No. 19-793

In the Supreme Court of the United States

INSTITUTE FOR FREE SPEECH,

Petitioner,

v.

XAVIER BECERRA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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May 1, 2020

QUESTION PRESENTED

Whether the First Amendment prohibits a State from requiring tax-exempt organizations to submit, on a confidential basis and for regulatory oversight purposes, the same schedule identifying their major donors that they provide to the IRS.

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INTRODUCTION

Federal law requires certain tax-exempt charities to annually report the names of their major donors to the Internal Revenue Service. That information is submitted to the IRS on form Schedule B as part of the charity's annual tax return. California requires charities that operate within the State to file the same Schedule B form with the California Attorney General's Registry of Charitable Trusts for regulatory oversight purposes. The Attorney General's Office is responsible for protecting charitable assets for their intended purposes, and it uses Schedule B information to detect and investigate fraud, self-dealing, and abuse of the special tax-exempt status enjoyed by charities. Schedule Bs filed with the Registry are confidential and may not be disclosed to the public.

In 2014, petitioner the Institute for Free Speech filed suit against the Attorney General, alleging that California's Schedule B requirement facially violates the First Amendment. In 2015, the court of appeals upheld the denial of petitioner's request for a preliminary injunction, reasoning that petitioner had failed to produce evidence—or even to claim—that the requirement to submit its Schedule B to state regulators on a confidential basis would chill or otherwise interfere with its protected associational activities. Applying exacting scrutiny, the court held that the State's interests in protecting the public from fraud and misuse of charitable assets were sufficient to outweigh the minimal associational burden asserted by petitioner, at least for purposes of petitioner's facial challenge. But the court left open the possibility that petitioner could plead a valid as-applied claim if it showed a reasonable probability that the State's information-

reporting requirement would subject it or its contributors to reprisals or other chilling effects on their associational interests. This Court denied certiorari.

On remand, petitioner declined to plead an as-applied claim or to allege facts suggesting that the State's confidential reporting requirement would harm it or its members' protected First Amendment activities. The district court dismissed petitioner's complaint without leave to amend. Relying on its 2015 decision, the court of appeals summarily affirmed the dismissal.

That decision is correct and does not warrant further review. The courts below properly rejected petitioner's facial challenge in light of the State's important law enforcement and regulatory interests and the absence of any allegations of actual First Amendment harm to petitioner or its donors. The decision below does not conflict with any of the lower court decisions cited in the petition. And this Court has already denied review of essentially the same decision challenged here. Nothing in the present petition warrants any different result.

STATEMENT

1. Under federal and California law, organizations operating for charitable purposes may obtain exemptions from paying federal and state taxes. 26 U.S.C. § 501(c)(3); Cal. Rev. & Tax Code § 23701. To safeguard against abuse of this tax-exempt status and other wrongdoing, federal and state laws require charitable organizations to submit information about their finances to oversight agencies. *See* Pet. App. 27-30. For example, the Internal Revenue Code requires organizations exempt under Section 501(c)(3) to file with the IRS an annual return reporting their income,

expenditures, assets, and liabilities as well as "the total of the contributions and gifts received by [them] during the year[] and the names and addresses of all substantial contributors." 26 U.S.C. § 6033(b). Federal regulations also generally require organizations to report the names and addresses of major donors for each taxable year. Depending on the circumstances of the organization, those regulations mandate the reporting of the names of any person who donated $5,000 or more or who contributed more than 2 percent of the organization's total contributions. 26 C.F.R. § 1.6033-2(a). Organizations report their major-donor information on a Schedule B form, which they submit to the IRS as an attachment to their Form 990. Pet. App. 27-28. Schedule Bs are confidential and are exempt from public disclosure. 26 U.S.C. § 6104(d)(3)(A).

