Nos. 19-251 and 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION, PETITIONER

v.

XAVIER BECERRA

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
SOPAN JOSHI
Senior Counsel to the Assistant Attorney General
REBECCA TAIBLESON
Assistant to the Solicitor General
MICHAEL S. RAAB
THAIS-LYN TRAYER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Additional Caption On Inside Cover

THOMAS MORE LAW CENTER, PETITIONER

v.

XAVIER BECERRA

QUESTION PRESENTED

Whether California's requirement that charitable organizations that fundraise in the State disclose to the state Attorney General's office the identities of their substantial contributors violates the constitutional freedom of association.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petitions for writs of certiorari should be granted.

STATEMENT

Petitioners, two charitable organizations that fundraise in California, filed suits alleging that the state Attorney General's demand for a list of their substantial contributors impermissibly burdens their constitutional

freedom of association. Following bench trials, the district court enjoined the Attorney General from compelling the disclosure of petitioners' substantial contributors. 19-251 Pet. App. 41a-56a; 19-255 Pet. App. 51a-67a. The court of appeals reversed. 19-251 Pet. App. 1a-40a.

1. California law requires respondent, the state Attorney General, to "establish and maintain a register" of all charitable organizations that solicit contributions within the State, and authorizes him to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Gov't Code § 12584 (West 2018); see *id.* § 12585. After an initial registration, such charitable organizations generally must continue to "file with the Attorney General periodic written reports * * * in accordance with rules and regulations of the Attorney General." *Id.* § 12586(a); see *id.* § 12586(b). Petitioners are tax-exempt charitable organizations under Section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. 501(c)(3), that solicit contributions in California and are subject to the registration requirement. See 19-251 Pet. App. 6a, 10a-11a.

Since at least 2005, California regulations expressly require charitable organizations to submit Internal Revenue Service (IRS) Form 990 as part of their annual periodic reports to respondent. See Cal. Code Regs. tit. 11, § 301 (2005). IRS Form 990 is a federal information form for tax-exempt organizations. Schedule B of the Form contains the "the names and addresses of all substantial contributors" to the organization, as required by the Internal Revenue Code for Section 501(c)(3) organizations. 26 U.S.C. 6033(b)(5). For such organizations, a substantial contributor is one who gives $5000

or more to the organization during the year, though in some cases only if the amount also exceeds 2% of the total donations that the organization received that year. See 26 C.F.R. 1.6033-2(a)(2)(ii)(F) and (iii)(A); cf. 26 U.S.C. 507(d)(2)(A). Although the IRS must allow public inspection of a public charity's Form 990, the Schedule B contributor information must be kept confidential, under pain of civil and criminal penalties. See 26 U.S.C. 6104, 7213, and 7431.

Under California law, charitable organizations' annual periodic reports, including IRS Form 990, generally must be made available for public inspection. See Cal. Gov't Code § 12590 (West 2018); Cal. Code Regs. tit. 11, § 310(a) (2016). Respondent has interpreted the regulation as requiring charities also to submit Schedule B of Form 990, although that view was codified only recently. Cf. Cal. Code Regs. tit. 11, § 301 (2020). Respondent had an informal policy of "maintain[ing] Schedule B for public charities as a confidential document," 16-55727 Pet. C.A. Supp. E.R. 202, which was codified in a 2016 regulation after this litigation commenced, see Cal. Code Regs. tit. 11, § 310(b) (2016). That regulation does not impose penalties for breaching the confidentiality requirement.

2. a. Since 2001, petitioners have included IRS Form 990 in their periodic reports to respondent, but have "either filed redacted versions of the Schedule B or not filed it with the Attorney General at all." 19-251 Pet. App. 10a-11a. In 2012 and 2013, respondent sent deficiency letters to petitioners asserting that their 2010 and subsequent periodic reports improperly omitted unredacted copies of Schedule B. See *id.* at 11a.

