

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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AMERICANS FOR PROSPERITY FOUNDATION,)
Petitioner,)
v.) No. 19-251
ROB BONTA, ATTORNEY GENERAL)
OF CALIFORNIA,)
Respondent.)

- - - - -)
THOMAS MORE LAW CENTER,)
Petitioner,)
v.) No. 19-255
ROB BONTA, ATTORNEY GENERAL)
OF CALIFORNIA,)
Respondent.)
- - - - -

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3 AMERICANS FOR PROSPERITY FOUNDATION,)

4 Petitioner,)

5 v.) No. 19-251

6 ROB BONTA, ATTORNEY GENERAL)

7 OF CALIFORNIA,)

8 Respondent.)

9 - - - - -

10 THOMAS MORE LAW CENTER,)

11 Petitioner,)

12 v.) No. 19-255

13 ROB BONTA, ATTORNEY GENERAL)

14 OF CALIFORNIA,)

15 Respondent.)

16 - - - - -

17 Washington, D.C.

18 Monday, April 26, 2021

19

20 The above-entitled matter came on for oral

21 argument before the Supreme Court of the United States

22 at 10:00 a.m.

23

24

25

1 APPEARANCES:

2

3 DEREK L. SHAFFER, ESQUIRE, Washington, D.C.; on behalf
4 of the Petitioners.

5 ELIZABETH B. PRELOGAR, Acting Solicitor General,
6 Department of Justice, Washington, D.C.; for
7 the United States, as amicus curiae,
8 supporting vacatur and remand.

9 AIMEE A. FEINBERG, Deputy Solicitor General,
10 Sacramento, California; on behalf of the
11 Respondent.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 19-251,
5 Americans for Prosperity Foundation versus
6 Bonta, and the consolidated case.

7 Mr. Shaffer.

8 ORAL ARGUMENT OF DEREK L. SHAFFER

9 ON BEHALF OF THE PETITIONERS

10 MR. SHAFFER: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 We're here because the California
13 Attorney General is demanding that tens of
14 thousands of charities annually disclose their
15 top donors nationwide as listed on Schedule B to
16 IRS Form 990.

17 This demand casts a profound
18 nationwide chill and it does so for no good
19 reason, Your Honors. As the district court
20 found following a full bench trial, California's
21 upfront collection of Schedule Bs does not
22 further the state's law enforcement goals. That
23 finding is both dispositive and unassailable.

24 Forty-six states today police
25 charities without any such blanket demand.

1 California itself likewise did so for years,
2 Your Honors, without any problems. These
3 Schedule Bs never find any legitimate use unless
4 and until a complaint comes in, as happens for
5 only a fraction of 1 percent of all charities.

6 Even when reviewed, Schedule Bs, for
7 all of their extreme sensitivity, have only
8 trifling utility. California used them in only
9 a handful of investigations over 10 years. The
10 rare times when Schedule B has use, Your Honors,
11 California has much narrower mean -- narrower
12 means to obtain it, namely, a targeted audited
13 letter -- audit letter to the charity of
14 concern. Indeed, it's California's standard
15 practice to issue precisely such an audit letter
16 requesting Schedule Bs and other documentation
17 from any charity it investigates.

18 At bottom, California's justification
19 reduces to a claimed law enforcement interest in
20 having all Schedule Bs prophylactically
21 warehoused before it re-requests Schedule B
22 pursuant to any actual investigation. That does
23 not begin to justify the First Amendment
24 intrusions here posed, as 40 amicus briefs from
25 hundreds of concerned parties spanning the

1 spectrum agree.

2 Because California's upfront
3 suspicionless demand for donor information is
4 not narrowly tailored as it must be under this
5 Court's precedents, it is unconstitutional in
6 all its applications and certainly in a
7 substantial number of them.

8 We respectfully urge this Court to
9 hold it facially invalid.

10 CHIEF JUSTICE ROBERTS: Mr. Shaffer,
11 your main argument is that we should apply
12 strict scrutiny to the disclosure requirements
13 here. But, with respect to political speech,
14 which is -- we've held is, of course, at the
15 heart of the First Amendment, when we have an
16 issue of compelled disclosure, we apply exacting
17 scrutiny.

18 And doesn't it seem strange that when
19 it's -- you're talking about charitable
20 association, you would apply a more rigorous
21 test than we apply to political association?

22 MR. SHAFFER: Well, Mr. Chief Justice,
23 I hate to dispute your premise, but I think that
24 among the Petitioners, it's the Thomas More Law
25 Center that urges strict scrutiny. We, for

1 Americans for Prosperity Foundation, have no
2 quarrel with that. We think they make the
3 argument well for that standard, but -- but the
4 prime imperative for the Petitioners, Your
5 Honor, is simply to stress that under any
6 standard of exacting scrutiny that calls for
7 narrow tailoring, this law is -- this demand is
8 facially invalid and due to be -- due to be
9 struck down across the board.

10 CHIEF JUSTICE ROBERTS: Well -- well
11 --

12 MR. SHAFFER: And -- and that --
13 sorry, Mr. Chief Justice.

14 CHIEF JUSTICE ROBERTS: I was going to
15 say thank you for the correction. But, when it
16 comes to tailoring, what -- what exactly is your
17 understanding? I think -- what that means? I
18 think it's not well settled under the exacting
19 scrutiny standard.

20 MR. SHAFFER: Well, I think Shelton
21 gives you the holding, Mr. Chief Justice.
22 Shelton specifically struck down the demand that
23 teachers disclose their associations, and it did
24 so for lack of -- of proper tailoring, even
25 while recognizing that there might be a

1 substantial relationship to the understandable
2 goal of protecting kids in schools.

3 And so it -- you have the holding
4 there. Gremillion articulates the standard too
5 specifically in this context. And I do know, to
6 your prior question, that even in the election
7 context, Buckley does speak in terms of strict
8 scrutiny. It simply holds that disclosure is
9 the least restrictive in that -- least
10 restrictive alternative in that context,
11 categorically different from this context, and
12 one where, of course, there's an interest in
13 public disclosure that California disavows in
14 this case.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas.

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice.

19 Counsel, a couple of quick questions.
20 How would it affect your analysis if the
21 organization involved just did something that
22 was not controversial, such as provide free dog
23 beds or taking care of stray puppies or
24 something like that? Would your analysis change
25 in any way?

1 MR. SHAFFER: It wouldn't, Justice
2 Thomas. And I do note that among the amici
3 supporting us is PETA joining the brief by the
4 nonprofit alliance. And -- and so their work
5 too can be controversial and, depending upon
6 one's views of how puppies should be handled,
7 there can be controversy around that.

8 We might not have thought before 2013,
9 when California leaked the Schedule B of the
10 Asian Americans For Advancing Justice, that that
11 would be especially threatening for the donor
12 there. But today, in 2021, sad to say, it could
13 be a life-or-death issue that their identities
14 have been disclosed.

15 Think about religious charities.
16 Think about medical organizations that may take
17 views about masking, about vaccinations. In --
18 in our very divisive times, it's tough to
19 identify with certainty a charity that is
20 non-controversial in those -- in those respects.

21 And -- and even if there were that --
22 that sort of a charity to posit, Justice Thomas,
23 there are understandable concerns -- religious
24 convictions, desire not to be -- lose privacy,
25 not to be harassed by solicitations -- that

1 donors legitimately have for, you know,
2 charities across the spectrum.

3 JUSTICE THOMAS: This -- in this era,
4 there seems to be quite a bit of -- quite a bit
5 of loose accusations about organizations, for
6 example, an organization that had certain views
7 might be accused of being a white supremacist
8 organization or racist or homophobic, something
9 like that, and, as a result, become quite
10 controversial.

11 Do you think that that -- that that
12 sort of labeling would change your analysis?

13 MR. SHAFFER: Well, I think it's part
14 of the problem here, Justice Thomas. And there
15 is expert testimony in the record from Paul
16 Shervis for both of these Petitioners explaining
17 that precisely because there is such intensity
18 of views and there's such a -- a -- a proclivity
19 to vilify perceived enemies in our times, that's
20 part of what puts so much -- it raises the
21 stakes, if you will, and raises the concerns of
22 reasonable donors for charities all across the
23 spectrum.

24 So that's there. But I also think
25 this Court's precedent recognizes the history

1 and the common sense that says donors to
2 associations are concerned about having their
3 identities revealed. That was true in Shelton.
4 That was true for the NAACP. It was true for
5 the Republican Party and donors to the
6 Republican Party in the Pollard case, where this
7 Court summarily affirmed.

8 JUSTICE THOMAS: The -- what if this
9 -- the State of California did exactly what the
10 U.S. Government is doing and just simply
11 requires this information as a part of your tax
12 returns if you claim a deduction?

13 MR. SHAFFER: Well, I -- I'd note,
14 Justice Thomas, that that is categorically
15 different from the AG's interest in policing
16 charitable fraud. They -- they don't serve the
17 tax function in California.

18 Also, Congress has made a statutory
19 judgment specifically for the IRS about a nexus
20 between Schedule B and the information listed in
21 there and how it's to be used.

22 And how is it to be used, Justice
23 Thomas? For federal tax collection. So it's a
24 comparison potentially of the individual donor's
25 deductions on their federal tax forms, and the

1 IRS has nationwide jurisdiction consistent with
2 the nationwide scope of a Schedule B. None of
3 that is true in California.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: Thank you.

8 If you win in this case, I think the
9 Court will have in some form held that the
10 interest of the donors in maintaining privacy of
11 their giving to a charity, interests of the
12 charity in receiving those money, here at least
13 outweighs the interest of the State in having a
14 law on the books that, even if it never is
15 actually enforced, frightens people into
16 behaving properly. Okay? Something like that.

17 Well, if we hold that, can we
18 distinguish campaign finance laws, where the
19 interest is even stronger in people being able
20 to give anonymously? Can we distinguish laws
21 that require them to disclose their givers? How
22 would you distinguish that, if you would?

23 And the other thing --

24 MR. SHAFFER: Yes, Justice Breyer.

25 JUSTICE BREYER: -- I would like to

1 hear you distinguish is just what Justice Thomas
2 brought up. The IRS requires disclosure for tax
3 purposes, okay, private disclosure. The --
4 California wants disclosure, so it has a
5 potential for finding out, and that potential,
6 as I said, might in and of itself discourage
7 people from acting improperly in respect to --
8 to charity.

9 So I'd like to hear the distinction,
10 if you want to make them, between those two
11 things.

12 MR. SHAFFER: I would, Justice Breyer.
13 Let me please take those in turn.

14 For the first question, let me
15 emphasize there is no law on the books in
16 California requiring Schedule B. What you have
17 is bureaucratic whim, and we submit that's
18 different from a considered legislative
19 judgment.

20 Number two, the interest is not in
21 reviewing Schedule Bs. It's in having them on
22 hand prophylactically on a suspicionless basis
23 from all charities to then review a tiny handful
24 when an external complaint comes in.

25 We're not here challenging the

1 individualized request for a Schedule B from a
2 particular charity which the AG is always doing
3 if they actually have reason to read a Schedule
4 B. So the -- the interest on the State side of
5 it, we respectfully submit, is really quite
6 negligible.

7 And you also alluded to a deterrence
8 rationale. Let me emphasize, Justice Breyer,
9 you won't find that rationale in the red brief
10 from California. That is not only a post-hoc
11 justification for this law, it's a post-hoc
12 justification that comes solely from amici
13 before this Court.

14 And -- and there's no -- not a shred
15 of evidence to support that. And, of course,
16 there's no more reason to think a Schedule B
17 sitting in the AG's hands as part of a warehouse
18 is any more deterring by virtue of sitting
19 there. It's only if it actually serves law
20 enforcement purposes that it might be that.

21 And, of course, as you note, it is on
22 file with the IRS in any event. So, if there's
23 a deterrent effect associated with filing it, it
24 rationally follows that it -- it's already being
25 served before California asks for it too.

1 Now, for the IRS, number one, there's
2 a statute from Congress. Number two, it is for
3 tax collection purposes. Number three, it has
4 nationwide scope to it. And, number four,
5 there's a whole statutory design, Justice
6 Breyer, that has criminal and civil penalties
7 for any violation of confidentiality.

8 There's no framework like that in
9 California, and, in fact, the record shows the
10 opposite in terms of how likely these are to
11 leak.

12 CHIEF JUSTICE ROBERTS: Justice Alito.

13 JUSTICE ALITO: What does the -- the
14 record show about the number of concrete cases
15 in which California has used this information
16 prior to an audit?

17 MR. SHAFFER: Justice Alito, we think
18 there are five instances where that's happened
19 in the past 10 years. California seems to
20 contend that there were 10. The district court
21 found five.