California requires charitable organizations operating within the State to submit the same information to state regulators for regulatory oversight purposes. In the Supervision of Trustees and Fundraisers for Charitable Purposes Act, the state Legislature required the Attorney General to establish and maintain a register of charitable trusts to register and gather financial information from charitable entities. *See* Cal. Gov't Code § 12584. The primary responsibility for supervising charities and protecting charitable assets in California resides with the Attorney General. *See id.* § 12598(a). Charities operating or soliciting in California must register with the Registry of Charitable Trusts and must file periodic financial reports on the assets they hold for charitable purposes. *Id.* §§ 12585, 12586(a); *see also id.* § 12584 (authorizing California Attorney General to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the

register"). The Attorney General can refuse to register or may revoke or suspend the registration of a charitable corporation or trustee. *See id.* § 12598(e). To maintain good standing with the Registry, charitable organizations must file a copy of their annual IRS Form 900 and attached schedules, including their Schedule B. Cal. Code Regs. tit. 11, § 301; Pet. App. 27; *see also* Cal. Code Regs. tit. 11, § 306(c) (authorizing Attorney General to require additional information deemed necessary "to ascertain whether the [organization] is being properly administered").

Schedule B forms submitted to the Registry are confidential and may not be disclosed to the public. Pet. App. 30. Before 2016, the Attorney General's Office maintained a policy that treated those forms as confidential. *Id.* at 4. In 2016, the Attorney General codified that policy in a regulation providing that "[d]onor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed." Cal. Code Regs. tit. 11, § 310(b); *see also* Pet. App. 4-5. The only exceptions to that requirement are for disclosures in a judicial or administrative enforcement proceeding or in response to a search warrant. Cal. Code Regs. tit. 11, § 310(b).

Consistent with this confidentiality requirement, the Attorney General maintains Schedule B forms separately from other submissions. Pet. App. 4. They are not available on the Registry's public website. *See id.* They are used and accessed only by the Charitable Trusts Section of the Attorney General's Office, which

is responsible for implementing the Attorney General's mandate to protect charitable assets. *See id.*[1] That unit evaluates complaints against charities and investigates fraud, self-dealing, diversion or misuse of charitable assets, and other violations of state law. Employees who mishandle or take Schedule B forms may be subject to discipline or, depending on the conduct, criminal sanctions. *See, e.g.*, Cal. Gov't Code § 6200.

Beginning in 2010, the Registry enhanced its efforts to notify non-compliant organizations of deficient filings. *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1006 (9th Cir. 2018), *petition for cert. filed*, Nos. 19-251 & 19-255. In 2014, the Registry informed petitioner that its submission of a redacted Schedule B was incomplete and directed the organization to submit the same form that it filed with the IRS. Pet. App. 5, 82-83.

2. Petitioner (then known as the Center for Competitive Politics) filed suit against the Attorney General in 2014, alleging that the requirement to submit an unredacted Schedule B to the Registry facially violates the First Amendment. Pet. App. 6.

a. The district court denied petitioner's motion for a preliminary injunction, concluding that petitioner had "not articulated any, objective specific harm" resulting from the State's Schedule B requirement. Pet. App. 65. The district court further determined that, even if petitioner had demonstrated an arguable interference with its First Amendment rights, it was unlikely to prevail on the merits of its claim because

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[1] *See generally* State of California Department of Justice, Charities, https://oag.ca.gov/charities (last visited April 30, 2020).

the Attorney General's interest in performing the "regulatory and oversight function as delineated by state law is compelling and substantially related to the disclosure requirement." *Id.* at 66.

b. The court of appeals affirmed. Pet. App. 26-50. Analyzing the nature of petitioner's claim, the court explained that the complaint asserted a facial challenge to California's Schedule B requirement, as petitioner itself conceded. *Id.* at 37-38 & n.5. The court acknowledged precedent applying different standards to evaluate facial challenges. *Id.* at 38-39. But the court saw no need to definitively resolve which standard applies, because petitioner could not satisfy even the least demanding standard, which asks whether a challenged law has a substantial number of unconstitutional applications judged in relation to its plainly legitimate sweep. *Id.* at 39.

The court further concluded that California's Schedule B requirement is subject to "exacting scrutiny." Pet. App. 32. That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 32-33 (quoting *Citizens United v. FEC*, 558 U.S. 310, 366-367 (2010)) (some internal quotation marks omitted). "In order for a government action to survive exacting scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Id.* at 33 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)) (emphasis omitted).

