Call for CEO to be Fired for Donating to Prop 8*

decorum and civility not want to flaunt their success where others have not succeeded.<sup>29</sup> Some donors may not want their gifts among various entities compared.<sup>30</sup> Donors may want to avoid sparking controversy for the nonprofit recipient.<sup>31</sup> And donors may even be concerned about the safety of their family.<sup>32</sup>

Nonprofits, in turn, can benefit from their donors' anonymity. For example, donor anonymity is used as a fundraising strategy, using anonymous matching funds to attract new donors.<sup>33</sup> But more broadly, donor privacy allows nonprofits to focus on their mission and priorities without the media distraction that controversial or celebrity donors might bring. Additionally, opponents to nonprofits—like amici, for example—often try to use donor disclosure as a means to target or weaken their organizations.<sup>34</sup> *See*

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*Campaign*, Nat'l Rev. (Apr. 1, 2014), <https://www.nationalreview.com/corner/mozilla-employees-call-ceo-be-fired-donating-prop-8-campaign-alec-torres/> (discussing how Mozilla CEO Brendan Eich's \$1,000 contribution to a traditional marriage campaign precipitated a call for his firing within his work place).

<sup>29</sup> Sharpe, *supra* note 25.

<sup>30</sup> Sharpe, *supra* note 25.

<sup>31</sup> Sharpe, *supra* note 25.

<sup>32</sup> Sharpe, *supra* note 25; *see Protecting Donor Privacy*, *supra* note 25, at 14 (discussing how the Koch brothers regularly face death threats, cyberattacks, and death threats, necessitating armed security).

<sup>33</sup> *See Protecting Donor Privacy*, *supra* note 25, at 6 (discussing how Edith and Peter O'Donnell donated \$135 million to the University of Texas, almost all anonymously to facilitate fundraising).

<sup>34</sup> *See* Jon Pritchett, *States Need to Ensure Donor Privacy—It's Crucial to Freedom of Speech*, Nat'l Rev. (Apr. 9, 2019), <https://www.nationalreview.com/2019/04/states-need-to-ensure->

*infra* Part I.C.1. Donor privacy helps prevent such onslaughts.

### **C. Disclosure of Nonprofit Donors Harms Donors, Nonprofits, and the Community.**

While giving declined generally among recipients in 2018 compared to 2017, giving to foundations and to public-society benefit organizations fell the most, by 9.1% and 6.0%, respectively.<sup>35</sup> Likewise, while most types of donors increased their giving or remained the same, individual donor giving saw a decrease of 3.4%.<sup>36</sup> Compelled nonprofit donor disclosure will do nothing to improve this decline and will harm nonprofits, their donors, and ultimately, local communities.

The Ninth Circuit required evidence of an actual burden to the parties to justify any meaningful First Amendment scrutiny. App. 60a. The actual risk of constitutional harm to nonprofits and donors, along with practical harm to American communities, resulting from compelled donor disclosure is readily demonstrated.

#### **1. Nonprofit Donor Disclosure Chills Protected Speech And Association.**

The First Amendment speech and associational rights protect against government-compelled

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donor-privacy-to-protect-freedom-of-speech/ (discussing states that are increasing seeking nonprofit donor disclosure). Mississippi Governor Byrant, on signing a bill that would increase donor privacy, observed that “[i]n recent years, charitable donations have been weaponized by certain groups against individuals to punish donors whose political beliefs differ from their own.” *Id.*

<sup>35</sup> *Giving USA: 2019, supra* note 3.

<sup>36</sup> *Giving USA: 2019, supra* note 3.

disclosure. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Charitable contributions represent both of these protected rights. The loss of these First Amendment rights for even the briefest amount of time is irreparable harm. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As the district court acknowledged in its summary judgment decision below, “once ... donor information is disclosed, it cannot be clawed back.” App. 55a.

Donor disclosure chills donor speech and association with nonprofits. For example, in 2011, the Heartland Institute, a free-market think-tank skeptical of global warming, had its donor list stolen, resulting in global warming activists launching attack campaigns against its corporate donors, several of whom withdrew their financial support as a result.<sup>37</sup> Likewise, in 2018, the governor of Montana issued an executive order requiring state contract bidders to disclose contributions made to certain nonprofits in the two years prior in order to be eligible to bid.<sup>38</sup> This has chilled nonprofits from engaging in desired issue advocacy so as not to jeopardize donor privacy. *See Illinois Opportunity Project v. Bullock*, No. 6:19-cv-56 (filed Aug. 27, 2019) (challenging on First Amendment grounds Bullock’s executive order and alleging harm to both the plaintiff and their donors). Amici have themselves seen their donors’ jobs and businesses threatened because of the support they provided to

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<sup>37</sup> *Protecting Donor Privacy*, *supra* note 25, at 5.