22 And the reason the district court
23 found five is based on the testimony of the
24 State's lead auditor, Steve Bauman, who had been
25 serving as an auditor since 1988, had been the

1 lead auditor since 2001, was designated as
2 California's witness on this critical subject
3 matter.

4 And he, in his experience, Justice
5 Alito, had used it once. He could think of one
6 instance. When he surveyed all the auditors,
7 they came up with five instances. And then the
8 AG's attorneys added to get to 10, but that's
9 the most they can get to.

10 And I would just commend to the Court
11 the relevant record excerpts on this point. You
12 can see Mr. Bauman's testimony at JA Americans
13 for Prosperity Foundation Appendix 397 to 99.

14 JUSTICE ALITO: California says that
15 on this record you haven't even shown an
16 entitlement to succeed on an as-applied
17 challenge.

18 What do you understand California to
19 demand you prove that you haven't already
20 proved?

21 MR. SHAFFER: I don't know, Justice
22 Alito, what you could possibly ask a charity in
23 the position of these Petitioners to prove that
24 they didn't prove.

25 Again, they had expert testimony.

1 They had testimony from their officers. They
2 had instances of horrific threats and violence,
3 including death threats that were directed
4 against the organizations or their proxies who
5 were in the same position that donors would be
6 in.

7 And I would note, Justice Alito, that
8 what California contemplates for an as-applied
9 challenge is very different from what you and
10 the Court contemplated in Doe v. Reed, where it
11 was 130,000-plus petitioners who could have
12 their First Amendment interests all adjudicated
13 together.

14 As we understand what California is
15 requiring, it's not just an extremely onerous
16 standard that's essentially impossible to meet,
17 but you'd have tens of thousands of charities
18 all having to go to court to try to vindicate
19 their First Amendment interest.

20 That's just not workable, and it's not
21 a satisfactory solution to the First Amendment
22 problem here posed, we submit.

23 JUSTICE ALITO: California had quite a
24 few leaks in the past, but they now tell us that
25 they've changed their practices and they're

1 serious about confidentiality.

2 What should we make of that? Should
3 we hold them forever to their past breaches?

4 MR. SHAFFER: Justice Alito, we think
5 that they -- they fall down before you even get
6 to the confidentiality problems. Having
7 adequate confidentiality protections, which they
8 demonstrably lack, is a necessary but not
9 sufficient condition to their demand being
10 upheld.

11 And -- and really it's the lack of
12 narrow tailoring, the lack of a state
13 interest -- and, by the way, Justice Alito, I
14 should emphasize for Mr. Bauman's cases, it was
15 -- those were not instances where it was the
16 upfront collection of Schedule B that was
17 useful. They, for all they know, obtained it
18 via audit letter.

19 So we think the confidentiality issues
20 add to the record of unconstitutionally, but
21 they're -- and -- and -- and even as to those,
22 just focusing on them, there's nothing
23 California can do at this point that would
24 convince reasonable donors and charities that
25 have seen the dismal record of confidentiality

1 lapses that now those have truly been fixed.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor.

5 JUSTICE SOTOMAYOR: Counsel, if we
6 were to apply the type of narrow tailoring you
7 advocate, I don't see how the public disclosure
8 at issue in Doe would have survived. In Doe,
9 this Court held that Washington State's
10 requirement that signatories to referendum be
11 publicly disclosed was substantially related to
12 its interest in protecting electoral integrity.

13 But, there, the State Secretary -- the
14 State's Secretary of State -- pardon the
15 redundancy -- checked signatures for fraud.
16 That doesn't seem to be anything like narrow
17 tailoring, if that's what we were applying.

18 It seems to me, as the Chief Justice
19 pointed out, that McCutcheon is different than
20 what we have been doing under exacting scrutiny.
21 Under your theory of the case, though, Doe
22 shouldn't survive.

23 MR. SHAFFER: If I may, Justice
24 Sotomayor, we think that Doe, respectfully, is
25 categorically inapposite. It is explicitly

1 specific to the electoral context. The Court
2 said so repeatedly in its opinion. And it --
3 and it turns --

4 JUSTICE SOTOMAYOR: Counsel, please.

5 MR. SHAFFER: -- on the significant
6 finding --

7 JUSTICE SOTOMAYOR: If -- if that were
8 the case, then Doe didn't have to go through its
9 analysis. It would have just said it's
10 electoral. And yet, it went through it. And
11 Buckley itself said that -- that the NAACP's
12 exacting scrutiny was something different than
13 what's the least -- the least restricted means
14 of doing something.

15 MR. SHAFFER: And, Justice Sotomayor,
16 we think you could stop short of requiring the
17 least restrictive alternative even in this
18 context and still reach the same result --

19 JUSTICE SOTOMAYOR: All right. So --

20 MR. SHAFFER: -- because there's no
21 tailoring here.

22 JUSTICE SOTOMAYOR: -- let me -- let
23 me go to everything you're saying about
24 California, okay?

25 I assume that the vast majority of

1 charities are not involved in fraud. You're
2 seeming to assume that the numbers of cases in
3 which this is useful has to be dramatically
4 large because charities are dramatically largely
5 committing fraud. What if I disagree with you,
6 number one?

7 Number two, the interest that
8 California has in this schedule is, in part --
9 there was testimony by the head of the
10 charitable organizations and by the
11 investigating -- auditing team that if you give
12 out a subpoena or an audit letter, that it tips
13 off, and there has been history of these letters
14 tipping off fraudsters and then hiding -- then
15 hiding their illegality.

16 So the audit -- this -- this
17 disclosure saves some time because audit and
18 subpoena letters take them a long time to get
19 the information. B, it helps them identify when
20 a report comes in of problems, whether it
21 supports further investigation. And, C, it
22 helps avoid the tipping that they're concerned
23 about.

24 Given that state interest, if the
25 State had properly kept this nonpublic, why

1 would it be not narrowly tailored?

2 MR. SHAFFER: Let me take, if I may,
3 the last part of that --

4 JUSTICE SOTOMAYOR: Or even fit our
5 usual definition of exacting scrutiny?

6 MR. SHAFFER: Justice Sotomayor, you
7 articulated the sole rationale California has
8 for upfront collection. And let me emphasize to
9 the Court it is not only post hoc and
10 hypothesized; it is not genuine. Okay?

11 It is also contrary -- and I'll
12 explain why. It is contrary to the factual
13 findings that the district court made. You can
14 see it in Petitioner's Appendix 47a. You will
15 find no witness who identified any specific
16 instance where the tampering that supposedly
17 concerns California occurred.

18 If the AG were genuinely concerned
19 about tipping off charities, they would never
20 do, Your Honor, what they always do, which is
21 send an audit letter at the outset of any
22 investigation telling a charity that it is being
23 investigated and asking it to supply Schedule B,
24 if relevant, along with all other relevant
25 documentation, which charities always do.

1 And during the years and years that
2 tens of thousands of registered charities were
3 not filing Schedule Bs, no one ever complained
4 about that or sought to change it. It was a
5 bureaucrat in the AG's office who said: Oh,
6 let's just require that all these be filed.

7 That did not come from audit stop.
8 That did not come from line attorneys.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

10 MR. SHAFFER: And let me add just one
11 other point if I may, Justice Sotomayor. It's
12 implausible that the State is using Schedule Bs
13 specifically in this prophylactic fashion. They
14 have all the other 990 information, including
15 Schedules L, M, and J that go to interested
16 party transactions, in kind donations, and
17 officer and employee compensation.

18 It is really, I think, not a genuine
19 interest that the State is asserting, and, at
20 best, it is a negligible one --

21 CHIEF JUSTICE ROBERTS: Thank you --

22 MR. SHAFFER: -- in the upfront
23 prophylactic collection.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Kagan.

2 JUSTICE KAGAN: Mr. Shaffer, I'd like
3 you to assume a set of facts with me and they're
4 this: that there are some donors to some
5 charities who are genuinely concerned about
6 public disclosure for fear of harassment or
7 threats, but that a very substantial majority of
8 donors in a very substantial majority of
9 charities are not concerned about that. In
10 fact, they rather like public disclosure of
11 their generosity.

12 If that's so, could you win a facial
13 challenge?

14 MR. SHAFFER: Yes, Justice Kagan, for
15 two reasons. One is that in the First Amendment
16 context, we need only show a substantial number
17 of instances in which the --

18 JUSTICE KAGAN: No, I'm -- I'm saying
19 -- you know, the -- the great majority are not
20 concerned about this.

21 MR. SHAFFER: Well, respectfully, I
22 would -- I would -- I would question Your --
23 Your Honor's premise. I think you have from
24 Paul Shervis the fact that --

25 JUSTICE KAGAN: You -- you -- you

1 know, my --

2 MR. SHAFFER: -- this is part of the
3 donors' bill of rights --

4 JUSTICE KAGAN: Excuse me, Mr.
5 Shaffer. I -- my premise is supported by a lot
6 of facts. Most charities disclose their donors,
7 and, in fact, it's part of their strategy, that
8 the more disclosure there is, the more
9 fundraising and association there is.

10 So, anyway, let's just take my facts
11 as a given.

12 MR. SHAFFER: I will --

13 JUSTICE KAGAN: That a very
14 substantial majority of charities disclose
15 themselves and don't mind disclosure.

16 MR. SHAFFER: As to that, Justice
17 Kagan, this Court in City of Los Angeles v.
18 Patel explained what the proper analysis is as
19 to whether you have some voluntary compliance
20 and non-objections. Those are outside of the
21 constitutional analysis. We are not here to --

22 JUSTICE KAGAN: Mr. Shaffer -- Mr.
23 Shaffer, just take my -- my -- just take it as a
24 stipulation that the great majority of donors do
25 not mind disclosure by anybody.

1 MR. SHAFFER: And I apologize, Justice
2 Kagan --

3 JUSTICE KAGAN: Can you -- can you win
4 a facial challenge on that premise?

5 MR. SHAFFER: Yes, because we're not
6 here to enjoin those charities from disclosing
7 their donors to California or anyone else. They
8 can continue to do so. California can request
9 it. And they can comply with that request.
10 We're here on behalf --

11 JUSTICE KAGAN: Okay. I mean, I guess
12 --

13 MR. SHAFFER: -- of those charities --

14 JUSTICE KAGAN: -- I would have
15 thought that a facial challenge, you need to
16 show that, you know, some significant number of
17 people in the world actually have this concern.
18 And, otherwise, you should bring an as-applied
19 challenge. I thought that that was the whole
20 point of the distinction between the two.

21 MR. SHAFFER: And -- and I -- I do
22 rest on *City of Los Angeles v. Patel*, which
23 basically explained that that is not the correct
24 analysis when you have some who will voluntarily
25 comply and others who are resisting the demand.

1 JUSTICE KAGAN: Okay. Can I ask
2 another question, Mr. Shaffer?

3 MR. SHAFFER: You look at those who
4 are resisting and rely upon the First Amendment.

5 JUSTICE KAGAN: I -- I heard you say
6 to Justice Alito that even if there were a
7 guarantee that this information was never
8 disclosed -- let's say that California had at
9 least as good protections in place as the IRS
10 does, better maybe. If that were so, could you
11 win a facial challenge?

12 MR. SHAFFER: Yes, because, facially,
13 there's no statute that protects
14 confidentiality. Facially, you have the
15 attorney --

16 JUSTICE KAGAN: You know, again --
17 again, Mr. Shaffer, I'm just stipulating that
18 the statute does exist, that there is at least
19 as good a protection as in the IRS context.
20 Could you win a facial challenge?

21 MR. SHAFFER: Yes, Justice Kagan. We
22 -- we respectfully submit you could because of
23 the lack of a state interest and the lack of
24 narrow tailoring. In Shelton II, the Court was
25 explicit, even if the information would remain

1 private and secure by the government, it was
2 still unconstitutional.

3 JUSTICE KAGAN: Thank you, Mr.
4 Shaffer.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: I -- I'd like to
8 pick up where we just left off and understand
9 more clearly your -- your thoughts on why a
10 facial challenge is appropriate here.

11 MR. SHAFFER: Yes, Justice Gorsuch. I
12 think anything short of facial relief here would
13 be a Pyrrhic victory for charities and donors
14 that are counting upon this Court's precedents
15 and principles to protect. And the reason for
16 that is, if you have to go to court and bring
17 the as-applied challenge and -- and -- and go
18 through the hurdles that California and the
19 Ninth Circuit would interpose, even these
20 Petitioners, who have been litigating for seven
21 years, Justice Gorsuch, with the benefit of
22 experts and percipient witnesses and their
23 officers and horrific experiences that were
24 recounted in court, were still struggling to
25 establish our First Amendment rights.

1 And if every charity that's in this
2 position and has concerns about exposure of
3 their donors has to go down that same winding
4 path, then the First Amendment will have lost
5 before the next as-applied challenge begins.

