NO. _____

IN THE

Supreme Court of the United States

THOMAS MORE LAW CENTER,

Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

LOUIS H. CASTORIA
KAUFMAN DOLOWICH & VOLUCK, LLP
425 California Street
Suite 2100
San Francisco, CA 94104
(415) 926-7600
lcastoria@kdvlaw.com

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W.
Suite 600
Washington, D.C. 20001
(616) 450-4235
jbursch@ADFlegal.org

Counsel for Petitioner

QUESTIONS PRESENTED

Petitioner Thomas More Law Center is a Michigan 501(c)(3) that defends religious freedom, family values, and the sanctity of life. To fundraise, the Law Center registered with the California Attorney General and made annual filings to his Register of Charitable Trusts. After a decade of accepting these filings without complaints, the Attorney General deemed them insufficient because, although they included the Law Center's IRS Form 990, they omitted Schedule B to that form, which identifies the Law Center's major donors. After the Attorney General threatened to suspend its nonprofit registration and personally fine its directors and tax preparer, the Law Center filed suit to protect donor anonymity.

The district court enjoined the Attorney General's donor-disclosure rule because his office had an extensive record of disclosing that confidential material, and donors were likely to face harassment and threats as a result. Because this disclosure rule arises outside the electoral context, six circuits would apply strict scrutiny. But the Ninth Circuit upheld the rule, joining the Second Circuit in holding that "there is only a single test—exacting scrutiny—that applies both within and without the electoral context." App.133a–34a. The questions presented are:

1. Whether exacting scrutiny or strict scrutiny applies to disclosure requirements that burden non-electoral, expressive association rights.

2. Whether California's disclosure requirement violates charities' and their donors' freedom of association and speech facially or as applied to the Law Center.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner is Thomas More Law Center. Respondent is Xavier Becerra, successor to Kamala Harris as Attorney General of the State of California. In the Ninth Circuit, Petitioner's case was combined for decision with Americans for Prosperity Foundation's similar lawsuit against Respondent.

Petitioner Thomas More Law Center is a Michigan nonprofit corporation with no parent corporation. No publicly held company owns 10% or more of its stock.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, Nos. 16-56855 & 16-56902, *Thomas More Law Center v. Becerra*, judgment entered September 11, 2018, en banc review denied March 29, 2019, mandate withdrawn August 5, 2019.

U.S. Court of Appeals for the Ninth Circuit, No. 15-55911, *Thomas More Law Center v. Harris*, judgment entered December 29, 2015, en banc review denied April 6, 2016.

U.S. District Court for the Central District of California, No. 2:15-cv-03048-R-FFM, final judgment entered November 16, 2016.

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The district court's unreported opinion granting Petitioner's motion for preliminary injunction is reprinted at App.90a–96a. The Ninth Circuit's decision vacating the preliminary injunction with instructions is reported at 809 F.3d 536 (9th Cir. 2015) and reprinted at App.76a–89a. The district court's unreported order enjoining the Attorney General from publicly disclosing the Law Center's Schedule B forms is reprinted at App.74a–75a.

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The district court's opinion granting Petitioner's motion for a permanent injunction is unreported but available at No. 2:15-cv-03048-R-FFM, 2016 WL 6781090 (C.D. Cal. Nov. 16, 2016), and reprinted at App.51a–67a. The Ninth Circuit's decision vacating, reversing, and remanding is reported at 903 F.3d 1000 (9th Cir. 2018) and reprinted at App.1a–50a. The Ninth Circuit's order denying rehearing en banc with five judges dissenting is reported at 919 F.3d 1177 (9th Cir. 2019) and reprinted at App.104a–45a.

STATEMENT OF JURISDICTION

On September 11, 2018, the Ninth Circuit issued its opinion vacating, reversing, and remanding, and on March 29, 2019, the Ninth Circuit denied rehearing en banc. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1291. On June 5, 2019, Justice Kagan extended the time to file a petition for a writ of certiorari to August 26, 2019. This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble." U.S. Const. amend I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend XIV.

Excerpts from relevant California statutes appear at App.148a–50a, and excerpts from California regulations appear at App.151a–57a. Excerpts from pertinent federal statutes are included at App.158a–61a, and excerpts from federal regulations appear at App.161a–62a.

INTRODUCTION

The California Attorney General demands that thousands of nonprofits fundraising in the State annually turn over their major donors' names and addresses. After a bench trial, the district court found that the Attorney General's Office leaks confidential records like a sieve. The Registry of Charitable Trusts is understaffed and poorly funded. It negligently posted nearly 1,800 IRS Form 990 Schedule Bs online, including one listing Planned Parenthood Affiliates of California's supporters. The district court further found that once the State posts donors' personal information on the internet, it remains public forever and puts donors' and their families' privacy at risk.

For those associated with charities that speak on contentious matters—like Petitioner the Thomas More Law Center (the "Law Center")—disclosing donor information to the Attorney General's Registry poses an imminent danger of hate mail, violence, ostracization, and boycotts. Only the most stalwart supporters will give money under such a toxic cloud. Most will reasonably conclude that the risk of association is too great, with the result that groups who make the most threats will effectively shut down those with whom they disagree.

Undeterred by these severe First Amendment harms, the Attorney General continues to demand donor disclosure. The Attorney General does so even though his office hardly ever uses donor information for any purpose, such data never launches or ends fraud investigations, and the Attorney General may obtain donor information in less overbroad and intrusive ways.

The district court rightly enjoined the Attorney General's blanket disclosure requirement, which the Attorney General acknowledged was at best a tool of convenience. The Ninth Circuit reversed, applying "exacting scrutiny," a lenient standard designed for disclosures that play a unique role in keeping elections fair and honest. *Buckley* v. *Valeo*, 424 U.S. 1, 64–68 (1976) (per curiam). In so doing, the Ninth Circuit cemented a circuit split between Second and Ninth Circuit rulings that apply exacting scrutiny to disclosure requirements outside the electoral context, and decisions by the First, Fourth, Fifth, Sixth, Tenth, and D.C. Circuits that apply strict scrutiny to disclosures that are not election related. *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958).

In the Second and Ninth Circuits, charities and donors have no meaningful protection against disclosure mandates. As the en banc dissent explained, states in those circuits only need to make "self-serving assertions about efficient law enforcement" to overcome "threats, hostility, and economic reprisals" that donors are likely to experience. App.128a. This low bar eviscerates First Amendment protections this Court has long recognized and puts donors and charities with contentious views at risk. App.127a–28a.

The Law Center and its clients speak on public issues. Its employees, donors, and clients have faced death threats, harassment, obscene emails, pornographic letters, and nationwide boycotts. Yet the Ninth Circuit refused to protect the Law Center's donor information, jeopardizing its ability to fund advocacy. This Court should grant review, resolve the circuit conflict, and reaffirm that freedom of association and speech is vital for advocacy and democracy.

STATEMENT OF THE CASE

A. The Attorney General's blanket disclosure rule.

California's Supervision of Trustees and Fundraisers for Charitable Purposes Act requires nonprofits fundraising in the state to register with the Attorney General and file periodic reports. Cal. Gov. Code 12581, 12582.1, 12584-86. The Act leaves the content of these reports to the Attorney General's discretion. Cal. Gov. Code 12586-87. By regulation, the Attorney General requires charities to file with the Registry of Charitable Trusts an Annual Registration Renewal Fee Report, as well as the nonprofit's annual IRS Form 990. 11 Cal. Code Regs. 301, 303, 305.

For many years, the Attorney General interpreted these disclosure regulations as merely requiring charities to submit Form 990s without the schedules. The Attorney General's Office then abruptly changed course. With no evidence of pervasive wrongdoing by charitable trusts in California, it demanded that the thousands of nonprofits fundraising in California submit their Form 990s along with all attachments, including Schedule B, as part of their annual reports.

Form 990's Schedule B includes donors' names, complete addresses, total contributions, and types of donations. Charities must generally disclose the identities of donors who contributed $5,000 or more on their Schedule Bs. 26 C.F.R. 1.6033-2(A)(2)(ii)(f). But, in some instances, charities may opt instead to list donors who gave more than 2% of the nonprofits' total contributions for the year. 26 C.F.R. 1.6033-2(A)(2)(iii)(a).

Until well after this litigation began, no California statutory or regulatory provision even nominally guarded donors' names and addresses from public disclosure. To the contrary, the Charitable Purposes Act mandated that reports filed with the Attorney General generally be open to public inspection, Cal. Gov. Code 12590, and the Attorney General's regulations made no exception for donors' personal information, 11 Cal. Code Regs. 310 (2015). The Attorney General did have a longstanding informal policy, which could be changed at any time, against disclosing Schedule B forms to the public. But employees inadvertently violated this policy regularly, and no penalties or terminations resulted.