After receiving the deficiency letters, petitioners filed separate suits alleging that the Attorney General's

demand impermissibly burdens their constitutional freedom of association. See 14-cv-9448 Compl. ¶¶ 1-6; 15-cv-3048 Am. Compl. ¶¶ 1-10. Petitioners alleged that their contributors had in the past suffered harassment, reprisals, and similar harms because of their association with petitioners. See, *e.g.*, 14-cv-9448 Compl. ¶ 19. Petitioners also alleged that respondent would make their Schedule B forms public. See, *e.g.*, *id.* ¶ 25. And petitioners alleged that such disclosure of their Schedule B forms likely would expose their substantial contributors to those harms, and thereby deter those contributors and others from making future contributions. See, *e.g.*, *id.* ¶¶ 13-18.

b. The district court preliminarily enjoined respondent from requiring petitioners to submit their Schedule B forms. 19-251 Pet. App. 70a-73a; 19-255 Pet. App. 90a-96a. The court of appeals vacated those injunctions, "with instructions [for the district court] to enter new orders preliminarily enjoining the Attorney General from publicly disclosing, but not from collecting, [petitioners'] Schedule B forms." 19-251 Pet. App. 58a.

c. Following bench trials, the district court entered permanent injunctions prohibiting respondent from requiring petitioners to include Schedule B forms in their periodic reports. 19-251 Pet. App. 41a-56a; 19-255 Pet. App. 51a-67a.

The district court found that the required disclosures were not substantially related to respondent's interest in regulating charities because "trial testimony confirmed that auditors and attorneys seldom use Schedule B when auditing or investigating charities," and "even in instances where a Schedule B was relied on, the relevant information it contained could have been obtained from other sources." 19-251 Pet. App.

45a; see 19-255 Pet. App. 55a. The court also found that the disclosure requirement was not narrowly tailored to the respondent's asserted interest because the trial record "lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance [respondent's] investigative, regulatory or enforcement efforts." 19-251 Pet. App. 47a; see 19-255 Pet. App. 57a.

On the other side of the balance, the district court found that petitioners had presented "ample evidence" that their known contributors had in the past suffered harassment, reprisals, and similar harms, and that contributors listed on the Schedule B would therefore face a reasonable probability of such harms in the future were their identities made public. 19-251 Pet. App. 49a; see *id.* at 48a-50a; 19-255 Pet. App. 58a-61a. The court also found that notwithstanding respondent's policy of keeping Schedule B forms confidential, he "ha[d] systematically failed to maintain the confidentiality of Schedule B forms," including by having thousands of forms accessible on the register's website during this litigation. 19-251 Pet. App. 51a; see *id.* at 51a-53a; 19-255 Pet. App. 61a-63a.

3. The court of appeals reversed. 19-251 Pet. App. 1a-40a.

a. The court of appeals first rejected the contention that the disclosure requirement must be narrowly tailored to the asserted governmental interest. See 19-251 Pet. App. 15a-17a. Relying on its decision in *Center for Competitive Politics* v. *Harris*, 784 F.3d 1307 (9th Cir.), cert. denied, 577 U.S. 975 (2015), the court then held that the disclosure requirement was substantially related to a compelling governmental interest because

"quick access to Schedule B filings 'increases the Attorney General's investigative efficiency' and allows him to 'flag suspicious activity'" without "'the need for expensive and burdensome audits.'" 19-251 Pet. App. 19a (brackets and citations omitted).

The court of appeals also disagreed with the district court's factual findings regarding the burden on petitioners' freedom of association. After reviewing trial testimony, the court of appeals concluded that "[t]he evidence presented by [petitioners] here does not show that disclosure to [respondent] will 'actually and meaningfully deter contributors.'" 19-251 Pet. App. 28a (citation omitted). The court likewise concluded, contrary to the district court, that petitioners "ha[d] not established a reasonable probability of retaliation from compliance with [respondent's] disclosure requirement." *Id.* at 34a. The court of appeals agreed that respondent "has not maintained Schedule B information as securely as [he] should have," *id.* at 35a, but found that in light of "the promulgation of § 310," which codified respondent's policy of treating Schedule B forms as confidential, and respondent's "adoption of additional security measures," the "evidence does not support the inference that [respondent] is likely to inadvertently disclose [petitioners'] Schedule B [forms] in the future," *id.* at 38a.

b. The court of appeals denied rehearing. 19-251 Pet. App. 77a. Judge Ikuta, writing for five judges, dissented. *Id.* at 77a-97a. She faulted the panel for not applying "a narrow tailoring requirement" and for "reach[ing] factual conclusions that were unsupported by the record." *Id.* at 91a. In a response, the three judges on the panel expressed their view that these cases involved "the *nonpublic* disclosure of Schedule B

information," and thus did not entail "exposing contributors to the threats, harassment or reprisals that might follow *public* disclosure." *Id.* at 98a; see *id.* at 98a-109a.