6 And -- and we think analytically,
7 doctrinally, in terms of precedent, it's
8 especially clear in the First Amendment context
9 that if we convince you there are a substantial
10 number of instances where the law is
11 unconstitutional, that warrants facial
12 invalidation.

13 Here, we think it is unconstitutional
14 in all its applications when you have a charity
15 that doesn't want to produce its Schedule B, and
16 California has no narrow tailoring.

17 And, if I may, Justice -- Justice
18 Gorsuch, at JA 42022, you have California
19 officials specifically testifying they never
20 considered even a narrow alternative. That is a
21 constitutional defect that runs across all these
22 cases.

23 JUSTICE GORSUCH: What is your
24 understanding of the relationship between
25 exacting scrutiny and strict scrutiny?

1 MR. SHAFFER: The Court's not been
2 perfectly clear about what one means relative to
3 the other. I think what is clear in terms of
4 the interest from NAACP versus Alabama on
5 forward, it needs to be a compelling interest.

6 And I think it -- it's also clear at
7 least when -- in the election context that we've
8 been talking about, categorically, disclosure is
9 at least presumed to be the least restrictive
10 alternative. Buckley indicates it satisfies
11 really strict scrutiny.

12 And I think, in -- in the charitable
13 context that we're talking about here, it may be
14 less clear exactly what the standard of scrutiny
15 is. But it is clear from this Court's
16 precedents and holdings that there is at least
17 narrow tailoring that is required. Once the
18 court requires that, California's demand cannot
19 survive. The Ninth Circuit was able to uphold
20 it only by dispensing with narrow tailoring
21 altogether.

22 JUSTICE GORSUCH: And what would, on
23 -- on your view, if anything, stop California
24 from issuing boilerplate requests to all
25 charities to disclose their Schedule Bs after

1 this or to add it as part of the tax collection
2 process?

3 MR. SHAFFER: Well, the -- the
4 California Attorney General has no
5 authorization, no mission to be collecting
6 taxes. That -- that's something that's
7 completely separate in California.

8 But, if you're positing bad faith, we
9 might challenge it as bad faith, Justice
10 Gorsuch. The record is perfectly --

11 JUSTICE GORSUCH: No, no, no, no, no.
12 I'm -- I'm -- I'm -- I'm positing -- I'm sorry,
13 maybe I wasn't clear -- two possibilities. One,
14 fine, you get rid of this rule, but the AG
15 issues a boilerplate request to organizations
16 for the purposes of policing potential fraud,
17 one.

18 Two, that in the tax collection
19 process, separate and apart from the AG,
20 California starts mandating the disclosure of
21 Schedule Bs.

22 MR. SHAFFER: Well, I think they'd
23 have to satisfy exacting scrutiny in either of
24 those instances. Hopefully, you'd get a
25 considered legislative judgment that balances

1 the competing considerations here and makes sure
2 that there truly is narrow tailoring happening.

3 And all we ask this Court to do in
4 order to decide this case is stand by its
5 precedents and principles. States need to think
6 hard and tread carefully before they infringe
7 upon the First Amendment rights that are at
8 issue.

9 And -- and I would reserve rights,
10 respectfully, to challenge either of the
11 programs that you just posited, Justice Gorsuch,
12 but they will have to withstand exacting
13 scrutiny in our view of -- of the precedents and
14 the principles that decide this case.

15 JUSTICE GORSUCH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Kavanaugh.

18 JUSTICE KAVANAUGH: Thank you, Chief
19 Justice.

20 Good morning, Mr. Shaffer.

21 MR. SHAFFER: Good morning.

22 JUSTICE KAVANAUGH: Can you
23 distinguish the -- what California is doing from
24 what the IRS is doing and -- and explain how you
25 would have us distinguish those two things?

1 MR. SHAFFER: Well, we think the IRS
2 clearly has a better set of defenses than --
3 than California does because of their statutory
4 mandate, because of the role that Schedule Bs
5 play in tax collection specifically and in
6 individual donors' exemptions because of the
7 IRS's nationwide charter that corresponds with
8 the nationwide scope of Schedule Bs and because
9 you have a strict confidentiality regime that
10 exists from the statute on down through careful
11 protocols that are implemented on the ground.

12 As to the chill, that too is
13 different. For the IRS, it's not a demand by
14 state law enforcement, which is what's at the
15 core of NAACP versus Alabama and its progeny.
16 The submission to a single federal regulator
17 pursuant to a tight nexus in careful statutory
18 design is much more limited than one state just
19 asking for this willy-nilly and then other
20 states essentially without limitation piling on
21 by the dozens to the same request.

22 Also, Justice Kavanaugh, the IRS is
23 not in the business of posting submissions
24 online the way that California is and has
25 resulted in so many of these leaks quite

1 predictably.

2 And -- and last, the -- I -- I -- I'd
3 note the IRS has credited concerns about
4 Schedule B and is moving in the opposite
5 direction of California. They're asking
6 themselves the tough questions about whether
7 they really need it and is it really worth it.
8 California, quite gratuitously, is -- is fishing
9 for Schedule Bs without seeing any real utility
10 in them at least in the upfront collection.

11 JUSTICE KAVANAUGH: Do you agree that
12 what the IRS is doing is constitutional?

13 MR. SHAFFER: It's a different case,
14 Justice Kavanaugh, that we have not brought. I
15 think it has stronger defenses for the reasons
16 we've discussed. And all I would say about it
17 is it will be subject to the -- to exacting
18 scrutiny in our view, and you can count on the
19 United States to provide, I'm sure, a very
20 powerful defense if that were the challenge.

21 JUSTICE KAVANAUGH: If California -- I
22 guess a related question -- but, if California
23 passed this same scheme in a statute and it was
24 designed for tax collection and they had a
25 strict confidentiality law that mirrored the

1 federal protections, it would rise or fall as
2 the IRS program rises or falls, correct?

3 MR. SHAFFER: Not quite, Justice
4 Kavanaugh. And, by the way, before the statute
5 passed, all these amici who are here before the
6 Court, I'm quite confident in saying, would be
7 lobbying the California legislature --

8 JUSTICE KAVANAUGH: I understand -- I
9 understand that, but suppose that they pass an
10 exact duplicate statute of the federal statutory
11 program.

12 MR. SHAFFER: I still don't think it
13 works, Justice Kavanaugh. I don't think it's as
14 powerful as the IRS's justification because it
15 is a nationwide form that lists donors
16 nationwide, very few of whom will be in
17 California.

18 And, of course, California, you know,
19 its -- its jurisdiction and concerns stop at its
20 borders in a way that is not true for the
21 federal government and the IRS.

22 JUSTICE KAVANAUGH: One very different
23 question but quickly: Do you agree on the text
24 of the First Amendment that the freedom to
25 peaceably assemble is distinct from the freedom

1 to petition the government for a redress of
2 grievances?

3 MR. SHAFFER: Yes, I think the Becket
4 Fund's amicus brief is extremely persuasive on
5 that point from a textualist and originalist
6 perspective and in explaining why the sort of
7 demand you have from California is a direct
8 restraint on that precious freedom as understood
9 by the framers and codified in the First
10 Amendment.

11 JUSTICE KAVANAUGH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Barrett.

14 JUSTICE BARRETT: Good morning,
15 counsel. I want to pick up where Justice
16 Kavanaugh left off.

17 MR. SHAFFER: Good morning.

18 JUSTICE BARRETT: So what if you had a
19 law, say, on a state university's campus, that
20 made it illegal for anyone to engage in any
21 speech whatsoever.

22 But it was also the case that most of
23 the students just shrugged and said, that's
24 fine, I'm not planning to, you know, demonstrate
25 or picket, and there was just a small percentage

1 of people who were bothered by it.

2 Would it be facially unconstitutional?

3 MR. SHAFFER: Of course, it would,
4 Justice Barrett. And I don't know that there's
5 any case from this Court that suggests the
6 opposite.

7 JUSTICE BARRETT: Okay.

8 MR. SHAFFER: And I -- I'm sorry.

9 JUSTICE BARRETT: Oh, go ahead. No,
10 finish.

11 MR. SHAFFER: And I think City of Los
12 Angeles v. Patel explains precisely why you look
13 only at those who are objecting and are standing
14 on their constitutional rights, not those who
15 simply succumb.

16 JUSTICE BARRETT: Okay. And this is
17 where it relates to Justice Kavanaugh's question
18 then. That's because it's an invasion of speech
19 directly. So I'd like you to discuss a little
20 bit how you conceive of this right.

21 Is it an independent right, say, the
22 freedom to associate and the freedom to
23 associate anonymously, or is it simply, I mean,
24 because showing chill makes sense if you're
25 saying that this is simply to protect -- and

1 this goes to Becket's amicus brief -- speech
2 down the road.

3 So can you describe a little bit the
4 nature of the right that's at stake here?

5 MR. SHAFFER: Sure. We think that
6 there are multiple ones, but let me start with
7 this, Justice Barrett, if I may.

8 We think even the indirect restraint
9 would be subject to exacting scrutiny and would
10 require narrow tailoring for the reasons set
11 forth in NAACP versus Alabama and its progeny,
12 particularly in Shelton and in Gremillion, where
13 narrow tailoring is required and -- and the
14 concern is indistinguishable from what you have
15 here in terms of the concept and the nature of
16 the right.

17 But we also think that there is a
18 direct infringement on the right peaceably to
19 assemble. I -- I -- I can't argue that any
20 better than the Becket fund has, but we agree
21 with their arguments, and also the right to
22 solicit. Keep in mind that this is a condition
23 to charities being able to speak as charities
24 and hold themselves out as charities to the
25 public. And Senator McConnell's brief, along

1 with others, explains that point very well.

2 JUSTICE BARRETT: Do you think the
3 right to anonymously associate is an inherent
4 part of the freedom of assembly?

5 MR. SHAFFER: Yes, it is. It was
6 precious to the framers. Anonymity was a -- a
7 core concern of theirs that's reflected in this
8 Court's precedents, McIntyre, Talley, and on
9 down the line.

10 But, also, the right to assemble is
11 the right to assemble privately and peaceably.
12 And when the government comes asking tell us who
13 your donors are, that is a direct infringement.

14 JUSTICE BARRETT: Okay. And I want to
15 ask you something. You've repeatedly
16 distinguished the IRS form from the California
17 use of Schedule B because of the fact that it's,
18 you know, kept strictly confidential and the IRS
19 has a nationwide mandate.

20 And you keep talking about the
21 distinction between this not being a statute in
22 California but being, you know, something that
23 was -- I think you described it as subject to
24 the executive's whim.

25 And I guess I don't understand why all

1 of those things matter. I would have thought
2 state action is state action. So, if
3 California, which has a state-wide mandate,
4 passes a statute and, you know, as Justice Kagan
5 asked you about keeping things strictly
6 confidential, keeps it strictly confidential,
7 it's done by statute, and it only applies to
8 donors in the State of California, is that a
9 different case?

10 MR. SHAFFER: Doe v. Reed explained
11 very well why the first thing in the analysis,
12 even after you have least restrictive
13 alternatives established in the election
14 context, it started with the state's interest
15 and it had to credit that before it went on to
16 the analysis of chill.

17 And whether there's a statute that
18 reflects the considered legislative judgment
19 that, yes, this is really warranted and it's
20 really useful should make a difference to this
21 Court's analysis. And I commend to you Justice
22 Stevens' Footnote 3 in his concurrence in Doe v.
23 Reed explaining that the strength of the state's
24 interest goes up depending upon whether you have
25 a considered and surer legislative judgment

1 that's been made.

2 Here, you have the opposite of that,
3 and you have the acknowledgment of California --
4 again, it -- it's reflected in Joint Appendix
5 and it's incontestable that they haven't even
6 thought about narrow tailoring.

7 JUSTICE BARRETT: Thank you, counsel.

8 CHIEF JUSTICE ROBERTS: A minute to
9 wrap up, Mr. Shaffer.

10 MR. SHAFFER: Yes, if I may, Mr. Chief
11 Justice. We think the rule of law that decides
12 this case is clear, not fuzzy. Even if there
13 may be semantic differences or questions of
14 doctrine as far as strict scrutiny versus
15 exacting scrutiny and least restrictive
16 alternatives versus narrow tailoring being
17 required, this Court's holding and precedent are
18 clear in Shelton and in Gremillion. Unless
19 those are overruled, narrow tailoring at the
20 very least, at a bare minimum, is required here.

21 This Court has insisted upon it
22 repeatedly, and it is -- and it has done so
23 across the larger realm of First Amendment
24 scrutiny. We don't know of heightened scrutiny
25 in the First Amendment context that does not

1 call for narrow tailoring, that does not say a
2 state cannot be infringing upon these precious
3 liberties gratuitously and -- and -- and
4 disproportionately.