Only after the blanket disclosure rule was challenged in court did the Attorney General amend the regulations to shield donor information from disclosure—at least on paper. 11 Cal. Code Regs. 310(b) (2016). The Attorney General's Office also belatedly devised a system of automated and personal reviews to identify documents that should be classified as confidential and not made public online. Yet the Attorney General's new system does not prevent employees and contractors from downloading, emailing, or printing donors' names and addresses and then disclosing them publicly. And the Registrar admitted at trial that he cannot ensure the confidentiality of donors' identities once they are submitted to the Registry. Second Br. of Appellee and Cross-Appellant 19–20, No 16-56902 (9th Cir. Oct. 20, 2017) ("Appellee Br.").

In contrast, the IRS has no publicly accessible website through which donor privacy may even potentially be violated. Congress bars the Secretary of

the Treasury from disclosing donors' names or addresses to the public. 26 U.S.C. 6104(b) & (d)(3)(A). And any federal employee or contractor who even *accesses* donors' confidential information in an unauthorized manner is subject to one year's imprisonment, a $1,000 fine, and dismissal. 26 U.S.C. 7213A. Those who willfully disclose supporters' identities without authorization face even harsher punishment: up to five years' imprisonment, up to $5,000 in fines, and dismissal. 26 U.S.C. 7213(a)(1).

Federal safeguards even covers third parties who broadcast or solicit charities' Schedule B data. Any third party who receives donors' confidential information and prints or publishes it in an unauthorized manner may be imprisoned for up to five years and fined up to $5,000. 26 U.S.C. 7213(a)(3). Third parties who pay for donors' names and addresses are subject to the same stiff punishment. 26 U.S.C. 7213(a)(4).

As for California, its laws provide no penalties for accessing, leaking, publishing, or soliciting donors' names and addresses. That is likely because the California Assembly never contemplated making charities turn over this data in the first place.

B. The Attorney General's history of disclosing donor information.

At one point, anyone could use a web browser to access *all* the Registry's confidential documents. Appellee Br. 14; App123a. These records were theoretically invisible to the public eye, but they could be revealed by altering a single digit at the end of a URL. App.39a. This simple maneuver made all the Schedule Bs that the Registry classified as "confidential" publicly available.

In addition, Registry employees authorized access to nearly 1,800 confidential Schedule Bs by mislabeling them as "public" documents. App.123a. This resulted in public disclosure of Planned Parenthood Affiliates of California, Inc.'s 2009 Schedule B, containing the names and addresses of hundreds of donors. App.123a. Only 7-10 days before the Law Center's trial, at least 40 Schedule Bs were still erroneously classified as "public" documents on the Registry's website. Appellee Br. 14; App.123a–24a. Roughly 1,500 other "confidential" documents were also accessible via a quick web search. Appellee Br. 15.

The Attorney General's failure to maintain the confidentiality of nonprofits' Schedule B forms was systematic and foreseeable. Isolating Schedule Bs and other confidential material is tedious, and there is ample room for error. *Ams. for Prosperity Found.* v. *Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016). The Attorney General also perennially underfunds, understaffs, and ill-equips the Registry to safeguard confidential information. *Ibid.*

Just as important, by placing thousands of confidential documents online, the Attorney General created an ideal target for attacks. One individual overloaded the Registry's website to download confidential documents even during this litigation. Appellee Br. 15. Nonetheless, the Attorney General's Office has made no serious effort to evaluate or bolster its cyber defenses. *Id.* at 19–20.

C. The Attorney General's demand that the Law Center divulge its Schedule B.

The Law Center is a 501(c)(3) organization based in Michigan that defends and promotes America's Judeo-Christian heritage, religious freedom, moral and family values, and the sanctity of human life. Roughly 5% of its donors are California residents. The Law Center operated as a charity in good standing with the Attorney General from 2001 until 2012. For over a decade, the Law Center's annual reports to the Registry included its IRS Form 990 but *not* the form's Schedule B. The Attorney General never investigated the Law Center, and no one ever filed a complaint against it.

In March 2012, the Registry sent the Law Center a letter stating that its 2010 filing was "incomplete" because it lacked Schedule B's contributor names and addresses. App.163a–64a. The Attorney General's Office demanded that the Form 990 filed with the Registry be identical to that filed with the IRS. App.163a. The Law Center responded that it had never included its Schedule B "in any previous filing for the State of California" and requested the legal basis for this sudden policy change. App.165a.

The Registry never responded. Instead, it sent a series of letters warning that the Law Center's filings for 2010, 2011, 2012, and 2013 were deficient because they did not include "the names and addresses of contributors." App.169a–70a, 173a–74a, 177a–80a. The Law Center retained Michigan counsel who asked the Registry to direct all future communication to him and provide counsel "the legal authority" for the Attorney General's demand for donor disclosure. App.167a.

The Attorney General's Office honored neither request. Instead, it sent another letter threatening to suspend the Law Center's non-profit registration and impose personal fines on its directors, officers, and return preparers unless the Law Center handed over its Schedule Bs within 30 days. App.181a–83a. In response, the Law Center's counsel noted the "significant Constitutional questions involved and the irreparable harm that would occur if my client is required to provide Schedule B" information. App.185a. The Law Center's counsel asked the Attorney General's Office to defer any enforcement action until existing legal challenges were resolved. App.185a–86a. He explained that otherwise the Law Center would be forced to file a lawsuit of its own. App.186a. But the Attorney General would not defer, forcing the Law Center to bring this lawsuit to protect its donors' anonymity.

D. Lower Court Proceedings

The Law Center filed suit in the U.S. District Court for the Central District of California, alleging that the Attorney General's blanket disclosure rule violated the Law Center's and its donors' freedom of association. It requested a temporary restraining order enjoining the Attorney General from demanding—or punishing the Law Center for refusing to provide—donor names and addresses. The district court granted that request, App.97a–103a, and later converted the TRO into a preliminary injunction because persons associated with the Law Center had experienced threats, harassment, and other chilling conduct, and the Attorney General had successfully regulated charities without collecting Schedule Bs for over a decade, App.94a–96a.

On appeal, the Ninth Circuit believed it was bound by a prior decision declaring the Attorney General's Schedule-B-disclosure regime facially constitutional. App.79a (citing *Ctr. for Competitive Politics* v. *Harris*, 784 F.3d 1307 (9th Cir. 2015)). Although an as-applied challenge was possible, the panel rebuffed the Law Center's claim based on an assumption that the Registry would keep Schedule B forms confidential. App.78a, 81a–85a. The Ninth Circuit applied exacting scrutiny and deemed it irrelevant that the Attorney General sought information about the Law Center's non-California donors because narrow tailoring was not required. App.79a, 84a–85a. It doubted that any charity could overcome the State's "'compelling interest' in enforcing the law." App.85a. But, because California law appeared to make Schedule B forms open to public inspection and the Attorney General

only promised a toothless confidentiality policy, the Ninth Circuit approved a limited injunction that allowed the Attorney General to collect Schedule Bs while prohibiting public disclosure. App.86a–88a.

The Ninth Circuit denied en banc rehearing. App.146a–47a. Meanwhile, the district court modified its preliminary injunction per the Ninth Circuit's ruling. App.74a–75a. The district court later denied the parties' cross-motions for summary judgment, App.68a–73a, and conducted a four-day bench trial.

Following trial, the district court granted final judgment to the Law Center on its as-applied claim. App.51a–67a. The court found that collecting Schedule Bs did not substantially assist the Attorney General's monitoring of charities: out of 540 investigations over 10 years, the Attorney General's Office had only used Schedule B information in five cases, and even then admitted the same data could have been obtained other ways, such as through targeted subpoenas or audits. App.55a. Because the Attorney General effectively monitored charitable organizations for decades without Schedule Bs, the district court concluded that the Attorney General could effectively regulate the Law Center by narrower means. App.57a–58a, 66a. And it distinguished free-association rulings in "the electoral context" that required no narrow tailoring whatsoever. App.56a.

The district court further found that the Attorney General's new "protective" regulation would be of cold comfort to donors. App.62a–63a. That regulation formalized a confidentiality policy that the Registry had violated with "a proven and substantial history of

inadvertent disclosures." App.62a. Donors would still reasonably fear public disclosure. App.63a.

This was particularly true of the Law Center's donors because it advocates on issues that "arouse intense passions," and the Law Center's speech had already produced "threats, harassing calls, intimidating and obscene emails, and even pornographic letters." App.59a. Supporting the Law Center's views had resulted in opponents wrongly labeling its co-founder and major donor, Thomas Monaghan, one of the "most antigay persons in the country" and in a national boycott of his chain of pizza-restaurants. App.60a. One donor even anonymously sent cash to the Law Center out of fear of creating any traceable link, and the district court found that other donors likely felt the same way. App.59a–61a. That finding was supported by the unrebutted expert testimony of Dr. Paul Schervish, the author of the only peer-reviewed sociological study of anonymous-donor behavior. Appellee Br. 12–14.

The irreparable harm to the Law Center's and its donors' freedom of association and speech outweighed the Attorney General's interest in investigative convenience and efficiency. App.66a. For decades, the Attorney General protected the public against charitable fraud without Schedule B information and could do so again, as all but three states do. App.66a. But the "Law Center would be hard-pressed to regain the trust of its donors and continue the exercise of its First Amendment rights should it be required to violate the trust and desires of its donors." App.66a. So the court permanently enjoined the Attorney General from requiring the Law Center to file its Schedule B with its annual report. App.67a.