DISCUSSION

The court of appeals erred in holding that the compelled disclosure of petitioners' substantial contributors need not satisfy narrow tailoring. As this Court's precedents make clear, compelled disclosures that carry a reasonable probability of harassment, reprisals, and similar harms are subject to exacting scrutiny, which requires a form of narrow tailoring. That distinguishes the disclosures here from those required to participate in voluntary tax-benefit programs; indeed, respondent does not even administer the California tax laws. And given the district court's factual findings that respondent routinely discloses Schedule B forms, thereby creating a risk of harassment, and that those forms have proved unnecessary to respondent's regulatory enforcement duties, the compelled disclosures here are subject to narrow tailoring but lack a reasonable fit to the asserted governmental interest. The court of appeals' contrary holding compromises important associational interests protected by the First Amendment, is of nationwide importance given California's outsized role, and is in tension with decisions of this Court and other courts of appeals. The petitions for writs of certiorari should therefore be granted.

A. The Decision Below Is Incorrect

1. Compelled disclosures of an organization's contributors imposed as a regulatory requirement generally must satisfy narrow tailoring

The compelled disclosure of an organization's contributors that carries a reasonable probability of harassment, reprisals, and similar harms must satisfy exacting scrutiny, which in turn requires narrow tailoring. By contrast, a disclosure requirement imposed as a condition of voluntary participation in a tax-benefit program need not satisfy exacting scrutiny.

a. The First Amendment protects "the freedom of speech" and "the right of the people peaceably to assemble." U.S. Const. Amend. I. This Court has derived from those freedoms an attendant freedom of association, which helps to enable "[e]ffective advocacy of both public and private points of view." *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); see *Buckley* v. *Valeo*, 424 U.S. 1, 65-66 (1976) (per curiam). The Court further has stated that the "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Patterson*, 357 U.S. at 462.

Accordingly, the compelled disclosure of a group's membership may infringe on the freedom of association if it could "induce members to withdraw from the [group] and dissuade others from joining it because of fear of exposure * * * and of the consequences of this exposure," such as "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Patterson*, 357 U.S. at 462-463. Likewise, the compelled disclosure of an advocacy

group's donors may infringe on the freedom of association if it "will deter some individuals who otherwise might contribute" or "expose contributors to harassment or retaliation." *Buckley*, 424 U.S. at 68. In an as-applied challenge to a compelled-disclosure requirement, "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74.

Under those circumstances, "[t]he right to privacy in one's political associations and beliefs will yield only to a 'subordinating interest of the State that is compelling,' and then only if there is a 'substantial relation between the information sought and an overriding and compelling state interest.'" *Brown* v. *Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91-92 (1982) (brackets and citations omitted); see *Bates* v. *City of Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."). As the words "subordinating" and "overriding" imply, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis* v. *FEC*, 554 U.S. 724, 744 (2008). Accordingly, a court should uphold a compelled-disclosure requirement only if the "public interest in disclosure * * * outweighs the harm." *Buckley*, 424 U.S. at 72.

In *Buckley*, this Court described that standard as "exacting scrutiny." 424 U.S. at 64. The Court has continued to use that label to describe the standard applicable to compelled-disclosure requirements "in the electoral context." *Doe* v. *Reed*, 561 U.S. 186, 196 (2010);

see *Citizens United* v. *FEC*, 558 U.S. 310, 366-367 (2010). That same standard should apply in other contexts in which compelled disclosure is reasonably likely to result in harassment, reprisal, and similar harms. *Buckley* itself used "exacting scrutiny" to describe the standard from *Patterson*, which did not involve the electoral context. *Buckley*, 424 U.S. at 64. And *Patterson* made clear that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." 357 U.S. at 460. In all of those contexts, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460-461. It follows that the "exacting scrutiny" described in *Patterson* and *Buckley* should apply to compelled disclosure that is reasonably likely to result in harassment, reprisals, and similar harms in the electoral and non-electoral contexts alike.