5 Here, California's narrow -- narrower
6 alternative is obvious and unanswerable. It's
7 an individualized audit request that we are not
8 challenging and that California is relying upon
9 in every case, redundantly, after the
10 prophylactic upfront collection. To collect
11 gratuitously and redundantly is the opposite of
12 doing it narrowly.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 General Prelogar.

16 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR
17 FOR THE UNITED STATES, AS AMICUS CURIAE,
18 SUPPORTING VACATUR AND REMAND

19 GENERAL PRELOGAR: Mr. Chief Justice,
20 and may it please the Court:

21 In its reply brief and again this
22 morning in response to Justice Sotomayor's
23 questions, the Foundation concedes that exacting
24 scrutiny does not contain a least restrictive
25 means requirement and for good reason.

1 This Court's cases make clear that
2 while fit matters under exacting scrutiny, the
3 standard is less stringent than strict
4 scrutiny's narrow tailoring test. The court of
5 appeals thus applied the correct legal standard
6 to this reporting requirement.

7 The court also correctly rejected
8 Petitioners' facial challenge. Petitioners
9 haven't shown that disclosure in the typical
10 case involving the typical charity would expose
11 donors to the risk of threats, harassment, or
12 reprisal. Absent that showing of an
13 across-the-board First Amendment burden, they
14 provide no basis to strike down this law on its
15 face. Instead, Petitioners' evidence of burden
16 focused on the harm to their own donors.

17 We agree that the court of appeals'
18 analysis of the as-applied challenge was
19 incomplete, and the cases should therefore be
20 remanded for the court to properly assess the
21 potential chilling effect on Petitioners'
22 donors.

23 I welcome the Court's questions.

24 CHIEF JUSTICE ROBERTS: General, how
25 do you think an as-applied challenge would work?

1 It -- is a charity supposed to -- you know, the
2 -- the Schedule B is due to be disclosed. Are
3 they supposed to attach an affidavit or
4 something saying we're a very controversial
5 charity and we think, if people knew who gave
6 money to us, they would be -- their rights to
7 association would be chilled?

8 GENERAL PRELOGAR: This Court has
9 recognized, Mr. Chief Justice, in cases like
10 Buckley that there shouldn't be unduly stringent
11 standards of proof for purposes of adjudicating
12 an as-applied challenge. So I think that a
13 charity in that circumstance that thinks that
14 its donors are going to face a reasonable
15 probability of threats or harassment could come
16 forward with any kind of evidence that would
17 bear on that question. But that --

18 CHIEF JUSTICE ROBERTS: Well, but I
19 mean -- do you mean of -- of the 60,000 or how
20 many there -- ever many there are, I guess
21 that's my question. When you say come forward
22 with, does that mean they file a statement
23 saying we're a very controversial charity; to
24 prove that, here are a number of examples where
25 our donors were harassed? And -- and then

1 somebody in the AG's office would make a
2 judgment about it? I just -- I -- I just don't
3 understand how it works.

4 GENERAL PRELOGAR: I think it could
5 work in two different ways. So, first, there
6 might be those kinds of administrative
7 procedures where the charity could seek an
8 exemption from the Attorney General's Office
9 itself directly. But, of course, here, the way
10 that this was pressed in the lower courts was
11 through a judicial challenge where the charity
12 did not disclose its Schedule B requirement and
13 then subsequently --

14 CHIEF JUSTICE ROBERTS: Well, I mean,
15 do -- do you -- would -- would you require that,
16 anybody who wanted to not have to disclose it
17 would have to go into court?

18 GENERAL PRELOGAR: Not necessarily if
19 they want to take advantage of any
20 administrative remedies that might exist. And I
21 think this Court, in cases like Buckley and Doe
22 versus Reed, recognized that there do have to be
23 those meaningful opportunities to obtain the
24 as-applied challenge but that that's what
25 sufficiently safeguards First Amendment rights

1 in this context --

2 CHIEF JUSTICE ROBERTS: How would --

3 GENERAL PRELOGAR: -- in that they're

4 --

5 CHIEF JUSTICE ROBERTS: -- how would

6 the -- the administrative person in the

7 California Attorney General's office decide

8 whether a particular charity qualified for an

9 as-applied exemption?

10 GENERAL PRELOGAR: We think that the

11 relevant information would pertain to whether

12 there is actually a risk of harassment, threats,

13 or reprisal. So that could turn on things like

14 hostility to the organization itself, any

15 documented record of those kinds of threats

16 against the organization, its members, its

17 donors, other organizations like it.

18 CHIEF JUSTICE ROBERTS: Well, how many

19 examples of people being abused do you have to

20 have before you'll say yes, that's a -- that

21 charity is a controversial one and they don't

22 have to file the Schedule B?

23 GENERAL PRELOGAR: I don't think that

24 it turns on a particular number. Instead, what

25 this Court has used to describe the framework is

1 whether there's a reasonable probability, and
2 it's emphasized that that's a flexible standard
3 that there shouldn't be unduly stringent burdens
4 of proof. That's the exact reason we think this
5 case should be sent back for the court of
6 appeals to properly measure the chilling effect
7 based on this kind of evidence, which we think
8 does create a serious concern in this case.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Counsel, you -- you speak of a
14 chilling effect. What role would accusations
15 that a particular organization is racist or is
16 white -- supports white supremacy, that if --
17 that if there's a view of that organization to
18 that -- with that reputation, would it be a
19 chilling effect if these -- if its contributors
20 think that that information or that their
21 contributions to the organization would be
22 disclosed, is it more than -- would that be more
23 of a concern in that case than it would be, say,
24 in the case of the organization that provides
25 dog beds for adopted dogs or something?

1 GENERAL PRELOGAR: Yes, I agree
2 completely, Justice Thomas, that we think that
3 with respect to the organizations that might be
4 subject to forms of public backlash or that are
5 associated with particular causes that have been
6 the subject of public attention, that that might
7 very well create that kind of chilling concern
8 if the organization can show that it triggers
9 this probability of -- of threats or harassment.

10 But that is clearly distinguishable
11 from the case of the typical donation to the
12 typical charity that isn't at all controversial,
13 that doesn't trigger that kind of public
14 backlash. And as Justice Kagan noted, many
15 charities already disclose the identities of
16 their donors. Many sell their donors'
17 identities to third parties.

18 So there's just no basis in this
19 record to conclude that in the case of the
20 general application of this disclosure
21 requirement, there's going to be anything
22 remotely like the risks associated with
23 organizations that instead have provoked that
24 kind of public debate.

25 And I would just emphasize as well

1 that, in that respect, we think the record here
2 is on all fours with the record the Court
3 confronted in Doe versus Reed because, there,
4 the Court recognized that although, with respect
5 to particular referendum petitions, there might
6 be risks of harm arising from disclosure, there
7 was no basis to think that that would apply
8 across the board in each and every case.

9 JUSTICE THOMAS: I'd like your
10 reaction to -- somewhat related, but your
11 reaction to this sentence from the reply --
12 NAACP's reply brief in the NAACP case, and I
13 quote, "The right of anonymity is an incident of
14 a civilized society and a necessary adjunct to
15 freedom of association and to full and free
16 expression in a democratic state."

17 What do you think of that? Is -- is
18 there such a right?

19 GENERAL PRELOGAR: I think that what
20 this Court has recognized in considering claims
21 like that is that privacy may in many cases be
22 essential to the effective exercise of
23 associational rights, but it's not invariably
24 the case that that will be so.

25 What the Court has said in cases like

1 Buckley is that there's a possibility that a
2 disclosure requirement will interfere with
3 association insofar as privacy might sometimes
4 be important to protect the associational
5 rights. But that's exactly why the Court has
6 adopted exacting scrutiny as the proper
7 framework for measuring these claims, to ensure
8 that there is an actual burden on First
9 Amendment rights produced by a disclosure
10 requirement for purposes of assessing whether
11 the state's law is valid.

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.

15 JUSTICE BREYER: I'd like to know what
16 you think of the argument raised in several of
17 the amici briefs anyway that this case is really
18 a stalking horse for campaign finance disclosure
19 laws.

20 What's the difference? If we hold in
21 your opinion, the government's view -- if we
22 were to hold against you and for the broader
23 claims of the rule at issue in this case that
24 the Petitioner brings, how would you distinguish
25 disclosure in the campaign finance context? The

1 right at issue, you heard Justice Thomas very
2 eloquently explain that right, and it would
3 certainly seem to apply as much.

4 And the need in the political fora,
5 money is involved in both cases, and the need to
6 give anonymously would seem as strong. And you
7 could argue about the government's interest.
8 So, if that broad interest exists here, how
9 would you -- and wins, how would you distinguish
10 campaign finance, or would you?

11 GENERAL PRELOGAR: So I think that
12 campaign finance disclosure requirements would
13 still be distinguishable insofar as there are
14 different interests, government interests that
15 are asserted in support of those laws and where
16 the Court might conclude that there aren't other
17 alternatives that could equally be as effective
18 in pursuing those goals.

19 But I want to be clear that we think
20 that the same standard of review applies to
21 disclosure requirements across the board. And
22 this distinction between electoral cases and
23 non-electoral cases is illusory because the
24 relevant point that this Court has recognized is
25 that disclosure requirements are subject to

1 exacting scrutiny because they only affect
2 protected associational rights indirectly, and
3 they don't present the same risk the
4 government's seeking to suppress particular
5 ideas or viewpoints or try -- or types of
6 association, and for that reason, they should be
7 subject to a less stringent standard of review.

8 We urge the Court to adopt and apply
9 that framework to this disclosure requirement as
10 well.

11 CHIEF JUSTICE ROBERTS: Justice Alito.

12 JUSTICE ALITO: I was interested in
13 your colloquy with the Chief Justice. Has
14 California ever said that it will grant an
15 exemption if a nonprofit submits an affidavit or
16 other proof that its donors will be chilled by
17 disclosure?

18 GENERAL PRELOGAR: I'm not aware of
19 any evidence about that in the record. And,
20 ultimately, these kinds of administrative
21 remedies, I'm drawing a parallel to the campaign
22 finance regulations and, for example --

23 JUSTICE ALITO: Well, if it's not in
24 the record, then does every nonprofit that fears
25 its donors will be chilled have to do what these

1 Petitioners have done, which is to take
2 California to court and fight the state tooth
3 and nail for more than six years in order to
4 avoid potential public disclosure of its list of
5 donors?

6 GENERAL PRELOGAR: To the extent
7 they're pursuing an as-applied exemption, I
8 think that that's so, but I don't think there is
9 anything wrong with it.

10 And the -- the corresponding rule that
11 would facially invalidate this law would mean
12 that in the mine-run case where there is no
13 First Amendment burden at all, nevertheless, the
14 state would be precluded from regulating and
15 pursuing its important interests in policing
16 charitable fraud in this way.

17 JUSTICE ALITO: Do you think that
18 would provide adequate protection for First
19 Amendment rights? Do you doubt that donors to
20 organizations that take unpopular positions on
21 hot-button issues have reason to fear reprisals
22 if those donations are made public? Do you
23 think that's a legitimate fear in our current
24 atmosphere, or -- or do you think it's paranoid?

25 GENERAL PRELOGAR: No, I think that

1 that can produce a chilling effect in individual
2 cases. But I don't think there's any indication
3 in this record that that kind of chilling effect
4 is created across the board with respect to the
5 average person donating to the average
6 charitable organization.

7 And there's simply no evidence here to
8 conclude that individuals would stop donating to
9 charitable organizations if this reporting
10 requirement to the state were enforced in the
11 mine-run case.

12 JUSTICE ALITO: Let me ask you about
13 your position with respect to this particular
14 case because I found it a bit puzzling. You say
15 that the case should be remanded so the Ninth
16 Circuit can consider "how significant the harm
17 would be to Petitioner's contributors if their
18 identities became publicly known."

19 You know what the record here shows.
20 The district court conducted a trial and it
21 found ample evidence that the contributors to
22 Petitioners would be harassed. And the brief
23 filed by the American Civil Liberties Union and
24 the NAACP Legal Defense Fund and other groups
25 says, "Petitioners have shown that people

1 publicly affiliated with their organizations
2 have been subjected to threats, harassment, or
3 economic reprisals in the past and are likely to
4 be chilled."

5 What more do you think these
6 Petitioners would have to show?

7 GENERAL PRELOGAR: Well, I think the
8 way that that kind of evidence factors in in
9 this case, which, of course, involves a
10 nonpublic disclosure requirement, is in
11 measuring the chilling effect. So the reason
12 that we think that the court of appeals was
13 incomplete in its analysis is because, although
14 it concluded that there was no future
15 prospective risk of inadvertent disclosure, it
16 didn't consider the way that the past history
17 here of unfortunate widespread public disclosure
18 might factor into a prospective donor's chill
19 with respect to whether to continue associating
20 with Petitioners.