Back on appeal, the Ninth Circuit reiterated that its precedent barred the Law Center's facial challenge, then reversed the district court's as-applied ruling and ordered judgment for the Attorney General. App.43a–44a. The court applied exacting scrutiny, a flexible standard for election-related disclosures. App.8a. The court asked only whether the Attorney General's disclosure rule was substantially related to a sufficiently important government interest. App.16a (citing *Doe* v. *Reed*, 561 U.S. 186, 196 (2010)). It declined to apply strict scrutiny or any form of narrow-tailoring analysis, App.17a–18a, disregarded every trial-court fact finding, and substituted its own against all the evidence, App.33a–43a.

The Ninth Circuit concluded that the Attorney General's blanket-disclosure rule bore a substantial relation to the State's interest in preventing charitable fraud. App.8a, 20a, 25a. It cast aside the substantial evidence of threats and harassment and raised the bar for an as-applied exception, requiring the Law Center to prove that its donors would likely face harassment *solely* for providing the Law Center money, App.34a–35a n.6, and then only if harassment was "a foregone conclusion," App.37a.

The Ninth Circuit also said that the Law Center was unable to show a reasonably probability of harassment because the Attorney General's new system would avert public disclosure. App.37a–41a. It held that the district court clearly erred in finding otherwise, despite ample evidence of the Registry's systematic incompetence and the Attorney General's lack of effort to thwart hacks, punish leaks, or stop employees and contractors from wrongly accessing, downloading, or printing Schedule Bs. App.39a–43a.

The Ninth Circuit denied rehearing en banc over a five-judge dissent. App.107a–08a. Judge Ikuta, joined by Judges Callahan, Bea, Bennett, and R. Nelson, would have granted review to bring Ninth Circuit precedent "in line with Supreme Court jurisprudence" and a majority of other circuits. App.108a–10a, 115a–16a. The dissenters would have applied strict scrutiny as articulated in this Court's *NAACP* v. *Alabama* line of cases, not exacting scrutiny, which only applies to disclosures in the electoral context. App.108a, 110a, 113a–15a, 122a, 125a–28a. And the dissenters would not have overturned the district court's factual findings that (1) it was reasonably likely donors' names would be publicly disclosed, and (2) donors would face harassment as a result. App.122a–25a.

Freedom of association "is vital to a functioning civil society," and "[f]or groups with 'dissident beliefs,' it is fragile." App.129a. Because the panel's opinion gave donors to advocacy organizations no meaningful protection, the dissenters stated that review was necessary to avoid eviscerating "First Amendment protections long-established by the Supreme Court." App.127a. That was particularly true because the panel imposed "a next-to-impossible evidentiary burden on plaintiffs seeking protection of their associational rights." App.128a. Accordingly, the dissenters would have granted en banc review "to reaffirm the vitality of *NAACP v. Alabama's* protective doctrine, and to clarify that *Buckley*'s watered-down standard has no place outside of the electoral context." App.128a.

REASONS FOR GRANTING THE WRIT

Privacy of association is a fundamental right. It is presumed that citizens' beliefs and affiliations are generally no concern of the state. Overcoming this presumption should not be easy because officials may use such information to penalize views they dislike. And to say there is a *blanket* compelling interest in donor disclosure flips the First Amendment on its head, establishing a default rule of disclosure rather than one of confidentiality

That is why, since *NAACP* v. *Alabama*, this Court has subjected compelled disclosures that seriously burden freedom of association—outside the electoral context—to strict scrutiny. Yet in direct conflict with this Court and the First, Fourth, Fifth, Sixth, Tenth, and D.C. Circuits, the Second and Ninth Circuits apply *Buckley* v. *Valeo*'s exacting-scrutiny standard to non-election-related mandates requiring charities to annually disclose their major donors.

Only this Court can resolve these conflicts and protect the associational rights that ensure organizations and individuals can engage in public advocacy without fear. It should do so now because recent events have reiterated the importance of protecting donor confidentiality, and because the Attorney General's blanket-disclosure rule is prophylactic, imprecise, unduly burdensome, and facially violates the First Amendment. Enforcing that rule against the Law Center is also unconstitutional as applied because the Center proved that its employees, donors, and clients face intimidation, death threats, assassination attempts, hate mail, boycotts, and vitriol by ideological opponents. Review is warranted.

I. The Ninth Circuit's ruling conflicts with this Court's precedent, which applies strict scrutiny to disclosure and related mandates outside the electoral context.

NAACP v. *Alabama* has safeguarded freedom of association for 60 years. The Ninth Circuit has rejected that teaching and "eviscerate[d] the First Amendment protections long-established by" this Court. App.127a.

A. Freedom of association protects charities against government attempts to unmask their anonymous donors.

The First and Fourteenth Amendments protect charities' freedom to associate with donors to advocate shared ideals. *Kusper* v. *Pontikes*, 414 U.S. 51, 56-7 (1973). Privacy of association is a central aspect of that right. *Gibson* v. *Fla. Legislative Investigation Comm.*, 372 U.S. 539, 544 (1963). This Court has recognized that advocacy groups like the Law Center have a "strong associational interest in maintaining the privacy of membership lists," *id.* at 555, and also that members and donors are treated "interchangeably," *Buckley*, 424 U.S. at 66. Donors and members are equivalent because liking the message they hear and desiring to amplify it is why supporters contribute. *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985).

The Law Center—like hundreds of nonprofits across the political spectrum—has a powerful interest in protecting its donors' privacy. Repeatedly, this Court has "held laws unconstitutional that require disclosure of membership lists for groups seeking

anonymity" outside the electoral context, *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006), because the First Amendment's premise is distrust of government power. *Citizens United* v. *FEC*, 558 U.S. 310, 340 (2010). Generally speaking, a citizen's beliefs, speech, and associations "are no concern of government." *Gibson*, 372 U.S. at 570 (Douglas, J., concurring). But disclosure rules allow officials and persons who accidentally or maliciously gain access to donors' identities to expose and penalize their views—serious ills that freedom of association prevents. *Boy Scouts of Am.* v. *Dale*, 530 U.S. 640, 647-48 (2000).

That charitable donations involve money does not lower the First Amendment stakes. This Court has long safeguarded nonprofit solicitations as speech. *Riley* v. *Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789 (1988). And rightly so, because nonprofits' requests for money are typically combined with information, advocacy, and discussion that is fully First Amendment protected. *Sec'y of State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 961 (1984). Without donations, that speech will cease. *Vill. of Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). So this Court has safeguarded charities' ability to solicit donations. *Ibid.*; *Riley*, 487 U.S. at 801 n.13.

The First Amendment protects charities' right not just to associate but to do so effectively. *Kusper*, 414 U.S. at 58. And frontal attacks that bar or penalize affiliation are not the only state actions that implicate that right. *Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). "[R]egulatory measures . . . cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."

Louisiana ex rel. Gremillion v. *NAACP*, 366 U.S. 293, 297 (1961). Here, the Attorney General's disclosure rule implicates the Law Center's freedom of association because it has the "practical effect of discouraging" donors from giving to advance its advocacy. *NAACP* v. *Alabama*, 357 U.S. at 461 (cleaned up).

Forcing nonprofits to disclose supporters' names and addresses as a matter of course is a serious impediment to these freedoms. Because donations expose backers' most deeply held values and beliefs. *Buckley*, 424 U.S. at 66, financial support has "powerful political and civic consequences." *Knox* v. *Serv. Emps. Int'l Union*, 567 U.S. 298, 310 (2012). Donors today—as in the Civil Rights Era—regularly face harassment, threats of bodily harm, loss of employment, and economic retaliation. *Citizens United*, 558 U.S. at 482-83, 485 (Thomas, J., concurring in part and dissenting in part); *NAACP* v. *Alabama*, 357 U.S. at 462. Such hostility discourages new and existing donors alike. *Bates*, 361 U.S. at 524. Because our society has never been more vehemently polarized, fear of reprisal threatens to dry up funds to the point that some viewpoints cannot survive. *Buckley*, 424 U.S. at 71.

Given today's incendiary social conditions, donors rightly fear the Attorney General's blanket-disclosure rule. It is too easy for anyone with a computer to access Schedule B data from the Registry and use it to find and compile information about donors and their families, including contact information, homes, vehicles, and jobs. *John Doe No. 1* v. *Reed*, 561 U.S. 186, 208 (2010) (Alito, J., concurring). The potential for harassment, threats, and physical attacks is limitless. *Ibid.* As just one example, opponents of

California's Proposition 8 compiled lists of donors and created websites dedicated to those donors' personal destruction. *Citizens United*, 558 U.S. at 481 (Thomas, J., concurring and dissenting in part). Supporters faced death threats, property damage, and lost employment. *Id.* at 481-85.