Turning to the burdens on petitioner's First Amendment rights, the court concluded that petitioner had failed to show that California's Schedule B requirement actually interfered with its freedom of association. Pet. App. 37. The court recognized that a

state disclosure requirement can infringe First Amendment rights when it is "itself a form of harassment intended to chill protected expression." *Id.* at 35. Compelled disclosure can also violate associational rights when it "leads to private discrimination against those whose identities may be disclosed." *Id.* The court further recognized that "the chilling *risk* inherent in compelled disclosure triggers exacting scrutiny." *Id.* at 36 (emphasis in original). But the court declined to adopt petitioner's theory that compelled disclosure—without any demonstration of chilling, retaliation, or other negative consequences—is in itself a First Amendment injury. *Id.* at 36-37, 42.

In this case, petitioner did "not claim and produce[d] no evidence to suggest that [its] significant donors would experience threats, harassment, or other potentially chilling conduct as a result of" submitting its Schedule B to the Registry. Pet. App. 41. In addition, "there [was] no indication in the record" that California's Schedule B requirement "was adopted or is enforced in order to harass members of the registry in general or [petitioner] in particular." *Id.* at 36. The court recognized that "non-public disclosures can . . . chill protected activity where a plaintiff fears the reprisals of a government entity," but petitioner "has not alleged any such fear here." *Id.* at 42.

The court next weighed the State's interests in enforcing state laws protecting the public from fraud and misuse of charitable assets. *See* Pet. App. 43-45. Petitioner conceded that the Attorney General's interest in enforcing the law is compelling. *Id.* at 43. The court explained that having immediate access to an entity's Schedule B increases investigative efficiency and allows the Attorney General to "flag suspicious activity." *Id.* at 44; *see also id.* at 30-31. For purposes

of petitioner's preliminary injunction motion, the court thus concluded that the Schedule B requirement "bears a 'substantial relation' to a 'sufficiently important' government interest" and satisfies exacting scrutiny. *Id.* at 44-45; *see also id.* at 44 (reasons for requirement "not 'wholly without rationality'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 83 (1976) (per curiam)). In light of "the Attorney General's unrebutted arguments that only modest burdens attend the disclosure of a typical Form 990 Schedule B," the court held that petitioner's "broad challenge" was not likely to prevail. *Id.* at 44 (internal quotation marks and alterations omitted).

But the court "le[ft] open the possibility" that petitioner could obtain relief on an as-applied basis. Pet. App. 45. Such relief would be available on a showing of a reasonable probability that the State's Schedule B requirement would subject petitioner's contributors to reprisals from either government officials or private parties. *Id.*

c. This Court denied certiorari. *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015) (mem.) (No. 15-152).

3. On remand, petitioner filed an amended complaint that, like its original complaint, asserted only a facial challenge to the State's Schedule B requirement. Pet. App. 7, 10-11.

a. The district court dismissed without leave to amend. Pet. App. 23-24. The court explained that the amended complaint contained "no allegations" that the State's collection of Schedule B forms for nonpublic use "has caused any threat, harm, or negative consequences to [petitioner] or its members." *Id.* at 13. Petitioner's voluntary decision to cease operating in

California to avoid complying with state law was not a cognizable harm. *Id.* at 13-14. The court concluded that, given "the absence of any articulated burden" on petitioner's associational interests, particularly in light of its opportunity to file an amended complaint on remand, the Attorney General's stated reasons for collecting Schedule Bs—including the need to determine whether a charity is engaging in self-dealing, improper loans, or other unfair business practices—were sufficient to satisfy exacting scrutiny. *Id.* at 16-17.

b. Petitioner appealed and moved for initial hearing en banc. *See* Pet. App. 25. Petitioner argued that the court of appeals' earlier ruling affirming the denial of preliminary relief controlled the new appeal and asked the en banc court to reconsider that precedent. C.A. Dkt. 6. The Attorney General moved for summary affirmance based on the court's earlier ruling. C.A. Dkt. 25.

The court denied petitioner's motion for initial en banc hearing. Pet. App. 25. Petitioner then filed an urgent motion to withdraw its opposition to the Attorney General's request for summary affirmance. C.A. Dkt. 32. The motion conceded that the appeal was controlled by the court's prior ruling and urged the court to quickly enter an order summarily affirming. *Id.* at 3-4. Without a prompt order, petitioner argued, it "may be irreparably harmed," because delay would prevent it from filing a petition for a writ of certiorari in this Court in time to be considered with the anticipated petition in a similar challenge to California's Schedule B requirement, *Americans for Prosperity Foundation v. Becerra*, No. 19-251 (petition filed Aug. 26, 2019). C.A. Dkt. 32 at 4.