That scrutiny requires compelled disclosures to be narrowly tailored to the asserted governmental interest. On occasion, this Court has said so expressly. *E.g.*, *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960) (explaining that even when the government has a "legitimate and substantial" purpose to learn whether an individual belongs to a dissident group, compelling the disclosure of *all* of his group memberships is unconstitutional because "the end can be more narrowly achieved"); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296-297 (1961) (explaining that the compelled disclosure of membership lists involves "an area where * * * any regulation must be highly selective" and where "regulations need to be 'narrowly drawn'") (citation omitted). Moreover, narrow tailoring is to some degree implicit in the requirement that the governmental interest in the

compelled disclosures be "legitimate and substantial." *Shelton*, 364 U.S. at 488; see *McConnell* v. *FEC*, 540 U.S. 93, 198 (2003), overruled on other grounds by *Citizens United*, *supra*. That is because it is difficult to demonstrate a "substantial" interest in a broad disclosure scheme when narrower disclosures would be sufficient. Cf. *Patterson*, 357 U.S. at 463-464 (finding the compelled disclosure of an organization's "ordinary rank-and-file members" unconstitutional, but observing that the compelled disclosure of "members who are employed by or hold official positions" in the organization was unchallenged).

The Court at times has suggested that "'exacting scrutiny'" may be comparable to—albeit less demanding than—"strict scrutiny," which of course requires some form of narrow tailoring. See *McIntyre ex rel. McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 346 & n.10 (1995) (describing the standard in *Meyer* v. *Grant*, 486 U.S. 414 (1988), which applied "'exacting scrutiny'" to a limitation on political speech, as similar to "strict scrutiny") (citation omitted). As the Chief Justice has explained in the context of aggregate contribution limits, "[e]ven when the Court is not applying strict scrutiny, we still require 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective.'" *McCutcheon* v. *FEC*, 572 U.S. 185, 218 (2014) (plurality opinion) (citation and ellipses omitted). That principle should apply with equal force to compelled-disclosure requirements that carry a reasonable probability of harassment, reprisals, and similar harms.

Accordingly, a court must ensure that the compelled disclosure of a group's members or donors that carries a reasonable probability of exposing them to harassment, reprisals, and similar harm "bear[s] a crucial relation to," or is "essential to fulfillment of," a "proper governmental purpose." *Gibson* v. *Florida Legislative Investigation Comm.*, 372 U.S. 539, 549 (1963). However labeled—"narrow tailoring," "crucial relation," "essential to fulfillment"—that requirement ensures that the compelled disclosures do not sweep significantly more broadly than necessary to achieve the substantial governmental interest. As this Court has explained in a related context involving the freedoms of association and expression, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

b. By contrast, the disclosure of a group's donors, when imposed as a condition of administering a voluntary governmental benefit program or similar administrative scheme, is not a compelled disclosure subject to exacting scrutiny or the narrow-tailoring requirement. That is particularly so when the disclosure relates to a voluntary tax-benefit program—in effect, a governmental subsidy. An organization seeking the subsidy is not, strictly speaking, compelled to disclose its donors, because it always can forgo the governmental benefit. And the government in administering the program must be able to ensure compliance with the program's requirements and to monitor and deter fraud.

This Court's decision in *Regan* v. *Taxation With Representation*, 461 U.S. 540 (1983), is instructive. There, the Court upheld a requirement that organizations seeking tax-exempt status under Section 501(c)(3)

of the Internal Revenue Code refrain from lobbying activities. See *id.* at 545. The Court determined that although lobbying is protected by the First Amendment, denying tax-exempt status to organizations that engage in lobbying does "not infringe[] any First Amendment rights or regulate[] any First Amendment activity" because "Congress is not required by the First Amendment to subsidize lobbying." *Id.* at 546. The Court explained that the government need not "grant a benefit such as [the tax benefit] here to a person who wishes to exercise a constitutional right." *Id.* at 545. Accordingly, Congress's decision to condition a content-neutral tax break on the recipient's non-exercise of a First Amendment right "is not subject to strict scrutiny," and is instead "'a matter of grace that Congress can, of course, disallow as it chooses.'" *Id.* at 549 (brackets, citation, and ellipsis omitted).