21 And we think a donor would think about
22 not just the risk of future disclosure but also
23 how severe the consequences would be. The more
24 severe the consequences, the greater the
25 chilling effect, even if that threshold risk of

1 inadvertent disclosure remains relatively
2 slight.

3 JUSTICE ALITO: Well, again, you know
4 what the record here shows. Is it sufficient or
5 not? I -- I don't quite understand what your
6 position is.

7 GENERAL PRELOGAR: Our position is
8 that the court of appeals should complete its
9 analysis and conduct that inquiry in the first
10 instance. And, ultimately, the -- the interest
11 of the United States here is in -- in the legal
12 standards that apply to disclosure requirements
13 in this context. So we haven't taken an
14 ultimate position on the outcome of the
15 as-applied exemption, but we do think it needs
16 to be given meaningful consideration.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor.

20 JUSTICE SOTOMAYOR: I am think -- I'm
21 thinking along Justice Alito's questioning, and
22 it seems to me that you are basically asking a
23 question that the Ninth Circuit -- you're saying
24 the Ninth Circuit didn't answer.

25 And it's -- and the question you think

1 the Ninth Circuit didn't answer is do -- can --
2 do donors have a reasonable fear -- given the
3 state's past disclosure problems, is it
4 reasonable for them to be chilled?

5 Is that what you're asking the Court
6 to do?

7 GENERAL PRELOGAR: Yes, Justice
8 Sotomayor, that's largely how we think the
9 chilling effect should be measured in this case.

10 JUSTICE SOTOMAYOR: All right. Now,
11 if that's the way you think it should -- and I
12 actually may agree with you that that's what our
13 -- our case law would suggest. Is that a
14 factual question or is that a legal question
15 that we should answer?

16 GENERAL PRELOGAR: That's, I think, a
17 mixed question, and in this realm, the Court has
18 recognized that mixed questions should generally
19 be answered de novo by looking at how the legal
20 standard applies to the particular facts.

21 JUSTICE SOTOMAYOR: Now let me tell
22 you how -- what I've been struggling with in
23 this case, and perhaps you'll tell me if I'm
24 struggling rightly or wrongly, given our -- what
25 you believe our exacting scrutiny standard

1 requires.

2 It seems to me that what we look at
3 first is, can a disclosure hurt a party? We
4 don't -- generally, we ask three questions, but,
5 if I take them backwards, we look at, is there a
6 potential burden?

7 And I think it goes without dispute in
8 this case that Petitioners have shown that a
9 disclosure of their donors could harm them. I
10 don't think you dispute that, correct?

11 GENERAL PRELOGAR: If it were a public
12 disclosure, that's correct.

13 JUSTICE SOTOMAYOR: That's the point.

14 Now the question is, if it's not a
15 public disclosure, which this law purports to
16 be, we would balance whatever -- whether the
17 state has a substantial interest, not a
18 compelling interest but a substantial interest
19 in this information.

20 And I guess the other side is saying,
21 given the number of times we use it, even if
22 it's small, 10 times, this is a substantial
23 interest. It helps us in our law enforcement.

24 So the issue really is, has the State
25 proven that it's really not -- it's really going

1 to keep this private? Isn't that the bottom
2 line?

3 GENERAL PRELOGAR: I think that is a
4 critical component of the inquiry here. And we
5 agree that there is a big difference between
6 public and nonpublic disclosure requirements
7 because, of course, nonpublic reporting reduces
8 the risk that there will be any harassment and
9 reprisal from third parties themselves.

10 But just pulling back and to -- to
11 provide our view on the overarching legal
12 question that you were referring to, Justice
13 Sotomayor, we do think that it's appropriate in
14 every case to take account of both the burden on
15 First Amendment rights and to use that as the
16 framework or benchmark for assessing the
17 sufficiency of the state's interests. That's --

18 CHIEF JUSTICE ROBERTS: Justice Kagan.

19 JUSTICE KAGAN: General Prelogar, I'd
20 like to get your views on this question that's
21 come up about when a facial challenge is
22 appropriate and when, on the contrary, it's not
23 and -- and a person should be remitted to an
24 as-applied challenge.

25 And as you answer that question, I'd

1 like you to answer Justice Barrett's
2 hypothetical, which is that, you know, it would
3 seem irrelevant that lots of people don't care
4 about a blanket restriction on speech. So why
5 is that any different here?

6 GENERAL PRELOGAR: So I'll begin with
7 that hypothetical, and -- and the big difference
8 with the situation that Justice Barrett was
9 positing is that that would have been a direct
10 prohibition of speech, and that creates all the
11 concerns that maybe government's trying to
12 suppress viewpoints or ideas and it triggers
13 strict scrutiny in the ordinary course.

14 Disclosure requirements are different
15 because this Court has recognized that they may
16 affect an association, but they do so only
17 indirectly, and so it's necessary in every case
18 to take account of the actual burden that's
19 presented with respect to First Amendment
20 rights.

21 And I think that that explains why a
22 facial challenge should not succeed here because
23 there is no evidence in this record that there
24 is any kind of widespread substantial burden in
25 the typical application of this statute to the

1 typical person contributing to a charity.

2 The evidence the Petitioners had
3 focused on the harm to their own donors. We
4 agree that that evidence is cause for concern,
5 but just like in Doe versus Reed, there is no
6 reason to generalize here and suggest that the
7 average person contributing to a charity would
8 be similarly situated with respect to those
9 harms.

10 JUSTICE KAGAN: And -- and I heard
11 some questioning at the -- at the end of Mr.
12 Shaffer's round about maybe this isn't an
13 indirect restriction, maybe associational rights
14 are being directly violated and some reference
15 to the Becket Fund brief.

16 Do you have a view on that?

17 GENERAL PRELOGAR: Well, I think that
18 that would run counter to this Court's
19 longstanding precedent concerning disclosure
20 requirements. The Court has again and again
21 characterized those as indirect. And that's the
22 reason that the Court's applied a different
23 level of scrutiny, exacting scrutiny, to those
24 requirements.

25 The Court has said that disclosure

1 poses the possibility but not the same certainty
2 or inevitability of affecting associational
3 rights. And so it would be a sea change in this
4 Court's precedent to instead subject disclosure
5 requirements to the same kind of scrutiny that
6 attaches to more direct regulations of speech or
7 association.

8 JUSTICE KAGAN: General, there's been
9 a lot of confusion about what exactly exact --
10 what exactly "exacting scrutiny" means. You
11 started by saying it's definitely not a least
12 restrictive alternative test. Some people say,
13 well, it has to be narrowly tailored.

14 What do you think of that and -- and,
15 you know, what's the proper level of tailoring
16 in this context?

17 GENERAL PRELOGAR: We think that the
18 problem with trying to label it narrow tailoring
19 is that that immediately connotes either the
20 strict scrutiny least restrictive means test or
21 at least it suggests that there's some kind of
22 universal fixed means and fit formulation that
23 applies in this context.

24 And, instead, the way we read this
25 Court's precedents, exacting scrutiny requires

1 that the strength of the governmental interests
2 must reflect the seriousness of the actual
3 burden on First Amendment rights.

4 That incorporates, in our view, an
5 element of flexibility in the means and fit
6 analysis that's intrinsically tied to that
7 actual First Amendment burden. And the more
8 significant the burden, the -- the more
9 stringent the showing the state will have to
10 make that it has a sufficiently strong interest
11 in regulating through its chosen means.

12 JUSTICE KAGAN: Thank you, General.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

15 JUSTICE GORSUCH: Good morning,
16 General. I -- I -- I guess I'm -- I want -- I
17 want to poke a little bit further into this --
18 the -- the facial challenge question and your
19 responses, as I understand your response that a
20 charity would have to come forward with some
21 evidence that it's likely to be harassed or that
22 its donors might be.

23 But doesn't that kind of put the --
24 the cart before the horse or invert the First
25 Amendment analysis because you're placing donors

1 and organizations, so the argument goes, in --
2 in the unenviable position of having to prove
3 that they have been harassed in order to
4 vindicate their First Amendment rights for
5 privacy in associations?

6 GENERAL PRELOGAR: Well, Justice
7 Gorsuch, I think, again, drawing on this Court's
8 analysis in Buckley, it -- it's certainly true
9 that courts have to ensure that they are not
10 holding organizations to unduly stringent
11 burdens of proof.

12 And I -- I would point the Court
13 actually to this Court's analysis in Shelton,
14 which Mr. Shaffer repeatedly relied on. There,
15 the Court was --

16 JUSTICE GORSUCH: I understand those
17 are nice words, but I -- I -- I'm -- I'm looking
18 for something a little more concrete, General.
19 How would you protect -- if -- if -- if you
20 agree, as I understand you do, with Justice
21 Thomas that the right to association includes a
22 right to privacy in that association, how do you
23 protect that when you're requiring donors and
24 organizations to come forward to prove that they
25 have been harassed?

1 GENERAL PRELOGAR: Well, to be clear
2 -- and I want to make sure that I'm being
3 absolutely clear on this point -- what the Court
4 has said is that privacy in association may
5 sometimes be critical to the effect of exercise
6 of the right, but that's not invariably the
7 case.

8 Now, with respect to the actual
9 evidence that organizations need to come
10 forward, ultimately, they -- they don't need to
11 show that there have been specific incidents of
12 harassment tied to the particular disclosure
13 requirement at issue. Instead, the Court has
14 said that any evidence that suggests that there
15 is public hostility to the organization, to its
16 individual members, that there have been past
17 practices to -- to demonstrate a pattern of
18 hostility, could suffice to show that there
19 really is a chilling effect in this
20 circumstance. But if the --

21 JUSTICE GORSUCH: So do you think, for
22 example, then -- then that the government could
23 compel private organizations to hand over
24 their -- I don't know, some examples in the
25 briefs I saw were their holiday card list, so

1 that it can ensure the accuracy of mail delivery
2 or a young person's -- a list of the people
3 they've dated so they can do a survey on
4 marriage patterns?

5 What would be wrong with, in -- in
6 your view, those sorts of things, at least
7 unless they come forward and show that they've
8 been harassed or are very likely to be as a
9 result of this disclosure? Why -- why isn't
10 that -- put another way, why -- why would it be
11 wrong to think of this as a problem of
12 compelling speech?

13 GENERAL PRELOGAR: Well, I think that
14 the big difference with those hypotheticals is
15 they would likely present very different balance
16 of interests with respect both to the burden and
17 to the state interest. And so just taking each
18 of those in turn --

19 JUSTICE GORSUCH: But, in each case,
20 you're compelling speech from a party who
21 doesn't wish to. Why isn't that a problem?

22 GENERAL PRELOGAR: Oh, to be clear, no
23 party here is suggesting that these disclosure
24 requirements should be analyzed under compelled
25 speech precedent.

1 JUSTICE GORSUCH: I'm asking you
2 whether they -- whether they should be.

3 GENERAL PRELOGAR: I don't think they
4 would succeed if they were. The -- the Court
5 has held in cases like Zauderer that so long as
6 what's being compelled is purely factual
7 information, the First Amendment won't
8 necessarily be violated.

9 Now, of course, they present serious
10 associational freedom concerns, and I think that
11 that's why the parties here have focused this
12 case on the privacy in -- in association.

13 JUSTICE GORSUCH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Kavanaugh.

16 JUSTICE KAVANAUGH: Thank you, Chief
17 Justice.

18 And good morning, General Prelogar.

19 There's an impressive array of amicus
20 briefs supporting Petitioners here across the
21 ideological spectrum, and one of them is from
22 the American Civil Liberties Union, the NAACP
23 Legal Defense and Educational Fund, and the
24 Human Rights Campaign, among others, and that
25 brief says -- and I'm going to quote you

1 something and then get your reaction to it -- "A
2 critical corollary of the freedom to associate
3 is the right to maintain the confidentiality of
4 one's associations absent a strong governmental
5 interest in disclosure. If the state could
6 categorically demand disclosure of associational
7 information, the ability of citizens to organize
8 to defend values out of favor with the majority
9 would be seriously diminished."

10 Your reaction to that amicus brief and
11 the amicus briefs more generally that are
12 supporting Petitioners?

13 GENERAL PRELOGAR: With respect to
14 that amicus brief in particular, a critical part
15 of that brief was to observe that -- and to
16 argue that this disclosure requirement should be
17 treated as a public disclosure requirement. So
18 I just want to flag at the outset that the ACLU
19 and the NAACP themselves recognize that there is
20 a critical distinction between public and
21 nonpublic disclosure.

22 With respect to the amicus briefs and
23 -- and that showing more broadly, it's certainly
24 the case that there are many organizations that
25 may desire that kind of privacy in association.

1 The relevant question is whether the state
2 should be foreclosed from regulating in a
3 particular way based on a showing that the
4 disclosure requirement truly creates First
5 Amendment burdens.