In an unpublished order, the court granted petitioner's motion to withdraw its opposition to the Attorney General's motion for summary affirmance and summarily affirmed the dismissal of petitioner's complaint. Pet. App. 1. The court concluded that its prior decision affirming the denial of a preliminary injunction clearly controlled the disposition of petitioner's second appeal. *See id.*

ARGUMENT

The petition asks this Court to consider two questions: whether the decision below correctly concluded that petitioner failed to allege an actual burden on its associational interests and whether the court of appeals properly applied exacting scrutiny to petitioner's claim. This Court previously denied petitioner's request to consider essentially the same challenge to essentially the same underlying decision. There is no reason for a different result here.

1. Petitioner first contends that any requirement to disclose associational information, including in confidence to government regulators, necessarily inflicts First Amendment injury, even absent any plausible allegations of harm to associational interests. Pet. 16-24. The court of appeals correctly rejected this theory.

a. In addressing First Amendment challenges to information-reporting requirements, this Court has consistently evaluated the extent of any actual burden on associational interests; and it has rejected First Amendment challenges where plaintiffs have failed to identify concrete harm to their associational freedoms. For example, in *John Doe No. 1 v. Reed*, 561 U.S. 186 (2010), the Court rejected a facial challenge to a state law providing for the public disclosure of the names

and addresses of individuals signing referendum petitions. The Court explained that the plaintiffs had presented "scant evidence" that revealing the names of signatories of typical referendum petitions would lead to threats or reprisals. *Id.* at 201. And the Court saw "no reason to assume" that, in the typical case, disclosure would have such an effect. *Id.* "Faced with the State's unrebutted arguments that only modest burdens attend the disclosure of a typical petition," the Court denied plaintiffs' "broad challenge." *Id.*

Likewise, in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), the Court rejected a challenge to a law requiring public disclosure of certain campaign contributions as applied to minor parties. The Court explained that the plaintiffs' claims of injury were "highly speculative." *Id.* at 70. There was scant evidence suggesting that the compelled disclosure requirement would lead supporters to avoid making contributions. *Id.* at 71-72. On that record, "the substantial public interest in disclosure . . . outweigh[ed] the harm generally alleged." *Id.* at 72. These authorities establish that in a challenge to information-reporting or disclosure requirements the question is whether the *actual* burden on associational interests outweighs the interests of the government—just as the court of appeals here concluded. Pet. App. 36-37.

Petitioner is incorrect in contending (at 16) that this Court's decisions in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), support its theory that any government disclosure requirement necessarily burdens First Amendment rights. To the contrary, in both cases the Court invalidated demands for NAACP membership lists because the NAACP marshaled "un-

controverted" evidence that past disclosure of its members' identities had exposed them to economic reprisals, threats, and other public hostility, which either had led or was likely to lead members to withdraw or others to refrain from joining the organization. *NAACP*, 357 U.S. at 462-463; *Bates*, 361 U.S. at 524. In both cases, the proffered governmental interests were insufficient to justify those concrete "deterrent" effects. *NAACP*, 357 U.S. at 463-464, 466; *see also Bates*, 361 U.S. at 524-527.[2]

The Court's decision in *Talley v. California*, 362 U.S. 60 (1960), also does not support petitioner's arguments. *See* Pet. 18, 22. There, the Court facially invalidated a municipal ordinance requiring handbills to identify the name and address of their author because it was clear that the required public disclosure would chill protected expression. *Talley*, 362 U.S. at 60-61, 64-66. The Court explained that the forced revelation of the identities of pamphleteers and other authors had long been used as a tool by governments to suppress dissenting voices. *Id.* at 64-65. "Before the Revolutionary War," for example, "colonial patriots frequently had to conceal their authorship or distribution of literature," or else risk "prosecutions by English-controlled courts." *Id.* at 65. The challenged