<sup>38</sup> *Executive Order Requiring Disclosure of Dark Money Spending for Entities Doing Business With the State of Montana*, EO No. 15-2018 (June 8, 2018), [https://governor.mt.gov/Portals/16/docs/2018EOs/EO-15-2018\\_Disclosure%20Requirement.pdf](https://governor.mt.gov/Portals/16/docs/2018EOs/EO-15-2018_Disclosure%20Requirement.pdf).

an amicus organization.<sup>39</sup>

The distinction of disclosure solely to the government rather than the public at large offers little comfort. In 2012, an IRS employee leaked the Schedule B of the National Organization for Marriage, resulting in a \$50,000 fine.<sup>40</sup> In 2015, the nonprofit Montana Growth Network saw 14 of its donors made public when the government agency investigating a complaint against the nonprofit unilaterally released copies of checks cut to the organization that were published statewide.<sup>41</sup> Even in the underlying cases below, evidence of publication of more than 1,700 unredacted Schedule Bs on the California attorney general's website was produced. App. 52a. It is not a question of if, but when, disclosures made to the government will be shared (intentionally or otherwise) with the public.

Indeed, donors have seen retaliation directly from elected officials. A popular restaurant chain saw city council members and mayors threaten to forbid it from opening in their communities on account of the

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<sup>39</sup> See also Tracie Sharp and Darcy Olsen, *Beware of Anti-Speech Ballot Measures*, Wall Street Journal (Sept. 22, 2016), <https://www.wsj.com/articles/beware-of-anti-speech-ballot-measures-1474586180> (describing other examples of vandalism and raids resulting from donor disclosure).

<sup>40</sup> Mackenzie Weinger, *IRS pays \$50K in confidentiality suit*, Politico (June 24, 2014), <https://www.politico.com/story/2014/06/irs-nom-lawsuit-108266>.

<sup>41</sup> See *IMAGES: The donation checks issued by Montana Growth Network's donors*, The Missoulian (Dec. 21, 2015), [https://missoulian.com/gallery/images-the-donations-checks-issued-by-montana-growth-network-s/collection\\_8fcbda2-0ee1-57b2-8442-176874efcd99.html](https://missoulian.com/gallery/images-the-donations-checks-issued-by-montana-growth-network-s/collection_8fcbda2-0ee1-57b2-8442-176874efcd99.html) (publishing copies of 14 checks, front and back).

owner's family giving to nonprofits perceived to be hostile to gay rights.<sup>42</sup> Compelled disclosure only to the government does not lessen the First Amendment harm.

That First Amendment chill of donor speech and association will result from nonprofit donor disclosure is both known and encouraged. As David Callahan, the founder of Inside Philanthropy and an opponent of donor privacy, admits, that outcome is even desirable: "If th[e nonprofits] can take the heat, the donors backing them should be able to do the same. And if the donors can't, they can choose not to give. A little less philanthropic money flowing into today's polarized policy and advocacy battles probably wouldn't be a bad thing."<sup>43</sup> Government-compelled nonprofit disclosure causes actual First Amendment harm.

## **2. Nonprofit Donor Disclosure Means Lost Revenue.**

The court below, in reviewing the "seriousness of the actual burden" on Petitioners' First Amendment rights, App. 23a, concluded that their evidence of chilled donors "show[ed] at most a modest impact on contributions." 27a. This, in essence, subjects every nonprofit in the Ninth Circuit, no matter how large or how small, with the obligation to mount an as applied challenge in order to preserve what may be its very existence.

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<sup>42</sup> *Protecting Donor Privacy*, *supra* note 25, at 15.

<sup>43</sup> David Callahan, *The Price of Privacy: Four Problems With Anonymous Giving—and a Case for Reform*, Inside Philanthropy (Nov. 17, 2016), <https://www.insidephilanthropy.com/home/2016/11/17/the-price-of-privacy-four-problems-with-anonymous-givingand-the-case-for-reform>.

Indeed, while widely-known and well-resourced nonprofits like the Red Cross, United Way, or the Salvation Army may create the impression that the loss of 2-5 donors, even big donors, is no big deal, the reality is that 92% of reporting nonprofits have annual revenue under one million dollars.<sup>44</sup> For example, among some of amici family policy organizations supporting this brief, the loss of their top 5 donors represents a 20% to 32% loss of revenue. The loss of association with donors for many nonprofits represents a serious decline in their ability to effectuate their mission.<sup>45</sup>

### **3. Nonprofit Donor Disclosure Means Community Needs Are Not Adequately Met.**

When a nonprofit loses funding, the community it serves ultimately pays the price. “While an individual taxpayer only receives a partial tax benefit for charitable donations, the community served by the charitable nonprofit receives the full value of every dollar.”<sup>46</sup> Thus, any restriction that disincentivizes

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<sup>44</sup> *Myths About Nonprofits*, Nat’l Council of Nonprofits, <https://www.councilofnonprofits.org/myths-about-nonprofits> (last visited Sept. 19, 2019).

<sup>45</sup> Nonprofit donor disclosure may also represent job loss for donors: “Unlike former Mozilla CEO Brendan Eich, most Americans don’t have deep financial resources to fall back on if they’re driven from the workplace because they hold unpopular views. ... Many if not most workers would opt to withdraw from civic life and keep the paychecks coming.” Hans A. von Spakovsky, *Forced Donor Disclosure Is Bad for Democracy*, The Heritage Foundation (Feb. 26, 2016), <https://www.heritage.org/civil-society/commentary/forced-donor-disclosure-bad-democracy>.