6 And I'll just emphasize as well that
7 there are an array of amicus briefs on the other
8 side, including from associations of nonprofits,
9 the California Association of Nonprofits with
10 10,000 member organizations, the National
11 Council of Nonprofits with 25,000 member
12 organizations, and what those briefs suggest is
13 that there is a critical role to be played in
14 having the state police charitable fraud to
15 ensure that donors have confidence in charitable
16 organizations, which itself increases the -- the
17 willingness to donate and, therefore, the
18 pursuit of philanthropic efforts.

19 JUSTICE KAVANAUGH: Turning to the
20 text of the First Amendment, do you agree that
21 there is a right of the people peaceably to
22 assemble?

23 GENERAL PRELOGAR: I certainly agree
24 that the assembly provision is an independent
25 First Amendment right, but, of course, here, no

1 party is pressing that and, instead, that --
2 it's focused on the right to associate.

3 JUSTICE KAVANAUGH: And then, in terms
4 of applying strict or exacting scrutiny,
5 sometimes those words really are just asking the
6 question, not answering the question. You're --
7 you're asking whether the state has an interest
8 sufficiently compelling or important to warrant
9 an exception to a constitutional right or to
10 spell out the contours of the rights.

11 And two things the Court has often
12 looked to in applying that to state laws, say,
13 in the free speech context and others is, one,
14 whether the right -- the exception is
15 historically recognized, that a right has
16 coexisted with an exception of some kind
17 historically; and the second thing, this -- the
18 Court's often looked at, not exclusively, but
19 has looked at, is how many states have also
20 shared this same interest.

21 So, here, I think there's not an
22 historically recognized exception of this kind,
23 although I want to get your response to that.
24 And, second, what do you say about the fact that
25 this right -- this California interest can't be

1 all that important, so the argument goes,
2 because 46 other states have not sought this
3 kind of information?

4 GENERAL PRELOGAR: Well, let me take
5 each of those, but I'll do them in reverse
6 order.

7 On the number of states that regulate
8 in this way, I don't think it could possibly be
9 the case that California's law could be invalid
10 just based on that kind of head count.
11 Obviously, states in our federalist system can
12 choose to devote different levels of resources
13 to problems. They can choose to regulate in
14 different ways and have different priorities.

15 What California has shown is that it's
16 prioritized this issue of charitable fraud in
17 the state, it's devoted far more resources than
18 many other states, and I think it's done so
19 because of the sheer number of charitable
20 organizations that solicit in the state and the
21 amount of their donations, which are somewhat
22 unique in number, and that's prompted California
23 to act in this way.

24 So I think the relevant question isn't
25 how it compares to other states but whether it

1 has sufficiently justified this law.

2 JUSTICE KAVANAUGH: Thank you,
3 General.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

6 JUSTICE BARRETT: Good morning,
7 General Prelogar. I have a question about
8 tailoring.

9 Let's say that I agree that exacting
10 scrutiny applies and that the Ninth Circuit
11 didn't really engage in any kind of tailoring
12 inquiry. I think what it did could more fairly
13 be described as a balancing, balancing of
14 interests.

15 You kind of demurred a little bit when
16 you were asked about what level, if any, of
17 tailoring is required. So do you agree there
18 has to be some kind of means and fit or not?

19 GENERAL PRELOGAR: Yes, we do think
20 that there is a means and fit but we think that
21 it's incorporated into the requirement that the
22 strength of the governmental interest has to
23 reflect the seriousness of the actual burden on
24 First Amendment rights.

25 And so that will vary depending on the

1 context or the circumstances based on the
2 showing with respect to First Amendment burden.

3 And, again, the -- the more serious
4 the burden, then the less likelihood that the
5 state has a sufficiently strong interest in
6 regulating through its chosen means.

7 And -- and Justice Barrett, just to
8 close the loop on this, I do think that the
9 court of appeals here considered alternatives.
10 It specifically discussed the audit letters, the
11 subpoenas and explained why those would be less
12 effective at allowing California to make use of
13 Schedule Bs at the outset in responding to
14 complaints before it's formally opened an
15 investigation and cited that tip-off concern and
16 other concerns related to having that
17 information at an early stage.

18 So I don't think it's accurate to
19 suggest that there was no means and fit analysis
20 in the lower court opinion.

21 JUSTICE BARRETT: Well, General, let
22 me read you this language from Shelton and tell
23 me if you think that this -- you would agree
24 that this is the standard we should apply when
25 thinking about means fit.

1 There, it -- the Court -- we said
2 that, in evaluating means and fit, we struck
3 down the law because we concluded that the
4 government's purpose -- here is the quote --
5 "cannot be pursued by means that broadly stifled
6 personal liberties when the end can be more
7 narrowly achieved."

8 Would you be satisfied with that
9 standard?

10 GENERAL PRELOGAR: I think that
11 standard applies based on a showing of
12 substantial First Amendment burdens. And that's
13 specifically the context in which this Court
14 articulated that language in Shelton.

15 It said that the disclosure
16 requirement there would show every teacher in
17 the state from association because the teacher
18 lacked tenure protection and would naturally
19 avoid any associations that might cause concern
20 for the employer even though it didn't bear on
21 the fitness of the teacher to serve in that
22 capacity.

23 JUSTICE BARRETT: Okay. Let me ask
24 you about that predictive judgment then.

25 So in -- in pressing for as-applied

1 challenges here or talking about whether this
2 record adequately establishes that the
3 Petitioners have reason or their donors have
4 reason to fear retaliation, what if the
5 Petitioners here had filed this challenge right
6 at the beginning before any of these incidents
7 of violence had occurred? How -- how is the
8 State -- State supposed to judge whether there's
9 chilling?

10 GENERAL PRELOGAR: So the Court
11 addressed this in Buckley and it said there,
12 with respect to minor political parties, that if
13 there's a new political party that doesn't have,
14 for example, a -- a history it can point to,
15 then it can rely on evidence with respect to
16 related organizations or organizations that
17 share similar missions.

18 So the Court has specifically
19 acknowledged this concern and made clear, again,
20 that there has to be --

21 JUSTICE BARRETT: But would it be
22 different, say, in California than in Alabama?
23 What evidence is the Court supposed to look to?
24 Political climate of the particular state?

25 GENERAL PRELOGAR: I don't think that

1 it should be limited in that -- in that way,
2 and, again, I don't think this should be an
3 unduly narrow inquiry. So I think that the --
4 the Petitioner should be able to come forward
5 with any evidence of harm that's occurred
6 anywhere for purposes of trying to show that
7 there would actually be a chilling effect in
8 this case.

9 JUSTICE BARRETT: Thank you, General.

10 CHIEF JUSTICE ROBERTS: A minute to
11 wrap up, General.

12 GENERAL PRELOGAR: Thank you, Mr.
13 Chief Justice.

14 To wrap up I'd like to focus on the
15 legal standards that we think the Court should
16 apply here. The Court's cases make clear that
17 exacting scrutiny applies to reporting
18 requirements, but the standard does not contain
19 a least restrictive means test, and that a
20 facial challenge should be rejected when, as
21 here, there is no basis to conclude that
22 disclosure poses a risk of threats, harassment
23 or reprisals in nearly all of the law's
24 applications.

25 But the other relevant legal standard

1 is that organizations need to have a meaningful
2 opportunity to claim an as-applied exemption
3 from compelled disclosure when it would subject
4 their particular donors to harassment or
5 intimidation.

6 Petitioners presented evidence of
7 these kinds of harms and we think the court of
8 appeals should have considered that evidence in
9 measuring the chilling effect of this law as
10 applied.

11 We'd urge the Court to confirm these
12 legal standards and remand for the court of
13 appeals to assess the as-applied challenge in
14 light of them.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 General.

17 General Feinberg.

18 ORAL ARGUMENT OF AIMEE A. FEINBERG

19 ON BEHALF OF THE RESPONDENT

20 MS. FEINBERG: Mr. Chief Justice and
21 may it please the Court:

22 Petitioners advance two claims, a
23 facial challenge and an as-applied one. Those
24 claims are reviewed under exacting scrutiny, the
25 standard this Court has long applied to

1 reporting and disclosure requirements.

2 To prevail on their facial claim,
3 Petitioners must demonstrate that California's
4 Schedule B requirement is unconstitutional in
5 all or at least many of its applications.

6 The Petitioner's evidence centered
7 only on their own organization. They did not
8 show that California's confidential collection
9 of the same information that charities already
10 provide to the IRS chills associational interest
11 in general or for a substantial number of
12 charities in the state.

13 At the same time, the state's upfront
14 collection of Schedule Bs is substantially
15 related to important oversight and law
16 enforcement interests.

17 Schedule Bs are used routinely by
18 state charity regulators to evaluate complaints.
19 When examined with other documents, Schedule B
20 helps investigators determine if there is a
21 concern with self-dealing, diversion of
22 charitable assets, or gift-in-kind fraud that
23 warrants a formal investigation.

24 Now, Petitioners as-applied challenges
25 center on the claim that submitting their

1 Schedule B forms to state charity regulators
2 will lead to threats and harassment from the
3 public. The Schedule Bs are confidential under
4 California law and the state has bolstered its
5 confidentiality protocols in response to past
6 lapses.

7 There is no reasonable probability of
8 harm sufficient for as-applied relief. I
9 welcome the Court's questions.

10 CHIEF JUSTICE ROBERTS: I -- I guess
11 I want to follow up on that point now you were
12 just making, General.

13 If -- if -- assume you have a charity
14 that supports a cause that is controversial, and
15 a number of organizations, people have said they
16 will make life miserable for anybody who
17 supports that charity. They'll picket outside
18 their house. They will boycott anybody doing
19 business with them.

20 If -- if that person came to you and
21 said I want to give a donation, but I want to be
22 sure that California will not disclose this,
23 that it will not get out, can you give me
24 100 percent assurance that that will not happen?
25 What -- what would you tell that person?

1 MS. FEINBERG: Mr. Chief Justice, I
2 don't think any organization can guarantee
3 perfection. But here the State has promulgated
4 a regulation codifying the confidentiality --
5 confidential status of Schedule Bs, and it that
6 it had -- has enhanced its protocols in response
7 to past lapses.

8 The district court at 62a of the Law
9 Center's petition appendix called those efforts
10 commendable. And so we don't think there's any
11 probability that those harms would come to pass
12 in light of the non-public nature of this
13 requirement.

14 CHIEF JUSTICE ROBERTS: I'm sorry, I
15 meant there's no probability or -- I -- I didn't
16 catch the adjective there. No reasonable --

17 MS. FEINBERG: No reasonable
18 probability that the harms that Your Honor just
19 laid out would come to pass.

20 CHIEF JUSTICE ROBERTS: Reasonable
21 probability. Okay.

22 You -- you talked about the State
23 routinely using this Schedule B information and
24 all the -- I just want to make sure I understand
25 if your statements there were consistent with

1 the findings of the district court or if they
2 were meant to dispute those findings?

3 MS. FEINBERG: Your Honor, the
4 district court discounted uses of the State's
5 Schedule B for evaluating complaints, although
6 it did state at 56a of the Law Center's petition
7 appendix that it did not doubt that the Attorney
8 General's Office used Schedule Bs.

9 It did not regard that as deficient
10 because in its view a use of Schedule B that was
11 not strictly necessary or where there were not
12 any other alternatives did not suffice to
13 substantially further the State's interest, and
14 we think that was legal error.

15 CHIEF JUSTICE ROBERTS: Justice
16 Thomas.

17 JUSTICE THOMAS: Thank you, Mr. Chief
18 Justice.

19 Counsel, the -- I'm interested in your
20 discussion of the non-public disclosure laws,
21 the fact that you would have this internally and
22 not disclose it to the general public.

23 But through, you know, throughout at
24 least recent history, or not so recent history,
25 the Japanese internment cases, that census data

1 was used to locate them.

2 The -- the Council on American Islamic
3 Relations in their brief in this case say, or
4 allege, that the U.S. government used its own
5 data to -- to locate American Muslims.

6 The -- in the civil rights cases, like
7 the NAACP case, the local government, state
8 governments wanted data in order to target the
9 NAACP.

10 So how can we say that there is a
11 difference in -- in -- in public disclosure
12 versus non-public disclosures?

13 MS. FEINBERG: Your Honor, the
14 concerns you raise, of course, are very
15 significant ones, but they are not present here.

16 The district court made no finding of
17 potential state reprisals or retaliation against
18 charities, and there is no evidence in the
19 record to support any such concern here.

20 JUSTICE THOMAS: That -- with that in
21 mind, do you think it would be reasonable for
22 someone who wants to make a substantial
23 contribution to an organization that has been
24 accused of being racist or homophobic or white
25 supremacist, that in this environment that they

1 would be chilled because they have reduced or no
2 confidence that there -- the -- their
3 contribution will be kept confidential?