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[2] *See also Shelton v. Tucker*, 364 U.S. 479, 486, 490 (1960) (invalidating compelled disclosure of all organizational affiliations of all public school teachers, a law of "unlimited and indiscriminate sweep," where disclosure to superiors would create "constant and heavy" pressure to avoid certain associational affiliations); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 556-557 (1963) (rejecting inquiry into NAACP membership records and recognizing deterrent and chilling effect on exercise of members' First Amendment rights); *id.* at 557 (noting "intense resentment and opposition" to organization's activities) (internal quotation marks omitted).

ordinance violated the First Amendment because "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Id.*; *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (noting First Amendment's purpose of protecting "unpopular individuals from retaliation—and their ideas from suppression"). Because petitioner has never even tried to allege that California's Schedule B requirement causes any similar deterrent or other negative effect on its associational interests, the court of appeals correctly concluded that petitioner had failed to demonstrate an actual burden on its associational activities.

b. That conclusion does not conflict with the lower court decisions cited in the petition. *See* Pet. 24-27.

In *Anderson v. Spear*, 356 F.3d 651 (6th Cir. 2004), the Sixth Circuit considered a First Amendment challenge to a Kentucky law that banned any cash contribution to certain political campaigns by requiring that all contributions be made by negotiable instrument. *Id.* at 671. Far from holding that every disclosure requirement necessarily imposes First Amendment burdens, the court explained that Kentucky's law failed exacting scrutiny because it "effectively foreclose[d] speech by a large body of individuals who will be chilled from making a *de minimis* contribution." *Id.* at 672 (small contributors will be less willing or able to use negotiable instruments than larger contributors).

In *FEC v. Larouche Campaign*, 817 F.2d 233 (2d Cir. 1987) (per curiam), the Second Circuit upheld an FEC subpoena for the names of campaign contributors, but concluded that the agency had failed to demonstrate an interest sufficient to support obtaining the names of those who had solicited the contributions. *Id.* at 235. The court explained that the district

court had "erred in holding essentially that because the campaign had not made a showing that disclosure of those associated with it was likely to result in reprisals, harassment, or threats, the FEC needed only to show the information sought was relevant to the FEC's investigation." *Id.* (citing, *inter alia*, *NAACP*, 357 U.S. 449; *Buckley*, 424 U.S. 1, 71) (internal quotation marks omitted). Although "the campaign's failure to make such a record mean[t] that the subpoenaed material [was] not immune from disclosure," the risks of "chilling of unencumbered associational choices" meant that the agency was required to "make some showing of need for the material sought beyond its mere relevance to a proper investigation." *Id.* at 234-235; *see also id.* at 234 (agency "not automatically entitled to obtain all material that may in some way be relevant to a proper investigation"). Likewise here, as explained above, the court of appeals concluded that "the chilling risk inherent in compelled disclosure triggers exacting scrutiny." Pet. App. 36 (emphasis omitted).

And in *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), the Eleventh Circuit framed the analysis in the same way as the decision below. It noted that because compelled disclosure of funders' names "threatens to stymie the exercise of First Amendment freedoms—the so-called 'chilling effect'— . . . it must survive 'exacting scrutiny.'" *Id.* at 1366 (quoting *Buckley*, 424 U.S. at 64). As just explained, that is consistent with the holding of the court of appeals in this case. *See* Pet. App. 36 ("chilling *risk* inherent in compelled disclosure triggers exacting scrutiny").

2. There is also no reason for this Court to grant certiorari to consider the proper standard of scrutiny. *See* Pet. 27-37.

a. For more than sixty years, this Court has held that information-disclosure requirements are subject to "exacting scrutiny." *Buckley*, 424 U.S. at 64 (discussing *NAACP v. Alabama*, 357 U.S. 449). Petitioner conceded as much below. C.A. Dkt. 6 at 12 ("Over the past 60 years, the Supreme Court and [the Ninth Circuit] have required compelled disclosure regimes to be reviewed under exacting scrutiny."). That standard requires precisely what the decision below held: "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *E.g.*, *Doe*, 561 U.S. at 196 (internal quotation marks omitted); *see also* Combined Br. Opp. 12-13 in *Americans for Prosperity Foundation v. Becerra* and *Thomas More Law Center v. Becerra*, Nos. 19-251 & 19-255 (citing additional cases).[3]

This Court's foundational decision in *NAACP v. Alabama* did not, as petitioner now contends (at 34-35), establish strict scrutiny as the applicable standard. The Court held that Alabama's demand for a list of all NAACP members was invalid because the information sought had no "substantial bearing" on the State's purported regulatory interests and the State failed to