<sup>46</sup> *Myths About Nonprofits*, *supra* note 44.

giving negatively affects the community.<sup>47</sup>

**D. Disclosure of Nonprofit Donors Is Rarely Necessary.**

The court below states that while state government “may not routinely use Schedule B information *as it comes in*,” App. 21a, such information makes investigations of charities more efficient, App. 23a. It also found that California benefited from Schedule B disclosures for five completed and five ongoing investigations in the past 10 years. App. 21a n.3. California had 72,000 active nonprofits, excluding churches, in 2014,<sup>48</sup> a number that has likely only grown since then. That means that less than 1.4% of the forced donor disclosures made by nonprofits to the California attorney general were actually useful to attorney general investigations. State government has very little need for nonprofit donor disclosures.<sup>49</sup>

Historically, the restrictions on nonprofit organizations have not been zealously enforced.<sup>50</sup> Perhaps this is because nonprofits have always existed regardless of government regulation, with their treatment within the law simply a response to the creation of new types of nonprofit organizations.<sup>51</sup>

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<sup>47</sup> *Myths About Nonprofits*, *supra* note 44.

<sup>48</sup> *Causes Count: The Economic Power of California’s Nonprofit Sector*, CalNonprofits, at 11 (Aug. 2014), <https://calnonprofits.org/images/downloads/causes-count-08.pdf>.

<sup>49</sup> Calls for government oversight to promote “transparency” are also misguided. “Transparency is for the government, privacy is for the citizen.” *Donor Privacy at a Glance*, ALEC Action, <https://www.alecaction.org/toolkit/donor-privacy-at-a-glance/> (last visited Sept. 24, 2019).

<sup>50</sup> Hansmann, *supra* note 9, at 875.

<sup>51</sup> Hansmann, *supra* note 9, at 882 (“The tax code did not set

Indeed, “abuses appear to be the exception rather than the rule; in spite of minimal policing of the nondistribution constraint, nonprofit institutions in most industries evidently are operated on a fairly circumspect basis.”<sup>52</sup> This broad compliance is likely due to social norms creating ethical constraints that reinforce the legal restraints imposed on nonprofits.<sup>53</sup> Thus, while nonprofit donations are predicated on the trust of their donors, the need for government oversight is not rigorous.

Indeed, any transparency and accountability needed for nonprofits is often already addressed in boards of directors holding their staff accountable and donors holding recipients accountable for the dollars they have given them. Organizations like Charity Navigator, National committee for Responsive Philanthropy, and the Capital Research Center provide information to nonprofit community and the public to promote ethical philanthropy, leaving to the government the obligation of enforcing minimum standards that ensure charitable donations are used

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forth in the beginning a well-defined set of sectors in which nonprofits could qualify for exemption, generating nonprofits in those sectors. Instead, as nonprofits have moved into new types of activities, the tax code has been reinterpreted or amended to permit nonprofits undertaking those activities to qualify for exemption.”).

<sup>52</sup> Hansmann, *supra* note 9, at 875.

<sup>53</sup> Hansmann, *supra* note 9, at 875. These ethical constraints may also explain why “so many nonprofit institutions—including, for example, schools, hospitals, nursing homes, foster homes, and even housing project sponsors—are affiliated with religious groups. For such an association may help to keep the norms intact and at the same time assure potential patrons that in fact they are intact.” *Id.* at 876.

for charitable purposes.<sup>54</sup> “[T]he whole point of free speech and free association is that the government generally *should not* hold people accountable for what they say or believe, or with whom they chose to associate.”<sup>55</sup> “[P]hilanthropy must be largely (though not entirely) unaccountable to the government if it is to be anything more than an appendage of the state, unable to challenge the status quo.”<sup>56</sup> Government-compelled disclosure of nonprofit donors is unnecessary.<sup>57</sup>

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<sup>54</sup> *Protecting Donor Privacy*, *supra* note 25, at 17.

<sup>55</sup> *Protecting Donor Privacy*, *supra* note 25, at 17.

<sup>56</sup> *Protecting Donor Privacy*, *supra* note 25, at 18.

<sup>57</sup> The result of unnecessary donor disclosure is “junk disclosure”: since “[c]itizens give to groups in support of their overall mission—not to support a particular communication or statement a group makes,” such disclosures “actually misleads the public by associating individuals with communications that they likely have no knowledge of and may actually disagree with while simultaneously doing real harm to the privacy of citizens who wish to give to the causes of their choice.” Alex Cordell, *Why Donor Privacy Matters for Free Speech*, Institute for Free Speech (Oct. 27, 2017), <https://www.ifs.org/blog/why-donor-privacy-matters-for-free-speech/>.

**CONCLUSION**

For the foregoing reasons, this Court should grant Petitioners' petitions for writ of certiorari and reverse the decision of the court below.

Respectfully submitted,

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