Likewise, the Constitution does not provide an unconditional right for a group to claim a voluntary tax subsidy while keeping the identities of its donors private. Instead, as in other contexts involving conditions imposed on voluntary benefits or similar governmental programs, the government may require an organization seeking such a subsidy to disclose information that is germane to the government's administration of that program. See *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) ("Congress is free to attach reasonable * * * conditions" to voluntary federal subsidies); cf. *Dolan* v. *City of Tigard*, 512 U.S. 374, 386 (1994) (requiring an "'essential nexus'" and a "degree of connection") (citation omitted); see generally, *e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1457 (1989) ("the legitimacy of a government proposal depends upon the degree of relatedness between the

condition on a benefit and the reasons why government may withhold the benefit," and "[t]he more germane a condition to a benefit, the more deferential the review") (citation omitted).

In this context, federal law reflects Congress's judgment that the disclosure of certain donor-related information is germane to the IRS's administration of tax-exemption laws for charities under Section 501(c)(3). See 26 U.S.C. 6033. Indeed, Congress specifically added the disclosure requirement of Section 6033 in the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, in order to "facilitate meaningful enforcement" of "new self-dealing rules and other provisions" regulating organizations that choose to claim tax-exempt status under Section 501(c)(3). H.R. Rep. No. 413, 91st Cong., 1st Sess. 36 (1969); see also Taxpayer First Act, Pub. L. No. 116-25, Tit. II, Subtit. D, § 2301, 133 Stat. 1012-1013 (requiring electronic reporting of Form 990). The IRS thus properly collects Schedule B information as part of its administration of the government subsidy program that is tax-exemption. Cf. *Agency for Int'l Dev.* v. *Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013) (explaining that the government may impose "conditions that define the limits of the government spending program").

In addition to being germane to a government-spending program, the federal donor-disclosure requirement operates in a content-neutral fashion, as was the case in *Regan.* Any organization claiming tax-exempt status under Section 501(c)(3) must disclose "the names and addresses of all substantial contributors," 26 U.S.C. 6033(b)(5), regardless of the content of any message it may convey. Accordingly, heightened scrutiny does not apply. See *Regan*, 461 U.S. at 545; see

also *Lewis Publ'g Co.* v. *Morgan*, 229 U.S. 288, 306-307 & n.3, 314-315 (1913) (rejecting a First Amendment challenge to a discounted postal rate conditioned on the recipient's making certain disclosures); *Cammarano* v. *United States*, 358 U.S. 498, 513 (1959) (rejecting a First Amendment challenge to a regulation denying a tax deduction for lobbying expenses because "[p]etitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets").

At least one lower court has correctly applied the foregoing principles in a context similar to this one. In *Mobile Republican Assembly* v. *United States*, 353 F.3d 1357 (2003), the Eleventh Circuit addressed Section 527 of the Internal Revenue Code, which requires any "political organization" claiming tax-exempt status under that section to disclose "[t]he name and address * * * of all contributors which contributed an aggregate amount" exceeding a certain threshold. 26 U.S.C. 527(j)(3)(B). Citing *Regan*, *supra*, the Eleventh Circuit rejected First and Fifth Amendment challenges to that disclosure requirement. *Mobile Republican Assembly*, 353 F.3d at 1361. The court explained that "Congress has enacted no barrier to the exercise of the [organization's] constitutional rights. Rather, Congress has established certain requirements that must be followed in order to claim the benefit of a public tax subsidy." *Ibid.* The court observed that "[a]ny political organization uncomfortable with the disclosure [requirements] may simply decline to register under Section 527(i) and avoid these requirements altogether." *Ibid.*

2. The court of appeals incorrectly declined to require narrow tailoring here

a. The court of appeals erroneously held that narrow tailoring is inapplicable to California's compelled-disclosure requirement. It recognized that the "exacting scrutiny" of *Patterson*, *Buckley*, and other compelled-disclosure cases applied to the compelled disclosures of petitioners' Schedule B forms here. See 19-251 Pet. App. 15a. It nevertheless concluded that the narrow tailoring set forth in those cases does not apply here, on the ground that this Court's cases in the electoral context, such as *Doe, supra,* and *Citizens United*, *supra,* rejected the application of strict scrutiny. See Pet. App. 16a.