[3] The petition suggests in passing (at 17, 22) that cases involving campaign finance regulation are inapplicable in this non-electoral context. That is not correct. This Court's foundational decision in the campaign context, *Buckley v. Valeo*, expressly adopted the framework applied in *NAACP* and other cases from outside of the election context. *See Buckley*, 424 U.S. at 64-65 & 64 nn.73-75; *see also* Combined Br. Opp. 12-13, 15 in Nos. 19-251 & 19-255 (discussing same).

demonstrate an interest "sufficient to justify" the demand. 357 U.S. at 463, 464. The Court's description of its approach as calling for the "closest scrutiny," *id.* at 461, and as setting a "strict test," *Buckley*, 464 U.S. at 66, did not change the elements of the standard. *See* Pet. 34.

Petitioner is also mistaken in contending that this Court's recent decisions have departed from *NAACP*. To the contrary, they have applied the same exacting scrutiny standard to challenges to policies requiring the reporting or disclosure of information. *See Doe*, 561 U.S. at 196 (exacting scrutiny requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest); *Citizens United*, 558 U.S. at 366-367 (same); *Davis v. FEC*, 554 U.S. 724, 744 (2008) (requiring relevant correlation or substantial relation between the governmental interest and the information required to be disclosed). Petitioner argues that *McCutcheon v. FEC*, 572 U.S. 185 (2014) (plurality opinion), and *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000), reflect confusion over the applicable standard. *See* Pet. 36-37. But neither involved an information-reporting requirement. *See McCutcheon*, 572 U.S. at 192-193 (challenge to aggregate limits on campaign contributions); *Nixon*, 528 U.S. at 382 (challenge to limits on campaign contributions).[4]

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[4] Petitioner's quotes from *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), and then-Judge Gorsuch's concurrence in *Riddle v. Hickenlooper*, 742 F.3d 922 (10th Cir. 2014), also do not support review. *See* Pet. 37. The Fourth Circuit observed in *Washington Post* that "First Amendment analyses can get bogged down in terminology and tier-chasing," 944 F.3d at 523, but the court had no difficulty applying the exacting scrutiny standard, *id.* at 520 ("Under exacting scrutiny, there must be a 'substantial

There is likewise no basis for applying strict scrutiny to California's Schedule B requirement. *See* Pet. 27-29. This Court has explained that, although "[d]isclaimer and disclosure requirements may burden the ability to speak," they impose "no ceiling" on First Amendment activities and "do not prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (internal citation and quotation marks omitted). Nothing in the present case—which involves no evidence (or even any allegation) of an actual burden on petitioner's First Amendment rights—calls that conclusion into question.

b. The court of appeals' application of exacting scrutiny also does not conflict with any of the lower court decisions on which petitioner relies. *See* Pet. 29-34.

As an initial matter, petitioner is incorrect in characterizing the decision below as applying "a lessened form of rational basis review." Pet. 30. Petitioner notes the court of appeals' conclusion that the State's

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relation' between an 'important' government interest and 'the information required to be disclosed.'") (quoting *Buckley*, 424 U.S. at 64-66). And the court saw no need to decide whether strict or exacting scrutiny applied because the law at issue failed exacting scrutiny. *Id.* *Riddle* did not involve a First Amendment challenge to an information-reporting requirement, but rather an equal protection challenge to state limits on campaign contributions, as indicated in the full quotation partially excerpted by the petition. *See* 742 F.3d at 930 (Gorsuch, J., concurring) ("I confess some uncertainty about the level of scrutiny the Supreme Court wishes us to apply to this contribution limit challenge, but I harbor no question about the outcome we must reach. My colleagues are surely right that, as applied, Colorado's statutory scheme offends the Constitution's equal protection guarantee, whatever plausible level of scrutiny we might deploy.").

interests here are not "'wholly without rationality.'" *Id.* (quoting Pet. App. 44). But the court of appeals did not excuse the Attorney General from demonstrating the required "substantial relation" between the Schedule B requirement and a "sufficiently important governmental interest." Pet. App. 33 (internal quotation marks omitted); *see also id.* at 44-45. Furthermore, in a subsequent decision addressing a similar challenge to California's Schedule B requirement, the court of appeals confirmed that exacting scrutiny—not any lesser standard—applies to state information-reporting mandates. *Ams. for Prosperity Found.*, 903 F.3d at 1008-1009; *see also* Combined Br. Opp. 6, 12-15 in Nos. 19-251 & 19-255 (discussing same).