These costs illustrate "the vital relationship between freedom to associate and privacy in one's associations." *NAACP* v. *Alabama*, 357 U.S. at 462. Donors' desire for anonymity stems from rational fears of retaliation, social ostracization, and economic ruin. *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). Donating anonymously—like speaking anonymously—is "an honorable tradition of advocacy," "a shield from the tyranny of the majority" that protects donors "from retaliation—and their ideas from suppression—at the hand of an intolerant society." *Id.* at 357.

Access to Schedule Bs by any government agency other than the IRS threatens to rob donors of privacy and the Law Center of means to advocate its and its donors' views. Thus, the Attorney General's disclosure regime poses severe First Amendment harms. When the government burdens free speech and association rights, it must prove that burden is justified. *McCutcheon* v. *FEC*, 572 U.S. 185, 210 (2014). Instead, the Ninth Circuit relieved the Attorney General of that burden and engaged in "appellate factfinding," "holding against all evidence that the donors' names would not be made public and that the donors would not be harassed." App.109a (Ikuta, J., dissenting). And it did so even though such broad prophylactic rules are inherently suspect under the First Amendment. *Riley*, 487 U.S. at 801.

B. This Court applies strict scrutiny to disclosure rules—like the Attorney General's—that burden freedom of association outside the electoral context.

As *NAACP* v. *Alabama* and its progeny make clear, strict scrutiny applies to disclosure rules that seriously burden free association outside the electoral context. Strict scrutiny requires the government to show that its actions "are narrowly tailored to serve compelling state interests." *Reed* v. *Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

During the Civil Rights Era, states devised all manner of ploys to obtain NAACP member lists. Exposing this affiliation often resulted in members facing "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP* v. *Alabama*, 357 U.S. at 462. Recognizing this, the Court established a stringent standard for reviewing state efforts to compel nonprofits to divulge their supporters.

NAACP v. *Alabama* held that the government's interest in enforcing disclosure rules that deter free association "must be compelling." 357 U.S. at 463 (cleaned up). Two years later, this Court reiterated that government may only justify a disclosure requirement that significantly interferes with freedom of association by "showing a subordinating interest which is compelling." *Bates*, 361 U.S. at 524. Government may not force citizens to reveal their private affiliations based on anything less than a goal "of overriding and compelling state interest." *Gibson*, 372 U.S. at 546. Accord *id.* at 555 (requiring a "compelling and subordinating state interest").

No daylight exists between the *NAACP* v. *Alabama* line of cases and the compelling-interest test this Court traditionally uses to evaluate other burdens on freedom of association. *E.g.*, *Knox*, 567 U.S. at 314 ("mandatory associations are permissible only when they serve a compelling state interest") (cleaned up); *Dale*, 530 U.S. at 648 (freedom of association may only be "overridden by regulations adopted to serve compelling state interests") (cleaned up); *Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623 (1984) (same). This Court consistently requires that the government prove that non-election-related associational burdens serve a compelling interest.

This Court has also established that disclosure rules "must be highly selective" or "narrowly drawn" to survive First Amendment challenge. *Gremillion*, 366 U.S. at 296-97 (cleaned up). The Court has expressed that principle in different ways, such as requiring "a crucial relation" to the government's interest, or that the measure be "essential to fulfillment of" the government's purpose. *Gibson*, 372 U.S. at 549. Regardless, the gist has always been the same: the state may not pursue even its legitimate interests "'by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *NAACP* v. *Alabama*, 377 U.S. 288, 307-08 (1964) (quoting *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960)).

Outside the disclosure context, this Court's free-association cases incorporate a similar rule. Laws that burden freedom of association "must not be significantly broader than necessary to serve" the government's interest. *Knox*, 567 U.S. at 314. Accord *Roberts*, 468 U.S. at 623 (government action is not

sufficiently tailored if the same goal could be achieved "through means significantly less restrictive of associational freedoms"). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

The only standard in this Court's lexicon that incorporates both a compelling interest and a narrow tailoring requirement is strict scrutiny. Accordingly, strict scrutiny is the default rule for disclosure mandates that burden free-association rights. This includes the Attorney General's extraordinary blanket requirement here that charities disclose their major donors' names and addresses in annual Registry filings.

C. This Court designed "exacting" scrutiny for disclosures related to elections and has never applied that lower standard outside the electoral context.

Buckley v. *Valeo* devised "exacting" scrutiny to evaluate disclosure rules imposed by the Federal Election Campaign Act. Those rules were calculated to inform voters regarding who gave money to political campaigns and how that money was spent. 424 U.S. at 66. Because such disclosures play a unique role in helping citizens evaluate political candidates and keeping elections fair and honest, this Court decided that a more flexible standard of review should apply. *E.g.*, *id.* at 66 (noting the Act's disclosure rules concern "the free functioning of our national institutions") (cleaned up).

Buckley's "substantial governmental interests" standard, *id.* at 68, is a hallmark of intermediate—not strict—scrutiny. *E.g.*, *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180, 186 (1997). In keeping with that reduced standard, exacting scrutiny requires only "a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed." *Buckley*, 424 U.S. at 64 (cleaned up). No separate tailoring analysis applies because election-related disclosure rules are generally "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

No equivalency exists between the tests in *NAACP* v. *Alabama* and *Buckley*. In fact, *Buckley* explicitly distinguished *NAACP*: "We agree with the Court of Appeals' conclusion that *NAACP v. Alabama* is inapposite where, as here, any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative." 424 U.S. at 69-70. All *Buckley* allows in the electoral context is an as-applied exemption once a party demonstrates the "reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. Accord *Brown* v. *Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 98 (1982) (describing "the test announced in *Buckley* for safeguarding the First Amendment interests of minor [political] parties and their members and supporters").

This Court has applied *Buckley's* test numerous times and adopted a customary formulation: significant encroachments on free association must have "a

relevant correlation or substantial relation between the governmental interest and the information required to be disclosed, and the governmental interest must survive exacting scrutiny," which means "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis* v. *FEC*, 554 U.S. 724, 744 (2008) (cleaned up). Accord *Citizens United*, 558 U.S. at 366.

But this Court has *never* applied exacting scrutiny to non-election-related disclosures. To the contrary, this Court places *Buckley* at the heart of "a series of precedents considering First Amendment challenges to disclosure requirements *in the electoral context*" that apply "exacting scrutiny." *John Doe No. 1*, 561 U.S. at 196 (emphasis added). That is because the First Amendment grants states "significant flexibility in implementing their own voting systems." *Id.* at 195.

In sum, exacting scrutiny is *only* for the electoral context, based on concerns unique to elections, and has no application outside "campaign-related activities." *Citizens United*, 558 U.S. at 366 (quoting *Buckley*, 424 U.S. at 64). Thus, this Court assuaged *political* donors' concerns about anonymity—and exacting scrutiny's lack of rigor—by noting they could instead "contribute unlimited amounts to 501(c) organizations, which are not required to publicly disclose their donors." *McCutcheon*, 572 U.S. at 224. No such donor alternative is available under the Attorney General's disclosure rule and after the Ninth Circuit's ruling here.

D. The Ninth Circuit's contrary ruling jeopardizes association rights.

The Attorney General's blanket-disclosure rule bears no relation to elections. Yet the Ninth Circuit (1) cited several electoral-disclosure cases, (2) used exacting scrutiny, and (3) refused to "apply the kind of 'narrow tailoring' traditionally required in the context of strict scrutiny" to the Law Center's claims. App.16a–17a, 43–44a. As the panel majority saw it, "there is only a single test—exacting scrutiny—that applies both within and without the electoral context." App.133a–34a.

This Court's immediate intervention is crucial to prevent the Ninth Circuit from wiping out vital rights that the First Amendment protects. The Ninth Circuit treats *any* disclosure rule—instigated by *any* agency in the State's vast bureaucratic network—as equivalent to statutes designed to ensure free and fair elections. That lax analysis infects every facet of the Ninth Circuit's decision, fails to take freedom of association seriously, and "is contrary to the reasoning and spirit of decades of [this Court's] jurisprudence. App.128a (Ikuta, J., dissenting). Left unchecked, the ruling could spread to other circuits, giving ideological opponents a powerful weapon to shut down speech using intimidation and threats. Recent events amplify the chilling effects of these threats on free expression and association.

If the First Amendment is to provide meaningful protection, a compelling interest must be more than the government's speculative assertion that it might be able to use material that a federal court has already found the government did not need in the past.

1. Under strict scrutiny, the Attorney General's blanket-disclosure rule is facially unconstitutional.

Facial challenges to disclosure rules are an established part of this Court's jurisprudence. "[T]he threat to the exercise of First Amendment rights [may be] so serious and the state interest furthered by disclosure so insubstantial that [such] requirements cannot be constitutionally applied." *Buckley*, 424 U.S. at 71. This warning applies equally to the Attorney General's blanket-disclosure rule, which is a nuclear threat to freedom of association with little-to-no benefit to the State.