That reasoning was mistaken. For one thing, it erroneously assumes that a narrow-tailoring requirement applies *only* under strict scrutiny. To be sure, strict scrutiny, as the court below recognized, requires a particularly stringent form of narrow tailoring: the state must "choose the least restrictive means of accomplishing its purposes." 19-251 Pet. App. 16a. But while lesser degrees of scrutiny do "not necessarily [require] the least restrictive means," exacting scrutiny still requires "a means narrowly tailored to achieve the desired objective." *McCutcheon*, 572 U.S. at 218 (plurality opinion) (citation omitted). Specifically, narrow tailoring under exacting scrutiny requires only a "reasonable" fit, rather than a "perfect" one. *Ibid.* (citation omitted). The court of appeals thus erred in dispensing with that requirement altogether.

This Court's electoral disclosure cases do not support the court of appeals' refusal to require narrow tailoring. As discussed earlier, see pp. 10-11, *supra*, courts

evaluating disclosure requirements in the electoral context often have given effect to the narrow-tailoring requirement by separately analyzing each disclosure requirement to determine whether there exists a substantial relation, or reasonable fit, with a substantial or compelling governmental interest. See, *e.g.*, *Citizens United*, 558 U.S. at 367-371. That approach makes particular sense in the electoral context, in which the governmental interest often is the disclosure itself. See, *e.g.*, *id.* at 367 (explaining that "disclosure could be justified based on a governmental interest in 'providing the electorate with information' about the sources of election-related spending") (brackets and citation omitted). In those circumstances, a limited disclosure requirement for which the government has demonstrated a compelling interest generally is presumed "to be the least restrictive means of curbing the evils of campaign ignorance and corruption." *Buckley*, 424 U.S. at 68.

b. Nor can the court of appeals' refusal to apply narrow tailoring be justified on the ground that the disclosures here are germane to the administration of a voluntary tax-benefit program. Cf. pp. 12-14, *supra*; *Dolan*, 512 U.S. at 386; *Agency for Int'l Dev.*, 570 U.S. at 214-215; *Mobile Republican Assembly*, 353 F.3d at 1361. To be sure, California requires disclosure of the same list of substantial contributors that the IRS requires Section 501(c)(3) organizations to submit on their Schedule B forms. See 26 U.S.C. 6033(b)(5); 26 C.F.R. 1.6033-2(a)(2)(ii)(F). But unlike the IRS, the California Attorney General's office does not appear to enforce or administer any tax laws. Instead, those tasks are reserved to an entirely separate state agency: the Franchise Tax Board. As respondent's website explains,

"[t]he role of the Attorney General in overseeing California charities is different from the IRS and Franchise Tax Board." State of Cal. Dep't of Justice, *Filing a Complaint About a Charity or Charitable Solicitation*, https://oag.ca.gov/charities/complaints. Whereas the Franchise Tax Board determines an organization's "liability for taxes, penalties, or revocation of tax-exempt status," respondent only "represents the public beneficiaries of charities" and investigates whether "directors and trustees have mismanaged, diverted, or defrauded the charity." *Ibid.*

It follows that the underlying rationale of *Regan* (namely, that conditions imposed by the government in administering a voluntary tax-benefit program do not trigger exacting scrutiny) would not apply to respondent's collection of the information listed on Schedule B. That the doctrinal analysis here would turn on the State's internal administrative organization is not unique to this context. For example, immunity under the Eleventh Amendment may depend on how a State has organized its instrumentalities. See, *e.g.*, *Regents of the Univ. of Cal.* v. *Doe*, 519 U.S. 425, 429-431 & nn.5-6 (1997); *Hess* v. *Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48-49 (1994). California's apparent choice to divest the Attorney General's office of authority to administer the tax laws likewise means that respondent can assert only a broad regulatory interest in compelling the disclosures here—not an interest in administering a tax-benefit program that is conditioned on the disclosures.