That conclusion is consistent with the cases on which petitioner relies. Petitioner argues that the courts of appeals have taken three different approaches (*see* Pet. 31-34), but each of the cases cited by petitioner applies the same standard.

Petitioner's first category of cases is comprised of decisions by the Second, Fourth, Seventh, and Tenth Circuits (*see* Pet. 31), all of which concluded that information-disclosure requirements are reviewed under "exacting scrutiny" and that exacting scrutiny requires a "substantial relation between the disclosure requirement and [a] sufficiently important government interest." *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 548-549 (4th Cir. 2012) (internal quotation marks and footnote omitted); *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840-841 (7th Cir. 2014) (same); *Free Speech v. FEC*, 720 F.3d 788, 790, 792-793 (10th Cir. 2013) (same); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132-133, 137 (2d Cir. 2014) (same).

Petitioner's second category of cases also does not reflect a conflict on the meaning of the exacting scrutiny standard. *See* Pet. 32-33. In *Worley v. Florida Secretary of State*, 717 F.3d 1238 (11th Cir. 2013), the Eleventh Circuit concluded that information-disclosure requirements "must be substantially related to a sufficiently important government interest." *Id.* at 1245. In *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (en banc), the Eighth Circuit explained that "when reviewing a disclosure law, there must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed and the governmental interest must survive exacting scrutiny." *Id.* at 876 (internal quotation marks omitted).[5] And in *Libertarian Party of Ohio v. Husted*, 751 F.3d 403 (6th Cir. 2014), the Sixth Circuit stated that exacting scrutiny "requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id.* at 414 (internal quotation marks omitted).

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[5] *See also Iowa Right to Life Comm., Inc. v. Tooker*, 717 F.3d 576, 592 (8th Cir. 2013) ("relevant inquiry is whether the disclosure requirement bears a substantial relation to a sufficiently important governmental interest") (footnote omitted); *Calzone v. Summers*, 942 F.3d 415, 423 (8th Cir. 2019) (en banc) (under "'exacting scrutiny,'" State must "show, at a minimum, that the law has a substantial relationship to a sufficiently important governmental interest") (footnote, alterations, and internal quotation marks omitted); *id.* ("task is to determine whether the strength of the asserted governmental interest reflects the seriousness of the actual burden" on First Amendment rights) (alterations, ellipses, and internal quotation marks omitted).

As the petition notes, the court in *Libertarian Party* observed that exacting scrutiny "does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may." 751 F.3d at 414. But the court was simply explaining that, under the established exacting scrutiny standard, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Id.* (internal quotation marks omitted). Neither *Libertarian Party* nor any of the other cited cases applied strict scrutiny to the challenged information-disclosure requirement.[6] And *Worley* expressly rejected application of that standard, explaining that the plaintiffs' demand for strict scrutiny review of the law challenged there was "in conflict with cases from every one of our sister Circuits who have considered the question, all of whom have applied exacting scrutiny to disclosure schemes." 717 F.3d at 1244.

The decisions in petitioner's third category of cases (Pet. 33-34) likewise applied the same exacting scrutiny standard. In *National Organization for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), the First Circuit explained that exacting scrutiny "requires a substantial relation between the disclosure requirement and

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[6] In *Minnesota Citizens Concerned for Life*, the court questioned whether the statute at issue could properly be considered a disclosure law subject to exacting scrutiny rather than a more onerous regulation of speech subject to strict scrutiny. 692 F.3d at 875. The court ultimately concluded that the law was likely unconstitutional even under the exacting scrutiny standard. *Id.* at 875-877. In *Calzone*, the court believed some authority supported applying strict scrutiny to a law requiring the public disclosure of lobbying activities, but it declined to decide which standard governed because the law as applied to the plaintiff failed exacting scrutiny. 942 F.3d at 423 n.6.

a sufficiently important governmental interest." *Id.* at 55 (internal quotation marks omitted); *see also id.* at 56-57. The Third and Fifth Circuits said the same thing. *See Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 309 (3d Cir. 2015) (disclosure requirement subject to exacting scrutiny, which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (internal quotation marks omitted); *Justice v. Hosemann*, 771 F.3d 285, 296 (5th Cir. 2014) (disclosure obligations reviewed under "exacting scrutiny" and "[t]hat label means that the government must show a sufficiently important governmental interest that bears a substantial relation to the requirement") (internal quotation marks omitted).