4 MS. FEINBERG: Your Honor, those
5 concerns are certainly relevant for
6 consideration of an as-applied challenge, but in
7 any as-applied challenge, the question is, is
8 there a reasonable probability of threat,
9 harassment, or reprisals, which would turn on,
10 one, the risk that Your Honor noted about those
11 kinds of harassment but also the risk of public
12 disclosure. And here with a non-public
13 reporting requirement, those risks of public
14 threats would -- there would not be a
15 significant possibility of those.

16 JUSTICE THOMAS: So -- but you think
17 that there is in -- in that calculus, do you
18 include the possibility of an intentional leak
19 by someone who happens to disagree with or
20 dislike that particular group, that someone
21 would consider that a possibility?

22 MS. FEINBERG: Justice Thomas, that
23 generally certainly would be a relevant
24 consideration. I don't -- there is no evidence
25 in the record of -- suggestive of that sort of

1 willful or advertent kind of retaliation.

2 JUSTICE THOMAS: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Breyer.

5 JUSTICE BREYER: What do I read in the
6 record to show that this statement of the other
7 side is wrong? I assume you think it is. The
8 statement is, as I paraphrase it, there -- there
9 is no need for this. You can't say there isn't
10 some risk of leakage. It's never been
11 necessarily really or hardly ever, and at the
12 very least you could have a carefully tailored,
13 more -- more like New York's, which is a more
14 carefully tailored statute, the same thing.

15 I thought the answer might be,
16 Mr. Smith, the charity, goes and buys a piece of
17 land or property in San Francisco or New York.
18 It belongs to a major donor. Maybe he overpaid.
19 Huh. This law means any charity will be very
20 careful before they get into that fix. That's
21 called, you know, preventative.

22 But you don't make that argument.
23 You're making the first. So what's the answer
24 to this -- the first? And why didn't you make
25 the second argument? There's some good reason.

1 MS. FEINBERG: Justice Breyer, the
2 record shows that the upfront collection of
3 Schedule B assists state regulators in
4 evaluating complaints to detect precisely the
5 sort of self-dealing concerns that your question
6 is premised upon, when with upfront collection,
7 the State is able to evaluate complaints, look
8 for those kinds of situations, decide whether a
9 formal investigation is needed, and, if so,
10 focus the investigation on the relevant
11 concerns.

12 The alternatives posited by my friend
13 would not be sufficient to meet those needs.
14 The State would not have the ability to evaluate
15 -- to see Schedule B information in connection
16 with other information to decide if an
17 investigation is even needed.

18 Audit letters and subpoenas after the
19 fact lead to delays. They also lead to
20 considerable burdens on charities. And it is
21 not clear that Petitioners or other charities
22 would even provide their Schedule B in response.

23 I thought I heard my friend say that
24 any routine requests for those sort of audit
25 letters would be something he -- requests for

1 Schedule Bs would be something he would
2 challenge.

3 CHIEF JUSTICE ROBERTS: Justice Alito.

4 JUSTICE ALITO: Counsel, would your
5 scheme be facially unconstitutional if you
6 publicly disclosed these donor lists?

7 MS. FEINBERG: Your Honor, in that
8 circumstance, the burden on charities and their
9 supporters would be higher, and so a stronger
10 interest would be needed. We don't assert an
11 interest in public disclosure.

12 There could be circumstances where it
13 could serve an interest, but we don't assert any
14 such interest here.

15 JUSTICE ALITO: Are -- are you willing
16 to say that that would be unconstitutional?

17 MS. FEINBERG: Your Honor, as a facial
18 matter, the challenger would still have to show
19 that it was operating unconstitutional in all or
20 a substantial number of cases, which would
21 require a showing that the sorts of public
22 threats, harassment, and reprisals would occur.

23 And as Justice Kagan was note --
24 noting before, many charities do not have those
25 types of concerns with the public knowledge of

1 donations.

2 JUSTICE ALITO: All right. The brief
3 filed by the ACLU and the NAACP Legal Defense
4 Fund says that we should regard your system as a
5 system of de facto public disclosure because
6 there have been such massive confidentiality
7 breaches in California.

8 And from the perspective of a donor,
9 that may make sense. A donor may say: This is
10 a state that has been grossly negligent in the
11 past. No sanctions against anybody who's leaked
12 this information. I have to assume that this
13 may happen again.

14 Why isn't that a reasonable way to
15 look at this?

16 MS. FEINBERG: I don't think even the
17 district court regarded it that way, Justice
18 Alito. At 62a of the Law Center petition
19 appendix, the district court said that the
20 Attorney General's Office efforts to rectify
21 past lapses and to prevent them in the future
22 were commendable.

23 JUSTICE ALITO: It said your past
24 record was shocking; did it not?

25 MS. FEINBERG: In the foundation

1 decision, it did. Following the court's
2 analysis of -- of the evidence regarding the
3 changes to the State's protocols, it called
4 those efforts commendable. Its concern at the
5 Law Center -- its concern at that point was that
6 the State could not guarantee confidentiality.

7 JUSTICE ALITO: Let me get your -- let
8 me get a sense from you what you think would be
9 necessary in order for an as-applied challenge
10 to proceed.

11 And let's take, as an example, the
12 brief filed by the Proposition 8 Legal Defense
13 Fund, where they detail evidence of vandalism,
14 death threats, physical violence, economic
15 reprisals, harassment in the workplace, the
16 well-known case of Brendan Eich.

17 Do you think that's sufficient? If
18 they came to you with that, would you grant them
19 an exemption?

20 MS. FEINBERG: Justice Alito, this is
21 a non-public disclosure -- reporting
22 requirement, so there is no reasonable
23 probability that that sort of threat,
24 harassment, and reprisal from the public would
25 come to pass.

1 But we agree with the United States
2 that, as a general principle of law, there is a
3 flexible evidentiary standard and challengers to
4 reporting or disclosure requirements can draw
5 from a wide range of evidence in order to
6 establish --

7 JUSTICE ALITO: Well, my time is up,
8 but -- so your answer is, basically, that no
9 as-applied challenge can ever succeed because
10 what you have, at least purportedly, is a
11 private disclosure system?

12 MS. FEINBERG: Justice Alito, there is
13 a -- with a challenger who is asserting concerns
14 related to threats, harassment, and reprisals
15 from the public, that -- they would not be able
16 to satisfy the -- the standard because there
17 isn't a reasonable probability that that
18 information would be made known to --

19 JUSTICE ALITO: Well, I -- I
20 understand your position. Your position is no
21 as-applied challenge can ever succeed?

22 MS. FEINBERG: There could be --

23 JUSTICE ALITO: For that reason?

24 MS. FEINBERG: Pardon me?

25 JUSTICE ALITO: For that reason, no

1 as-applied challenge could ever succeed?

2 MS. FEINBERG: With respect to a
3 non-public reporting requirement with a
4 challenger asserting claims -- asserting
5 threats, harassment, and reprisals from the
6 public, that would be a very difficult standard
7 to meet because --

8 JUSTICE ALITO: All right. Thank you.
9 My -- my time is up.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor.

12 JUSTICE SOTOMAYOR: Counsel, I
13 believe, and my memory could be wrong, that the
14 district court, in the end, commended you for
15 the efforts you had made for privacy but that it
16 concluded that, given the breaches -- the
17 breaches in the past that a reasonable person,
18 donor, might not have that much faith in the
19 AG's Office and that it would chill them from
20 making donations. And that's one of the
21 reasons, if not the reason, it issued the
22 injunction which the Ninth Circuit vacated.

23 So what are we to do with that?

24 I mean, isn't that the nub of this?
25 An exemption is only necessary if you're going

1 to make it public, and, you're right, the
2 district court has to determine whether your
3 office has a reputation or a reasonable
4 possibility that it's going to engage in
5 political retaliation and leak it secretly, et
6 cetera, et cetera.

7 But what do we do with that finding,
8 that given your past breaches you have
9 essentially turned this into a public disclosure
10 case?

11 MS. FEINBERG: Justice Sotomayor, I
12 read the district court's decision as, as you
13 note, commending the Attorney General's Office
14 for its changes but faulting the Attorney
15 General's Office for at that point not being
16 able to guarantee confidentiality.

17 We don't think that sort of guarantee
18 can be the standard and that the lack --

19 JUSTICE SOTOMAYOR: Well, let me just
20 give you an example. And -- and I think your --
21 someone said this earlier. It might have been
22 the other side.

23 How about if the requirement was that
24 you hand-deliver this list to somebody in the
25 AG's office who's going to put it in a locked

1 file?

2 Is that a guarantee better than
3 putting it on the Internet with all of the
4 anti-hacking procedures you have? There is a
5 normal human fear about hacking, that they can
6 hack anything.

7 MS. FEINBERG: In that hypothetical,
8 it's true that general concerns about hacking
9 would not be present. Here --

10 JUSTICE SOTOMAYOR: By the way, there
11 is a serious question. If someone came in and
12 argued that they were fearful on general
13 hacking, we probably under Clapper would say
14 they don't have standing to claim a -- a -- an
15 injury. But go ahead.

16 MS. FEINBERG: With respect to
17 hacking, Justice Sotomayor, it is a present risk
18 in modern society that no system can have a
19 100 percent safeguard against, but the important
20 point here --

21 JUSTICE SOTOMAYOR: That's including
22 the IRS, correct?

23 MS. FEINBERG: Indeed. Indeed. But
24 the important point here is that Petitioners did
25 not bring forward evidence suggesting that even

1 in light of that background risk, that charities
2 in general or at least a substantial number of
3 them were chilled in their contributions.

4 And, indeed, the amicus briefs from
5 Cal Nonprofits and the National Council of
6 Nonprofits said that robust Attorney General
7 oversight actually promotes charitable giving
8 because it promotes trust in the charitable
9 sector.

10 CHIEF JUSTICE ROBERTS: Justice Kagan.

11 JUSTICE KAGAN: Ms. Feinberg, I'd also
12 like to ask you about the Petitioners'
13 as-applied challenge. You lost that below and
14 we -- in the district court, and its findings
15 are reviewed only under a clearly erroneous
16 standard.

17 And the district court said two
18 things. It said there was a pervasive recurring
19 pattern of inadvertent disclosure by California,
20 and it said that the donors would likely be
21 subject to threats and harassment if their
22 affiliations were disclosed.

23 So given those two findings, given a
24 clear error standard, how can you win on the
25 as-applied challenge?

1 MS. FEINBERG: Justice Kagan, we think
2 that the district court's ruling was premised on
3 its observation that California could not
4 guarantee constitutional -- confidentiality even
5 after bolstering its protocols.

6 If the Court disagrees with the Ninth
7 Circuit's approach to considering the district
8 court's characterization of the confidentiality
9 measures, the appropriate course would be as the
10 United States suggests, which is to -- would be
11 to vacate and remand on the as-applied
12 challenges only and to reconsider the question
13 in light of the district court's framing of the
14 confidentiality protections.

15 JUSTICE KAGAN: I'm wondering about
16 the relevance of your new regulation. You know,
17 usually we don't allow parties, govern -- the
18 government to come in and say, you know, we've
19 reformed our ways. We've changed our practices.
20 We'll do better in the future. You should give
21 us a pass.

22 So why isn't that what you're asking
23 for here?

24 MS. FEINBERG: Justice Kagan, the reg
25 -- regulation codified existing practices in the

1 Attorney General's Office and an existing
2 policy. The Petitioners here are seeking
3 prospective facial invalidation. And the
4 district court considered the updated protocols
5 and the new regulation in connection with the
6 challenge. And we think that that -- they're
7 relevant for that reason.

8 JUSTICE KAGAN: On the question of
9 threats and harassment, if an organization comes
10 in or some of its members and -- and -- and
11 shows that they have been in the past subject to
12 such threats, do they need to do anything else
13 in your view? Is there a requirement that --
14 that they show that those threats have led to
15 chill, or is it enough if they show threats and
16 harassment?

17 MS. FEINBERG: In general, with
18 respect to public disclosure requirements, the
19 question is whether there's a reasonable
20 probability that those threats, harassment, or
21 reprisals would occur.

22 And, if they do, it's reasonable to
23 conclude that that sort of significant
24 repercussions would arise would demonstrate a
25 deterrent for associations or making

1 contributions to charity because of the
2 significance of those sorts of consequences.

3 JUSTICE KAGAN: Thank you, Ms.
4 Feinberg.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Good morning. If
8 the First Amendment protects the right to
9 associate in private, why do we need to consider
10 harassment?

11 MS. FEINBERG: Justice Gorsuch, this
12 Court has said repeatedly, including in its
13 foundational cases, that the First Amendment
14 protects associational rights and those rights
15 may be implicated by disclosure and reporting
16 requirements, but they don't do so invariably.

17 So the --

18 JUSTICE GORSUCH: Well, we certainly
19 said that proof of harassment can be very
20 significant evidence that the First Amendment
21 right to associate has been infringed. But
22 we've also said that -- that the First Amendment
23 right to associate includes the right to do so
24 privately. Right?