The Attorney General requires all charities that fundraise in California to disclose major donor names and addresses even though (1) there is no reason to suspect thousands of nonprofits of wrongdoing; (2) the IRS and often charities' home states already police their activities; (3) the Attorney General virtually never uses donors' information in enforcement actions; (4) donor information never opens or closes one of the Attorney General's fraud investigations; and (5) even when donor information is beneficial, the Attorney General can obtain it in far more targeted ways. That is why the district court found that out of 540 investigations over 10 years, the Attorney General's Office had only used Schedule B information in five cases, and even then could have obtained the same data in other ways. App.55a.

By "lump[ing] [legitimate charities] with those [rationally suspected of] using the charitable label as a cloak for profitmaking and refus[ing] to employ more precise measures to separate one kind from the

other," *Vill. of Schaumburg*, 444 U.S. at 637, the Attorney General treats thousands of charities as suspected criminals. Such indiscriminate treatment severely hampers freedom of association and fails to "employ means narrowly tailored to serve a compelling governmental interest." *Joseph H. Munson Co.*, 467 U.S. at 965 n.13. By going "far beyond what might be justified in the exercise of the State's legitimate inquiry" into charities' operations, *Shelton*, 364 U.S. at 490, the Attorney General's disclosure mandate "on its face and therefore in all its applications falls short of constitutional demands." *Joseph H. Munson Co.*, 467 U.S. at 965 n.13. Because the Attorney General's disclosure rule is facially unconstitutional, forcing charities to bring "case-by-case 'as applied' challenges" is superfluous and a waste of judicial resources. *Ibid.*

The Ninth Circuit reached the opposite conclusion only by pointing to another Ninth Circuit ruling that applied "exacting scrutiny" and by holding that the Attorney General's disclosure mandate did not fail that standard "in a substantial number of cases, judged in relation to [its] plainly legitimate sweep." App.43a–44a (citing *Ctr. for Competitive Politics*, 784 F.3d at 1315 (9th Cir. 2015)). But because exacting scrutiny does not apply outside the electoral context, the Ninth Circuit's facial analysis was wrong from the start.

The Ninth Circuit should have asked whether the Attorney General's blanket-disclosure regulation fails *strict scrutiny* in a substantial number of cases judged in relation to the mandate's legitimate sweep. The answer is "yes" because the disclosure regulation does nothing to prevent fraud. *Joseph H. Munson Co.*, 467

U.S. at 967. Requiring hundreds of charities to disclose donors' names and addresses annually to a Registry with a proven history of leaking confidential information will have a devastating impact on support. In contrast, the Attorney General does not need donors' confidential information, hardly ever uses it, and can readily obtain that data via an audit or subpoena on a reasonable suspicion of fraud.

2. The Attorney General's disclosure mandate is unconstitutional as applied under any standard.

The Attorney General's disclosure mandate is also unconstitutional as applied to the Law Center, under either strict or exacting scrutiny. Regarding strict scrutiny, the Attorney General has never investigated the Law Center for wrongdoing, and no complaints have ever been filed against it. There is no basis for forcing the Law Center to disclose donor information annually. Any generalized interest in "protecting charities and the public from fraud," *Riley*, 487 U.S. at 792 (cleaned up), has no force as applied to the Law Center and is merely "substantial," not compelling. *Ibid*.

Nor is the Attorney General's disclosure rule narrowly tailored to serve any legitimate state interest. It is a "prophylactic, imprecise, and unduly burdensome" regulation that is unnecessary because more narrowly tailored options of acquiring donor information through audit or subpoena are readily available. *Id.* at 800. Investigative efficiency is the Attorney General's sole basis for applying the disclosure rule to the Law Center. But the State may

not "sacrifice speech for efficiency." *Id.* at 795. And "[b]road prophylactic rules in the area of freedom of expression are suspect." *Button*, 371 U.S. at 438. In sum, the Attorney General's disclosure regime falls under strict scrutiny because it broadly stifles free association when the State's aims can be more narrowly achieved. *Gremillion*, 366 U.S. at 296.

Under exacting scrutiny, the details may vary but the result is the same. The Law Center merits an as-applied exemption to the Attorney General's blanket-disclosure rule because it is likely the Law Center's donors would be revealed and such exposure would subject them to threats, harassment, and reprisals. *Citizens United*, 558 U.S. at 370. The Registry's website is so vulnerable to hacks, leaks, and inadvertent disclosures "that Schedule B information is effectively available for the taking." App.120a. Public release of donor information is predictable.

For those associated with the Law Center, harassment, threats, and reprisals are not hypothetical. Opponents have wrongly labeled the Law Center a "hate group" and "Islamophobic." Employees face vulgar, hateful, and harassing phone calls and emails, and occasional pornographic correspondence. Appellee Br. 7–8.

Law Center clients like Pamela Geller—who used her blog to criticize a lawyer who represented the parents of a teenage girl who fled her home in fear of her life after converting from Islam to Christianity—frequently receive death threats. ISIS instructed its followers to kill Geller and labeled those like the Law Center who enable her speech "legitimate targets." *Id.*

at 10. Three ISIS followers conspired to assassinate Geller; she lives under constant guard. *Id*. at 9–10.

Law Center client Sally Kern, at the time a Kansas legislator, came under fire for expressing her Christian beliefs about marriage. She received a death threat and was shadowed by law enforcement for two weeks. *Id*. at 11.

Melissa Wood, another client, objected to a school forcing her teenage daughter to profess and write out the *Shahada*, the Muslim profession of faith. Wood received an online message from someone claiming to attend her daughter's school who threatened to stab her daughter's stomach, insert a hook, and hang her child from a tree. *Ibid*.

The Law Center's co-founder and first donor, Thomas Monaghan, was publicly branded, wrongly, as one of the "most antigay persons in the country" likely due to his Law Center support, and he then saw his business subjected to a national boycott based on his prolife views. *Id*. at 8.

And no doubt exists that such threats have caused donor concern. One contributor even anonymously mailed cash rather than leave a donor record and become a terrorist target. *Id*. at 9. Courts need not wait until a charity's donor base has been decimated.

Despite this evidence, the Ninth Circuit rejected the Law Center's as-applied challenge under exacting scrutiny. This result speaks volumes about the impossible bar the court set for as-applied claims and its "appellate factfinding." App.109–10a, 128a. (Ikuta, J., dissenting). One thing is clear: if the Law Center does

not qualify for an as-applied exemption to the Attorney General's blanket-disclosure rule, no one will. And that appears to be what the Ninth Circuit intended. App34a–35a n.6, 36a–37a & n.7, 85a–87a & n.4.

II. The Ninth Circuit's decision intensifies a mature, 6-2 circuit split.

The Ninth Circuit's ruling intensified a circuit conflict involving eight Courts of Appeals. The Second and Ninth Circuits apply exacting scrutiny to disclosure mandates outside the electoral context. But the First, Fourth, Fifth, Sixth, Tenth, and D.C. Circuits apply strict scrutiny to non-election, compelled disclosures. App.115a–16a & n.1 (outlining this conflict). Only this Court may resolve which standard is correct and whether the First Amendment provides charities meaningful protection.

Previously, the Courts of Appeals substantially agreed that exacting scrutiny applied only to election-related disclosures. App.115a. State donor-disclosure rules then led the Second and Ninth Circuits to forge a new path. App.117a–18a. Both have held that exacting scrutiny under *Buckley* applies to disclosure requirements no matter their context. *Citizens United* v. *Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018) (applying exacting scrutiny to all disclosure requirements because they are "not inherently content-based nor do they inherently discriminate among speakers"); App.133a–34a ("[T]here is only a single test—exacting scrutiny—that applies both within and without the electoral context."). *But see Schneiderman*, 882 F.3d at 384 (distinguishing *Americans for Prosperity Foundation* based on the

Attorney General's "systematic incompetence in keeping donor lists confidential of such a magnitude as to effectively amount to publication").

Most circuits view the issue differently. Outside the electoral context, they scrutinize disclosure mandates under a test that bears all the hallmarks of strict scrutiny, following *NAACP* v. *Alabama* and its progeny. The First Circuit, for example, approved a Nuclear Regulatory Commission subpoena that burdened a watchdog's free association with informants only because "the government ha[d] adequately shown both a compelling interest in obtaining the material sought and that no significantly less restrictive alternatives exist." *United States* v. *Comley*, 890 F.2d 539, 545 (1st Cir. 1989).

Although the Fourth Circuit cited a hodgepodge of standards in deciding whether the Department of Labor could require a trade association to disclose any agreement with members to engage in anti-union "persuader activity," *Master Printers of Am.* v. *Donovan*, 751 F.2d 700, 704-06 (4th Cir. 1984), its decision turned on whether "the disclosure and reporting requirements [were] justified by a compelling government interest, and [whether] the legislation [was] narrowly tailored to serve that interest," *id.* at 705.

The Fifth Circuit similarly cited "exacting scrutiny" in weighing whether a Texas judge could demand and publicize a Mexican-American association's officers and members list because it was organizing a school boycott. *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 399 (5th Cir. 1980). Yet the court barred the disclosure even though it served "a legitimate and compelling state purpose," because the state court's

order "swe[pt] too broadly," *id.* at 399-400, and was not "drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than [was] absolutely necessary," *id.* at 399.