c. In responding to the dissent from denial of rehearing, the judges on the panel stated that these cases involve only "the *nonpublic* disclosure of Schedule B information" that will not "expos[e] contributors to the

threats, harassment or reprisals that might follow *public* disclosure." 19-251 Pet. App. 98a. To the extent the statement suggests that nonpublic disclosure never triggers a narrow-tailoring requirement, that is incorrect; even disclosure only to the government may trigger exacting scrutiny if it would result in harassment, reprisals, and similar harms. See *Buckley*, 424 U.S. at 74 (acknowledging the possibility of "threats, harassment, or reprisals from *either Government officials* or private parties") (emphasis added). And here, following bench trials, the district court found a demonstrated pattern of neglect allowing substantial contributor information to become public, thereby enabling public harassment, reprisals, and the like. See 19-251 Pet. App. 49a-53a; 19-255 Pet. App. 59a-62a. Those findings were not clearly erroneous. Because plaintiffs demonstrated a "reasonable probability that the compelled disclosure of [their] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties," *Buckley*, 424 U.S. at 74, exacting scrutiny—and the concomitant narrow-tailoring requirement—applies to the compelled-disclosure scheme here.

3. The compelled disclosures here are not narrowly tailored to a compelling governmental interest

a. The required disclosures here lack a reasonable fit to the asserted purpose of regulating charities that operate in the State. The court of appeals found that the disclosures were justified because "the state's quick access to Schedule B filings 'increases the Attorney General's investigative efficiency' and allows him to 'flag suspicious activity'" in his efforts to prevent fraud and self-dealing. 19-251 Pet. App. 19a (brackets and citation omitted). The court also credited testimony from

a State employee surmising that "[i]f we subpoenaed [a charity's Schedule B] or sent a letter to the charity, that would tip them off to our investigation, which would allow them potentially to dissipate more assets or hide assets or destroy documents." *Id.* at 20a (citation omitted). Although regulating charitable organizations that operate within the State assuredly is a compelling interest, see *Patterson*, 357 U.S. at 464, the court of appeals erred in finding the required disclosures here narrowly tailored to the asserted convenience and efficiency rationales, given the district court's factual findings.

As the district court found, "out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section [of the Attorney General's office], only five instances involved the use of a Schedule B." 19-251 Pet. App. 45a. The court also found that "[e]ven in the few instances in which a Schedule B was relied on, the relevant information it contained could have been obtained from other sources." 19-255 Pet. App. 55a. And the court observed that petitioners' "'lack of compliance' [with the disclosure requirement] went unnoticed for over a decade." 19-251 Pet. App. 45a; see 19-255 Pet. App. 54a. The court thus concluded that "the Attorney General does not use the Schedule B in [his] day-to-day business," 19-251 Pet. App. 45a, and that "it is indeed possible for the Attorney General to monitor charitable organizations without Schedule B," 19-255 Pet. App. 54a.

As those factual findings make clear, the State barely has made use of the Schedule B forms that it has collected over the years, and can obtain the same information through subpoenas and audits in the rare instances when the need arises. See 19-251 Pet. App. 44a-45a; 19-255 Pet. App. 54a-56a; see also 19-251 Arizona

Amicus Br. 7 (explaining that in a "civil enforcement action in Arizona against four sham cancer charities" brought by the Federal Trade Commission and all 50 States, "[t]he Schedule B used by a California Attorney General's office attorney was obtained by a targeted subpoena," and that even though "Arizona does not even require charities to register," it "proved no obstacle to Arizona's vigorous pursuit of this matter"). Indeed, it appears that 47 States and the District of Columbia manage to regulate charities without requiring the filing of unredacted Schedule B forms—11 of them without requiring charities to register at all. See 19-251 Arizona Amicus Br. 6. California's prophylactic desire to collect as many as 60,000 Schedule B forms per year, see 19-251 Pet. App. 36a, is out of all proportion to any interest in regulating charities and in conducting efficient investigations.

Accordingly, the "strength of the governmental interest" in investigative efficiency does not adequately "reflect the seriousness of the actual burden on" associational rights, given the district court's finding that the disclosures here would as a practical matter result in harassment, reprisals, and similar harm. *Doe*, 561 U.S. at 196 (citation omitted). The disclosure of the NAACP's local membership lists in *Patterson* surely would have made enforcement of the Alabama statute regulating foreign corporations more efficient, see 357 U.S. at 464-465; administration of the Little Rock occupational licensing ordinance more efficient in *Bates*, see 361 U.S. at 525; and the Florida legislature's investigation of suspected Communist organizations more efficient in *Gibson*, 372 U.S. at 549. Yet in each case, disclosure was held to be insufficiently related to furthering the asserted governmental interest. Although these

cases involve the compelled disclosure of petitioners' donors, not members, there is no basis for applying a different rule. See *Buckley*, 424 U.S. at 68.