25 MS. FEINBERG: The Court has

1 recognized that privacy is a concern where the
2 disclosure of associational information would
3 lead to deterrence of associations because of
4 the reactions that the information would prompt
5 in others.

6 JUSTICE GORSUCH: So could the
7 government on that account require private
8 associations to reveal any manner of information
9 -- their Christmas card lists, their dating
10 lists, their whatever -- so long as there's no
11 evidence or at least not a -- I think it was a
12 reasonable probability of reprisal?

13 MS. FEINBERG: Justice Gorsuch, I
14 think, in those situations, it would be much
15 more difficult for the government to justify,
16 first, because there would be a --

17 JUSTICE GORSUCH: Well, there's always
18 some good efficiency argument. I mean, we've
19 heard about efficiency in administration here.
20 I'm sure there's efficiency in Post Office
21 services or Census information. So let's
22 suppose the government can come up with
23 something that sounds like that.

24 MS. FEINBERG: In any case involving a
25 disclosure or reporting requirement, the

1 government must come forward with an interest
2 that is sufficiently important to justify the
3 burden. And in Your Honor's --

4 JUSTICE GORSUCH: So -- so you -- so
5 you then -- you do agree that there is this
6 right to privacy of association that the
7 government must overcome?

8 MS. FEINBERG: In -- where a -- where
9 a plaintiff demonstrates that a disclosure or
10 reporting requirement is, in fact, resulting in
11 the kinds of -- in the kinds of burdens that
12 Your Honor's hypothetical would likely show,
13 then yes.

14 JUSTICE GORSUCH: Oh, my -- my -- my
15 hypotheticals included no reprisals of any kind.
16 It's just a very -- they choose to associate
17 privately. Their Christmas card lists, their
18 dating history are private information. There's
19 no reprisals.

20 So could the government come in -- in
21 the name of efficiency and good government, come
22 in and require disclosure of those kinds of
23 lists?

24 MS. FEINBERG: I think that would be
25 very difficult because, in that situation, there

1 would be a significant burden on intimate
2 association. There would very likely be a
3 significant burden resulting from public
4 dissemination of that kind of information.

5 And, as a result, the government would
6 have to come forward with a commensurately
7 strong justification, and it wouldn't be clear
8 to me in that context what that interest would
9 be.

10 JUSTICE GORSUCH: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh.

13 JUSTICE KAVANAUGH: Thank you, Chief
14 Justice.

15 And good morning, Ms. Feinberg. I was
16 asking Petitioners' counsel about the IRS
17 disclosure requirement, something that you have
18 emphasized in your briefing. And you heard
19 Petitioners' counsel's efforts to distinguish
20 the IRS situation from what California is doing
21 here. And I just want to give you an
22 opportunity to respond to that.

23 MS. FEINBERG: Justice Kavanaugh, for
24 -- California collects Schedule B information
25 for many reasons analogous to why the IRS does.

1 But, as a formal matter, regarding the
2 constitutional analysis, we agree with the
3 United States that it's different because the
4 IRS rule is a condition of a tax benefit and
5 those rules are analyzed under a different
6 framework.

7 But the -- California's reasons for
8 collecting Schedule B upfront in -- collecting
9 Schedule Bs upfront is analogous to the IRS
10 because, in both circumstances, regulators have
11 concluded that knowing the number -- knowing the
12 identities of the very small number of
13 individuals who may be in a position to
14 influence the financial decisions of a charity
15 are relevant and important for regulatory
16 oversight purposes.

17 JUSTICE KAVANAUGH: One thing we've
18 looked at, the Court has looked at, in prior
19 cases involving individual rights is -- in
20 assessing the strength of the state's interest,
21 is how many states have similar laws.

22 And you heard me ask General Prelogar,
23 and she had a good answer about each state has
24 to assess its interests differently. But it --
25 still, doesn't it show that it's really not all

1 that essential to a state's interests if 46
2 other states have seen fit to regulate without
3 infringing on the right to assemble or the right
4 to associate in this same way? Just how would
5 you respond to that?

6 MS. FEINBERG: I don't think it
7 undermines California's interests for many of
8 the reasons that the United States articulated.
9 Different states have made different judgments
10 regarding their priorities, and different states
11 face very different regulatory challenges.

12 In California, there is a very large
13 population of charities that solicit billions of
14 dollars from state residents. And the State has
15 made it a priority to protect state residents
16 from diversion of charitable assets and
17 deception. And that is the basis on which
18 California has concluded that upfront collection
19 of Schedule B information is important for
20 furthering its interests.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE BARRETT: Good morning,
25 General Feinberg. Let's assume that I think

1 that California has a substantial interest in
2 collecting this information for purposes of
3 policing potential fraud. Let's also assume
4 that I think that the personal liberties --
5 right to association, right to speech -- are
6 significantly burdened.

7 What kind of means-ends fit do I look
8 for then? Or how do -- how do I resolve those
9 competing interests?

10 MS. FEINBERG: Justice Barrett, you
11 would look at whether California's interests are
12 commensurate with those burdens. We think we
13 have clearly shown that here, given the uses of
14 Schedule B and how it helps in connection with
15 other information --

16 JUSTICE BARRETT: Was that a tailoring
17 requirement?

18 MS. FEINBERG: There is --

19 JUSTICE BARRETT: I'm not talking
20 about -- I'm not talking about least restrictive
21 alternatives. I'm -- assume I think exacting
22 scrutiny and not strict scrutiny applies. That
23 doesn't preclude, just like in intermediate
24 scrutiny -- scrutiny, it doesn't preclude a
25 means-ends fit requirement, right?

1 MS. FEINBERG: Justice Barrett, we
2 agree that the exacting scrutiny encompasses
3 consideration of the means and ends, and the
4 degree of fit required will turn on the severity
5 of the burden.

6 Here, Petitioners have not
7 demonstrated such a burden with respect to all
8 or even --

9 JUSTICE BARRETT: But I told you to
10 assume that I said that they did. Let's assume
11 that I think these Petitioners have shown a
12 substantial burden. And I'm -- I'm granting
13 that California has a substantial interest.

14 So you're really advocating just a
15 balancing test, right? Like, does the burden
16 outweigh the benefit to California? You're not
17 -- you're not proposing any kind of means-ends
18 tailoring inquiry.

19 MS. FEINBERG: No, we do think there
20 is a means-ends fit analysis. And we think,
21 here, the means California has chosen are well
22 tailored to the end.

23 JUSTICE BARRETT: So well-tailored is
24 the standard, not narrowly tailored?

25 MS. FEINBERG: Justice Barrett, I'm --

1 the term "narrow tailoring" can mean many things
2 in many contexts, and so -- but we do think that
3 under exacting scrutiny and in Your Honor's
4 hypothetical, where there is a significant
5 burden, there would be a necessary means-end
6 fit. We think that it's satisfied here because
7 California --

8 JUSTICE BARRETT: Well, I understand
9 you think it's satisfied, but, in considering
10 that means-ends fit, we look to alternatives and
11 see what other less restrictive alternatives
12 might be available, and it doesn't mean you have
13 to choose the least one. But we would consider
14 other alternatives, is that right?

15 MS. FEINBERG: Yes, Justice Barrett,
16 it would be a relevant consideration in
17 assessing whether the State has satisfied or is
18 acting with -- that the State's means are
19 sufficiently tailored.

20 JUSTICE BARRETT: Thank you. Let me
21 shift and ask you something else.

22 So we're at 250 organizations who
23 filed briefs in support of the Petitioners here,
24 arguing that the disclosure mandate would harm
25 their rights. Is that enough for a facial

1 challenge? I -- I gather your position is no.
2 So I'm wondering how many would it take?

3 MS. FEINBERG: This Court's precedents
4 require different standards for facial
5 invalidation, but even the most liberal is that
6 a facial challenger has to show a substantial
7 number of unconstitutional applications.

8 There is no such evidence here. And
9 as the United States pointed out, amicus briefs
10 in support of Respondent have indicated that
11 they support robust Attorney General oversight
12 because it actually promotes charitable giving
13 by promoting trust in the charitable sector.

14 JUSTICE BARRETT: Thank you, General
15 Feinberg.

16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, General.

18 MS. FEINBERG: Thank you, Mr. Chief
19 Justice.

20 However the Court resolves the
21 as-applied claims, there is no basis for
22 departing from the established exacting scrutiny
23 standard or invalidating California's
24 requirement with respect to all registered
25 charities.

1 Exacting scrutiny is the appropriate
2 standard for judging disclosure and reporting
3 policies. The standard requires the government
4 to have a sufficiently important interest and to
5 demonstrate that actual burdens on First
6 Amendment interests are justified, just as the
7 State has done here.

8 Facial challenges are reserved for
9 rare cases where a law is unconstitutional in
10 all or many of its applications. Petitioners
11 have not met that standard here because they
12 have not shown that California's requirement
13 chills contributions in general or for a
14 substantial number of charities operating within
15 the state.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal, Mr. Shaffer?

20 REBUTTAL ARGUMENT OF DEREK L. SHAFFER

21 ON BEHALF OF THE PETITIONERS

22 MR. SHAFFER: Thank you, Mr. Chief
23 Justice.

24 Let me begin where my friend left off.
25 Facial challenges are less rare in the First

1 Amendment context. The Court has special
2 solicitude for them in this context. This, Your
3 Honor, when we're talking about First Amendment
4 rights, is where facial challenges succeed. And
5 it succeeded in Stevens, in U.S. v. Stevens,
6 without the Court asking how many groups out
7 there would be interested in animal crush videos
8 and how many would just follow the general
9 chilling of reproach that was reflected in the
10 statute, as opposed to wanting to continue to
11 publicize those videos.

12 You can know, as you sit where you
13 sit, that, in fact, a substantial number of
14 charities and many multiples of their donors are
15 going to have the same interest that these
16 Petitioners do and suffer the same
17 constitutional deprivation absent facial
18 invalidation.

19 And that's the same judgment that the
20 Court made in Shelton, making that predictive
21 judgment, as Justice Barrett put it, as to
22 teachers, some of whom might have had
23 associations with the PTA and -- and other
24 innocuous associations, but the Court recognized
25 that there would be an inherent chilling effect.

1 What we have in our record vividly
2 illustrates just how pernicious the chill can
3 be, just how real the threat to donors is, but
4 that's always been baked into this Court's
5 precedents, and it should remain baked in, and
6 it's a recipe for facial invalidation.

7 That's especially true, Your Honors,
8 because I'm delighted to hear both the United
9 States and California agreeing today that
10 means-end fit is required. Once it is required,
11 we respectfully submit that ends the case.

12 It is undisputed that California --
13 California's prophylactic suspicionless demand
14 sweeps in the Schedule Bs of tens of thousands
15 of charities annually, and there are many
16 multiples of those charities in terms of the
17 donors whose information is being placed at risk
18 in this very threatening way.

19 And -- and according to the record,
20 Planned Parenthood's Schedule B, for instance,
21 contained hundreds and hundreds of donors that
22 were on there.

23 The record also makes clear -- and --
24 and my friend, Ms. Feinberg, did not deny --
25 that California's never reading these Schedule

1 Bs unless and until an external complaint comes
2 in from a news story, from an internal
3 whistleblower, from an aggrieved donor. And at
4 that point, if it thinks that there is a serious
5 complaint, it's asking for the Schedule B
6 pursuant to an audit letter.

7 So this is a totally gratuitous First
8 Amendment intrusion. And continuing to insist
9 upon some sort of means-end fit is dispositive
10 of the case and dispositive of it facially,
11 especially because we need only show a
12 substantial number -- a substantial number of
13 unconstitutional applications. Even if you
14 thought it was 5 percent or 10 percent of all
15 charities, we're still talking about thousands
16 and thousands and many multiples in terms of the
17 donors.

18 Of general back -- of general backlash
19 and concerns among charities and donors, I have
20 to respectfully correct.

21 If you look at the Thomas More Law
22 Center's Joint Appendix 197, you'll see
23 Professor Schervish's testimony about the donor
24 bill of rights and how important this principle
25 is to charities as a general rule, and note the

1 outpouring of amicus briefs as -- as Your -- as
2 Your Honors have today.

3 Justice Sotomayor asked whether the
4 sole question is whether the state will truly
5 keep this information private. We don't think
6 it is. I respectfully agree with Justice
7 Gorsuch that that does put the cart before the
8 horse.

9 The Court in Doe v. Reed started by
10 analyzing the state's interest and whether it
11 was weighty enough. Here California falls down
12 and it doesn't have, as it has in election -- in
13 the election context, disclosure as an
14 established least restrictive alternative. In
15 --

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:44 a.m., the case
19 was submitted.)

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Official - Subject to Final Review

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