The Sixth Circuit quoted much of the Fourth Circuit's analysis in determining whether the Department of Labor could force a law firm to disclose any anti-union "persuader activity" it undertook for an employer. *Humphreys, Hutcheson & Moseley* v. *Donovan*, 755 F.2d 1211, 1220-22 (6th Cir. 1985). It likewise held that the disclosure served "the government's compelling interest in maintaining antiseptic conditions in the labor relations field" and was "carefully tailored so that [F]irst [A]mendment freedoms are not needlessly curtailed." *Id.* at 1222.

Though ruling for the government, the Tenth Circuit also applied strict scrutiny when an anti-tax organization argued that IRS collaboration with an employee-informant violated its free-association rights. *Pleasant* v. *Lovell*, 876 F.2d 787, 789-93 (10th Cir. 1989). The court held that "some interference may be permissible [only] when the government can demonstrate a compelling interest, such as good-faith criminal investigation[,] that is narrowly tailored to detect information concerning tax evasion." *Id.* at 804-05.

Also applying strict scrutiny, the D.C. Circuit held that the government could not launch a full FBI investigation on a book-shelving employee simply because he associated with the Young Socialist Alliance. It found no "legitimate, much less compelling justification" for such an inquiry, *Clark* v. *Library of Congress*, 750 F.2d 89, 99 (D.C. Cir. 1984),

nor had the government "tailor[ed] its investigation so that it [was] the least restrictive means of achieving" its interests, *id.* at 98.

In sum, the Attorney General's blanket-disclosure rule would fall in six circuits because it does not serve a compelling interest and is not narrowly tailored. Yet it survives in the Second and Ninth Circuits because those courts *always* examine disclosure rules under exacting scrutiny. Given the current cultural climate, such a low standard fosters more polarization and open hostility, inducing fear by donors who want to participate in the public debate.

III. This case is an ideal vehicle to resolve a circuit conflict that has severe ramifications for charities nationwide.

The circuit conflict is deep and mature, and its resolution cannot wait. First, the Ninth Circuit's ruling impacts thousands of charities who fundraise in California, the nation's most populous state. And once major donor information is publicly leaked, it is impossible to undo the damage. This Court's decisive action is needed immediately to protect charities and donors across the political spectrum and throughout the United States.

Second, this case is a clean vehicle for the Court to resolve whether strict or exacting scrutiny applies to forced disclosure outside the electoral context. There are no disputed material facts—indeed, the Court has the benefit of findings based on a full trial—and the question presented controls the outcome.[1] Moreover, the Law Center's evidence of death threats, harassing phone calls, a boycott, hate mail, and even a conspiracy to kill a client places beyond doubt the merits of the Law Center's claims.

Third, First Amendment rights should not depend on where a charity solicits funds. Yet freedom of association currently means little for citizens considering donating to an organization that solicits in California. This Court has traditionally placed great faith in as-applied challenges to uphold free-association rights. But if four years of litigation and the Ninth Circuit's "next-to-impossible evidentiary" standard prove anything, App.128a, it is that this approach has not worked. *John Doe No. 1*, 561 U.S. at 203 (Alito, J., concurring). The practical result here is that citizens across the country are subject to having their information disclosed and to being harassed by those who disagree with them.

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[1] Regarding the Law Center's as-applied claim, the Ninth Circuit criticized the Law Center's return preparers for listing anyone who contributed $5,000 or more on its Schedule B filed with the IRS, when the Law Center could have listed only those who gave more than 2% of annual contributions. App.30a. But this honest misunderstanding based on cryptic IRS regulations is immaterial. Whereas the Law Center had every reason to believe the IRS would protect its donor information from public disclosure, the exact opposite is true of the Attorney General.

Fourth, the Attorney General's office codified its confidentiality policy and instituted its new system of automated and personal reviews to identify documents incorrectly classified as public shortly before the Law Center's trial. Yet the district court *still* found, after a full trial, that "[d]onors and potential donors would be reasonably justified in a fear of disclosure" under the new regime. App.63a. This forecloses any argument that the Attorney General's new policy warrants fresh review in the district court.

Finally, in papering over this Court's differing standards for evaluating the constitutionality of disclosure requirements in the election and non-election contexts, the Ninth Circuit has made clear that further percolation will not resolve the circuit split or deviation from this Court's jurisprudence. Only this Court can clarify that the government violates the First Amendment when it enables harassment of donors for their views. As 58 *amici* from across the political spectrum made clear in the Ninth Circuit, public advocacy is for everyone, not merely those able to weather abuse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KRISTEN K. WAGGONER
JOHN J. BURSCH
Counsel of Record
DAVID A. CORTMAN
RORY T. GRAY
ALLIANCE DEFENDING FREEDOM
440 First Street, N.W.
Suite 600
Washington, D.C. 20001
(616) 450-4235
jbursch@ADFlegal.org

LOUIS H. CASTORIA
KAUFMAN DOLOWICH & VOLUCK, LLP
425 California Street
Suite 2100
San Francisco, CA 94104
(415) 926-7600

Counsel for Petitioner

AUGUST 2019

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellee*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of California, *Defendant-Appellant*.	No. 16-55727 D.C. No. 2:14-cv-09448-R-FFM
AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellant*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of California, *Defendant-Appellee*.	No. 16-55786 D.C. No. 2:14-cv-09448-R-FFM

THOMAS MORE LAW CENTER, *Plaintiff-Appellee*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellant*.	No. 16-56855 D.C. No. 2:15-cv-03048-R-FFM
THOMAS MORE LAW CENTER, *Plaintiff-Appellant*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellee*.	No. 16-56902 D.C. No. 2:15-cv-03048-R-FFM OPINION

Appeal from the United States District Court for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted June 25, 2018
Pasadena, California

Filed September 11, 2018

Before: Raymond C. Fisher, Richard A. Paez

and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Fisher

SUMMARY*

Civil Rights

The panel vacated the district court's permanent injunctions, reversed the bench trial judgments, and remanded for entry of judgment in favor of the California Attorney General in two cases challenging California's charitable registration requirement as applied to two non-profit organizations that solicit tax-deductible contributions in the state.

Plaintiffs qualify as tax-exempt charitable organizations under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). They challenge the Attorney General of California's collection of Internal Revenue Service Form 990 Schedule B, which contains the names and addresses of their relatively few largest contributors. Plaintiffs argue the state's disclosure requirement impermissibly burdens their First Amendment right to free association.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the California Attorney General's Schedule B requirement, which obligates charities to submit the very information they already file each year with the IRS, survived exacting scrutiny as applied to the plaintiffs because it was substantially related to an important state interest in policing charitable fraud. The panel held that plaintiffs had not shown a significant First Amendment burden on the theory that complying with the Attorney General's Schedule B nonpublic disclosure requirement would chill contributions. The panel further concluded that even assuming arguendo that the plaintiffs' contributors would face substantial harassment if Schedule B information became public, the strength of the state's interest in collecting Schedule B information reflected the actual burden on First Amendment rights because the information was collected solely for nonpublic use, and the risk of inadvertent public disclosure was slight.

COUNSEL

Alexandra Robert Gordon (argued), Jose A. Zelidon-Zepeda, Kevin A. Calia, and Emmanuelle S. Soichet, Deputy Attorneys General; Tamar Pachter, Supervising Deputy Attorney General; Douglas J. Woods, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, San Francisco, California; for Defendant-Appellant/Cross-Appellee.

Derek Shaffer (argued), William A. Burck, Eric C. Lyttle, Keith H. Forst, and Jonathan G. Cooper,

Quinn Emanuel Urquhart & Sullivan LLP, Washington, D.C.; Harold Barza, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, California; for Plaintiff-Appellee/Cross-Appellant.

Tara Malloy, J. Gerald Hebert, and Megan P. McAllen, Campaign Legal Center, Washington, D.C., for Amicus Curiae Campaign Legal Center.

Jeremy Talcott and Joshua P. Thompson, Pacific Legal Foundation, Sacramento, California, for Amicus Curiae Pacific Legal Foundation.

Marc Rotenberg, Alan Butler, James T. Graves, and John Davisson, Electronic Privacy Information Center, Washington, D.C., for Amicus Curiae Electronic Privacy Information Center.

David Weiner and Robert Leider, Arnold & Porter Kaye Scholer LLP, Washington, D.C., for Amicus Curiae The Philanthropy Roundtable.

Keith Joseph Miller, Assistant Attorney General; Dominic E. Draye, Solicitor General; Mark Brnovich, Attorney General; Office of the Attorney General, Phoenix, Arizona, for Amici Curiae States of Arizona, Alabama, Louisiana, Michigan, Nevada, Texas, and Wisconsin.

Mark Joseph Fitzgibbons, American Target Advertising, Manassas, Virginia, for Amicus Curiae American Target Advertising, Inc.

Allyson Newton Ho and John C. Sullivan, Gibson Dunn & Crutcher LLP, Dallas, Texas; C. Dean McGrath Jr., McGrath & Associates, Washington, D.C.; for Amici Curiae Pacific Research Institute, Cato Institute, and Competitive Enterprise Institute.