b. Nor can the court of appeals' decision be justified on the alternative ground that the disclosures are germane to the State's interest in administering its tax laws. To be sure, administration of such tax laws is a compelling governmental interest. See *Bates*, 361 U.S. at 524. But as noted above, respondent does not administer the California tax laws; the Franchise Tax Board does. Indeed, it appears that any charity that solicits contributions in California must register and file periodic reports with respondent *whether or not* it enjoys tax-exempt status under federal or state law. See Charitable Trusts Section, Cal. Dep't of Justice, *Attorney General's Guide for Charities* 21 (2020), https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf. As a result, the "power to tax" cannot serve as a compelling governmental interest to which the disclosures here would be germane. *Bates*, 361 U.S. at 524. And even if the Franchise Tax Board were to demand the disclosures on the ground that they would be relevant to its administration of state tax laws, that alone would not justify making the information public. Respondent has not asserted any such justification here; to the contrary, respondent appears to acknowledge the constitutional importance of keeping Schedule B forms private, and has touted its post-litigation attempts to protect such privacy. See, *e.g.*, Br. in Opp. 4. The substantial privacy protections in federal law further underscore that public disclosure of substantial-contributor information likely is not sufficiently germane to any governmental interest in taxation.

B. The Decision Below Warrants This Court's Review

The question presented here is of substantial national importance. California is the most populous State in the union, and many charitable organizations fundraise there, see 19-251 Pet. App. 36a (stating that respondent "receives over 60,000 registration renewals annually"), giving its disclosure requirement outsized effect. And as noted, California's disclosure requirement has a nationwide impact because those charities must disclose all the substantial contributors listed on Schedule B, not just those with a connection to California. Although it appears that only three States currently require charities to disclose the identities of their substantial contributors, see 19-251 Arizona Amicus Br. 6, California's outsized importance—not to mention New York's, one of the other two States—counsels in favor of review. And the disclosures mandated by those states implicate important associational interests related to political and religious expression.

Moreover, as described above, the court of appeals' decision is in tension with this Court's precedents applying narrow tailoring to similar disclosure requirements. See *Patterson*, 357 U.S. at 461; *Shelton*, 364 U.S. at 488; *Louisiana*, 366 U.S. at 297. It also deepens tension among the courts of appeals. Like the Ninth Circuit here, the Second Circuit recently upheld New York's materially identical reporting requirement for charities without applying narrow tailoring. See *Citizens United* v. *Schneiderman*, 882 F.3d 374, 381 (2018) (rejecting the contention that disclosure is "unconstitutional absent a compelling government interest and narrowly drawn regulations furthering that interest").

By contrast, other courts of appeals have required narrow tailoring for disclosure requirements in related

contexts. For example, the Fifth Circuit has explained that a statute authorizing court-ordered disclosure of an organization's membership passes constitutional muster "only if drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than is absolutely necessary." *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 399 (1980). Similarly, the First Circuit has explained that a governmental subpoena seeking records that could burden the constitutional freedom of association by disclosing an organization's membership is enforceable only if "there is no significantly less restrictive alternative for obtaining the information." *United States* v. *Comley*, 890 F.2d 539, 544 (1989). The Fourth and Sixth Circuits likewise have applied narrow tailoring to disclosure requirements. See *Master Printers of Am.* v. *Donovan*, 751 F.2d 700 (4th Cir. 1984), cert. denied, 474 U.S. 818 (1985); *Humphreys, Hutcheson & Moseley* v. *Donovan*, 755 F.2d 1211 (6th Cir. 1985). Although none of those courts addressed disclosure requirements in the precise context presented here, their application of narrow tailoring is in tension with the decision below.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
HASHIM M. MOOPPAN
Counselor to the Solicitor General
SOPAN JOSHI
Senior Counsel to the Assistant Attorney General
REBECCA TAIBLESON
Assistant to the Solicitor General
MICHAEL S. RAAB
THAIS-LYN TRAYER
Attorneys

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