Petitioner argues that different courts have used different adjectives to describe the exacting scrutiny standard. *See, e.g.*, Pet. 31-33. As just explained, however, the courts have understood the standard as encompassing the same elements. Indeed, two of the decisions cited by petitioner expressly recognized uniformity in application of the standard. In *Real Truth About Abortion*, the Fourth Circuit explained that the "relevant case law . . . has consistently applied only one type of exacting scrutiny." 681 F.3d at 548 n.1. And in *Justice v. Hosemann*, 771 F.3d at 296, the Fifth Circuit reasoned that "[o]ther circuits have uniformly adopted the same standard" in subjecting disclosure requirements to exacting scrutiny. *Id.* That "circuit[] consensus," the court concluded, "is true to Supreme Court precedent . . . ." *Id.*

3. Finally, review is unwarranted because the court of appeals correctly applied this Court's precedents in rejecting petitioner's facial claim. California's Schedule B requirement is substantially related to the

State's important regulatory and law enforcement interests and the strength of those interests outweighs any burden on petitioner's First Amendment rights.

As petitioner acknowledges, California has a compelling interest in enforcing its laws. *See* Pet. App. 43. Those laws ensure that entities holding themselves out as charities do not engage in fraud, self-dealing, or other deceptive or improper conduct. Pet. App. 30; *Ams. for Prosperity Found.*, 903 F.3d at 1009. As the Second Circuit explained in rejecting a First Amendment challenge to another state Schedule B reporting requirement, States have important interests in "ensuring organizations that receive special tax treatment do not abuse that privilege" and "preventing those organizations from using donations for purposes other than those they represent to their donors and the public." *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018).

Collecting Schedule B forms furthers these important interests. By identifying the donor, the amount of the contribution, and the type of donation received (cash or in-kind), the form provides information that can indicate misappropriation or misuse of charitable funds and help state investigators determine whether the organization and its donors are engaging in self-dealing. Pet. App. 44; *Ams. for Prosperity Found.*, 903 F.3d at 1009-1011.

It is telling that petitioner concedes that the IRS's requirement to submit a Schedule B form "may survive constitutional scrutiny." Pet. 6 n.4. Petitioner recognizes the IRS's interests in "cross-referencing Schedule B information against personal tax returns to identify fraudulent attempts to claim tax deductions for charitable gifts that were never made." *Id.* But it does not explain why that interest would be a

sufficient reason for the federal reporting requirement to survive constitutional scrutiny, while the State's interest in cross-referencing Schedule B information to ferret out fraud and misuse of charitable assets would not. *See id.*

There is no comparison, moreover, between California's Schedule B requirement and the information demands this Court has held to be unconstitutional. In those cases, state officials sought to broadly compel disclosure of membership information, including to the public, in the face of evidence that threats, violence, or economic reprisals would result. In *NAACP v. Alabama*, for example, the Court held that Alabama could not compel the NAACP to disclose a list of rank-and-file members, where it was "uncontroverted" that revelation of NAACP members' identities exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462. Similarly, in *Bates*, the Court held unconstitutional a local government effort to compel the public disclosure of NAACP membership rolls, where the evidence showed that disclosure had resulted in harassment, threats of bodily harm, and a drop in membership. 361 U.S. at 521-522, 524.

Here, petitioner has not alleged that submitting its Schedule B form to state regulators would lead to reprisals, harassment, or any chilling effect at all on it or its members. Pet. App. 41. That is not surprising, because Schedule B forms are submitted to state regulators on a confidential basis and include only the identities of major donors. The information collected extends no further than what tax-exempt organizations already must report to the IRS. Particularly in the absence of any allegation of harassment or other

negative effects, the court of appeals' rejection of petitioner's facial challenge does not warrant any further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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