Christopher H. McGrath and Samuel S. Sadeghi Paul Hastings LLP, Costa Mesa, California; George W. Abele, Paul Hastings LLP, Los Angeles, California; Brett Harvey, Alliance Defending Freedom, Scottsdale, Arizona; Nathaniel Bruno, Alliance Defending Freedom, Washington, D.C.; for Amicus Curiae Alliance Defending Freedom.

Brian Timothy Burgess, Goodwin Procter LLP, Washington, D.C.; David J. Zimmer, Goodwin Procter LLP, Boston, Massachusetts; for Amici Curiae NAACP Legal Defense and Educational Fund, Inc.

Andrew P. Pugno, Law Offices of Andrew P. Pugno, Fair Oaks, California, for Amicus Curiae Proposition 8 Legal Defense Fund.

Herbert W. Titus, Jeremiah L. Morgan, William J. Olson, and Robert J. Olson, William J. Olson P.C., Vienna, Virginia; Joseph W. Miller, Ramona, California; Michael Boos, Washington, D.C.; for Amici Curiae Free Speech Defense and Education Fund, Free Speech Coalition, Citizens United, Citizens United Foundation, National Right to Work Committee, U.S. Constitutional Rights Legal Defense Fund, U.S. Justice Foundation, Family Research Council, Western Center for Journalism, Conservative Legal Defense and Education Fund, The Leadership Institute, Public Advocate of the United States, Downsize DC Foundation, Downsize. Org, Gun Owners Foundation, Gun Owners of America, 60 Plus, 60 Plus Association, America's Foundation for Law and Liberty, America's Liberty Committee, Citizen Outreach Foundation, Citizen Outreach, LLC, Law Enforcement Alliance of America, Liberty Guard, Coalition for a Strong America, The Jesse

Helms Center, Americans for Constitutional Liberty, Catholicvote.org, Eberle Communications Group, Inc., Clearword Communications Group, Davidson & Co., and JFT Consulting.

OPINION

FISHER, Circuit Judge:

We address the constitutionality of a California charitable registration requirement as applied to two non-profit organizations that solicit tax-deductible contributions in the state. Americans for Prosperity Foundation (the Foundation) and Thomas More Law Center (the Law Center) qualify as tax-exempt charitable organizations under § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). They challenge the Attorney General of California's collection of Internal Revenue Service (IRS) Form 990 Schedule B, which contains the names and addresses of their relatively few largest contributors. The Attorney General uses the information solely to prevent charitable fraud, and the information is not to be made public except in very limited circumstances. The plaintiffs argue the state's disclosure requirement impermissibly burdens their First Amendment right to free association by deterring individuals from making contributions.

The district court held that the Schedule B requirement violates the First Amendment as applied to the Foundation and Law Center and permanently enjoined the Attorney General from demanding the plaintiffs' Schedule B forms. We have jurisdiction

under 28 U.S.C. § 1291, and we vacate the injunctions, reverse the judgments and remand for entry of judgment in the Attorney General's favor.

We hold that the California Attorney General's Schedule B requirement, which obligates charities to submit the very information they already file each year with the IRS, survives exacting scrutiny as applied to the plaintiffs because it is substantially related to an important state interest in policing charitable fraud. Even assuming arguendo that the plaintiffs' contributors would face substantial harassment if Schedule B information became public, the strength of the state's interest in collecting Schedule B information reflects the actual burden on First Amendment rights because the information is collected solely for nonpublic use, and the risk of inadvertent public disclosure is slight.

I.

A.

California's Supervision of Trustees and Charitable Trusts Act requires the Attorney General to maintain a registry of charitable corporations (the Registry) and authorizes him to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the [Registry]." Cal. Gov't Code § 12584. To solicit tax-deductible contributions from California residents, an organization must maintain membership in the Registry. *See id.* § 12585. Registry information is open to public inspection, subject to reasonable rules and regulations adopted by the Attorney General. *See id.* § 12590.

As one condition of Registry membership, the Attorney General requires charities to submit a complete copy of the IRS Form 990 they file with the IRS, including attached schedules. *See* Cal. Code Regs. tit. 11, § 301.[1] One of these attachments, Schedule B, requires 501(c)(3) organizations to report the names and addresses of their largest contributors. Generally, they must report "the names and addresses of all persons who contributed . . . $5,000 or more (in money or other property) during the taxable year." 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). Special rules, however, apply to organizations, such as the Foundation and Law Center, meeting certain support requirements. These organizations need only "provide the name and address of a person who contributed . . . in excess of 2 percent of the total contributions . . . received by the organization during the year." *Id.* § 1.6033-2(a)(2)(iii)(a). An organization with $10 million in receipts, for example, is required to disclose only contributors providing at least $200,000 in financial support. Here, for any year between 2010 and 2015, the Law Center was obligated to report no more than seven contributors on its Schedule B, and the Foundation was required to report no more than

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[1] In July 2018, the IRS announced it would no longer require certain tax-exempt organizations, other than 501(c)(3) organizations, to report the names and addresses of their contributors on Schedule B. *See* Press Release, U.S. Dep't of the Treasury, Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations (July 16, 2018), https://home.treasury.gov/news/press-releases/sm426. Federal law, however, continues to require 501(c)(3) organizations, such as the plaintiffs, to file Schedule B information with the IRS.

10 contributors – those contributing over $250,000 to the Foundation.

The IRS and the California Attorney General both make certain filings of tax-exempt organizations publicly available but exclude Schedule B information from public inspection. *See* 26 U.S.C. § 6104; Cal Gov't Code § 12590; Cal. Code Regs. tit. 11, § 310. At the outset of this litigation, the Attorney General maintained an informal policy treating Schedule B as a confidential document not available for public inspection on the Registry. *See Americans for Prosperity Found. v. Harris*, 809 F.3d 536, 542 (9th Cir. 2015) (*AFPF I*). In 2016, the Attorney General codified that policy, adopting a regulation that makes Schedule B information confidential and exempts it from public inspection except in a judicial or administrative proceeding or in response to a search warrant. *See* Cal. Code Regs. tit. 11, § 310 (July 8, 2016). Under the new regulation:

> Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:
>
> (1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or
>
> (2) In response to a search warrant.

Id. § 310(b). In accordance with this regulation, the Attorney General keeps Schedule Bs in a separate file

from other submissions to the Registry and excludes them from public inspection on the Registry website.

B.

Thomas More Law Center is a legal organization founded to "restore and defend America's Judeo-Christian heritage" by "represent[ing] people who promote Roman Catholic values," "marriage and family matters, freedom from government interference in [religion]" and "opposition to the imposition of Sharia law within the United States." Americans for Prosperity Foundation was founded in 1987 as "Citizens for a Sound Economy Educational Foundation," with the mission of "further[ing] free enterprise, free society-type issues." The Foundation hosts conferences, issues policy papers and develops educational programs worldwide to promote the benefits of a free market. It operates alongside Americans for Prosperity, a 501(c)(4) organization focused on direct issue advocacy.

Charities like the Foundation and the Law Center are overseen by the Charitable Trusts Section of the California Department of Justice, which houses the Registry and a separate investigative and legal enforcement unit (the Investigative Unit). The Registry Unit processes annual registration renewals and maintains both the public-facing website of registered charities and the confidential database used for enforcement. The Investigative Unit analyzes complaints of unlawful charity activity and conducts audits and investigations based on those complaints.

Beginning in 2010, the Registry Unit ramped up its efforts to enforce charities' Schedule B

obligations, sending thousands of deficiency letters to charities that had not complied with the Schedule B requirement. Since 2001, both the Law Center and the Foundation had either filed redacted versions of the Schedule B or not filed it with the Attorney General at all. Each plaintiff had, however, annually filed a complete Schedule B with the IRS. In 2012, the Registry Unit informed the Law Center it was deficient in submitting Schedule B information. In 2013, it informed the Foundation of the same deficiency.

C.

In response to the Attorney General's demands, the Law Center and the Foundation separately filed suit, alleging that the Schedule B requirement unconstitutionally burdens their First Amendment right to free association by deterring individuals from financially supporting them. The district court granted both plaintiffs' motions for a preliminary injunction, concluding they had raised serious questions going to the merits of their cases and demonstrated that the balance of hardships tipped in their favor. *See Americans for Prosperity Found. v. Harris*, No. 2:14-CV-09448-R-FFM, 2015 WL 769778 (C.D. Cal. Feb. 23, 2015). The Attorney General appealed.

While those appeals were pending, we upheld the Schedule B requirement against a facial constitutional challenge brought by the Center for Competitive Politics. *See Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015). Applying exacting scrutiny, we held both that the Schedule B requirement furthers California's

compelling interest in enforcing its laws and that the plaintiff had failed to show the requirement places an actual burden on First Amendment rights. *See id.* at 1316–17. We left open the possibility, however, that a future litigant might "show 'a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties' that would warrant relief on an as-applied challenge." *Id.* at 1317 (alteration omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 74 (1976)).

The Law Center and the Foundation argue they have made such a showing. In considering the appeal from the preliminary injunction in their favor, we disagreed. *See AFPF I*, 809 F.3d at 540. We held that the plaintiffs had shown neither an actual chilling effect on association nor a reasonable probability of harassment at the hands of the state from the Attorney General's demand for nonpublic disclosure of Schedule B forms. *See id.* The Law Center and the Foundation had proffered some evidence that private citizens might retaliate against their contributors if Schedule B information became public, but "[t]he plaintiffs' allegations that technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure of their Schedule B forms [were] too speculative to support issuance of an injunction." *Id.* at 541.

We nevertheless identified some risk that the Attorney General could be compelled by § 12590 to make Schedule B information available for public inspection in the absence of a "rule[ ]" or "regulation[ ]," Cal. Gov't Code § 12590, formalizing the Attorney General's discretionary policy of maintaining

Schedule B confidentiality. *See AFPF I*, 809 F.3d at 542. The Attorney General had proposed a regulation to exempt Schedule B forms from the general requirement to make Registry filings "open to public inspection," Cal. Gov't Code § 12590, but the state had not yet adopted the proposed regulation. We held that a narrow injunction precluding public disclosure of Schedule B information would address the risk of public disclosure pending the Attorney General's adoption of the proposed regulation. We therefore vacated the district court's orders precluding the Attorney General from collecting Schedule B information from the plaintiffs and instructed the court to enter new orders preliminarily enjoining the Attorney General only from making Schedule B information *public*. *See AFPF I*, 809 F.3d at 543.[2]

After presiding over a bench trial in each case, the district court held the Schedule B requirement unconstitutional as applied to the Foundation and the Law Center. *See Thomas More Law Ctr. v. Harris*, No. CV 15-3048-R, 2016 WL 6781090 (C.D. Cal. Nov. 16, 2016); *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016). The district court first rejected the plaintiffs' facial challenges, holding they were precluded by our opinion in *Center for Competitive Politics*. It then held that the Attorney General had failed to prove the Schedule B requirement was substantially related to a

[2] On remand, the district court also prohibited the Attorney General from obtaining relevant discovery from the Foundation's contributors. This was one of several questionable evidentiary rulings the court issued in the plaintiffs' favor.

sufficiently important governmental interest, as necessary to withstand exacting scrutiny. The court reasoned that the Attorney General had no need to collect Schedule Bs, because he "has access to the same information from other sources," *Thomas More Law Ctr.*, 2016 WL 6781090, at *2, and had failed to demonstrate the "necessity of Schedule B forms" in investigating charity wrongdoing, *Americans for Prosperity Found.*, 182 F. Supp. 3d at 1053. The court also concluded there was "ample evidence" establishing the plaintiffs' employees and supporters face public hostility, intimidation, harassment and threats "once their support for and affiliation with the organization becomes publicly known." *Id.* at 1055. The court rejected the proposition that the Attorney General's informal confidentiality policy could "effectively avoid inadvertent disclosure" of Schedule B information, citing a "pervasive, recurring pattern of uncontained Schedule B disclosures" by the Registry Unit. *Id.* at 1057. Even after the Attorney General codified the non-disclosure policy, the court concluded that this risk of inadvertent public disclosure remained. *See Thomas More Law Ctr.*, 2016 WL 6781090, at *5.

Having found for the plaintiffs on their First Amendment freedom of association claims, the court entered judgment for the plaintiffs and permanently enjoined the Attorney General from enforcing the Schedule B requirement against them. The Attorney General appealed the judgments. The plaintiffs cross-appealed, challenging the district court's holding that precedent foreclosed a facial attack on the Schedule B requirement. The Law Center also cross-appealed the district court's adverse rulings on its Fourth

Amendment and preemption claims, and the district court's failure to award it attorney's fees.

II.

"In reviewing a judgment following a bench trial, this court reviews the district court's findings of fact for clear error and its legal conclusions de novo." *Dubner v. City & County of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001). "[W]e will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc) (footnote omitted).

III.

We address whether the Attorney General's Schedule B requirement violates the First Amendment right to freedom of association as applied to the plaintiffs. We apply "exacting scrutiny" to disclosure requirements. *See Doe v. Reed*, 561 U.S. 186, 196 (2010). "That standard 'requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.'" *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010)). "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Id.* (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008)).

The plaintiffs contend "[t]he 'substantial relation' element requires, among other things, that the State employ means 'narrowly drawn' to avoid needlessly stifling expressive association." They cite

Louisiana ex rel. Gremillion v. NAACP, 366 U.S. 293, 297 (1961) ("[W]hile public safety, peace, comfort, or convenience can be safeguarded by regulating the time and manner of solicitation, those regulations need to be 'narrowly drawn to prevent the supposed evil.'" (citation omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940))), *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."), and *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456–57 (2014) (plurality opinion) ("Even when the Court is not applying strict scrutiny, we still require 'a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, . . . that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.'" (alterations in original) (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989))). We are not persuaded, however, that the standard the plaintiffs advocate is distinguishable from the ordinary "substantial relation" standard that both the Supreme Court and this court have consistently applied in disclosure cases such as *Doe* and *Family PAC v. McKenna*, 685 F.3d 800, 805–06 (9th Cir. 2012). To the extent the plaintiffs ask us to apply the kind of "narrow tailoring" traditionally required in the context of strict scrutiny, or to require the state to choose the least restrictive means of accomplishing its

purposes, they are mistaken. *See, e.g.*, *Citizens United v. Schneiderman*, 882 F.3d 374, 381 (2d Cir. 2018) (rejecting the plaintiffs' request "to apply strict scrutiny and to hold that any mandatory disclosure of a member or donor list is unconstitutional absent a compelling government interest and narrowly drawn regulations furthering that interest"); *AFPF I*, 809 F.3d at 541 ("The district court's conclusion that the Attorney General's demand for national donor information may be more intrusive than necessary does not raise serious questions because 'exacting scrutiny is not a least-restrictive-means test.'" (quoting *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 541 (9th Cir. 2015) (en banc))); *Ctr. for Competitive Politics*, 784 F.3d at 1312 ("[The plaintiff's argument] that the Attorney General must have a compelling interest in the disclosure requirement, and that the requirement must be narrowly tailored in order to justify the First Amendment harm it causes[,] . . . is a novel theory, but it is not supported by our case law or by Supreme Court precedent.").

In short, we apply the "substantial relation" standard the Supreme Court applied in *Doe*. "To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" *Doe*, 561 U.S. at 196 (quoting *Davis*, 554 U.S. at 744).

A. The Strength of the Governmental Interest

It is clear that the disclosure requirement serves an important governmental interest. In *Center for Competitive Politics*, 784 F.3d at 1311, we

recognized the Attorney General's argument that "there is a compelling law enforcement interest in the disclosure of the names of significant donors." *See also id.* at 1317. The Attorney General observed that "such information is necessary to determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices," *id.* at 1311, and we agreed that "[t]he Attorney General has provided justifications for employing a disclosure requirement instead of issuing subpoenas," *id.* at 1317. In *AFPF I*, we reiterated that "the Attorney General's authority to demand and collect charitable organizations' Schedule B forms . . . furthers California's compelling interest in enforcing its laws." *AFPF I*, 809 F.3d at 538–39.

These conclusions are consistent with those reached by the Second Circuit, which recently upheld New York's Schedule B disclosure requirement against a challenge similar to the one presented here. The attorney general explained that the Schedule B disclosure requirement allows him to carry out "his responsibility to protect the public from fraud and self-dealing among tax-exempt organizations." *Schneiderman*, 882 F.3d at 382. The court agreed with the state that

> knowing the source and amount of large donations can reveal whether a charity is doing business with an entity associated with a major donor. The information in a Schedule B also permits detection of schemes such as the intentional overstatement of the value of noncash donations in order to justify

> excessive salaries or perquisites for its own executives. Collecting donor information on a regular basis from all organizations facilitates investigative efficiency, and can help the Charities Bureau to obtain a complete picture of the charities' operations and flag suspicious activity simply by using information already available to the IRS. Because fraud is often revealed not by a single smoking gun but by a pattern of suspicious behavior, disclosure of the Schedule B can be essential to New York's interest in detecting fraud.

Id. (alterations, citations and internal quotation marks omitted). The Schedule B requirement, therefore, served the state's important "interests in ensuring organizations that receive special tax treatment do not abuse that privilege and . . . in preventing those organizations from using donations for purposes other than those they represent to their donors and the public." *Id.*

The plaintiffs nonetheless question the strength of the state's governmental interest, arguing the Attorney General's need to collect Schedule B information is belied by the evidence that he does not use the information frequently enough to justify collecting it en masse, he is able to investigate charities without Schedule B information and he does not review individual Schedule B forms until he receives a complaint, at which point he has at his disposal tools of subpoena and audit to obtain the Schedule B information he needs. The district court credited these arguments, concluding that Schedule B

information is not "necessary" to the Attorney General's investigations because: the Registry, whose sole job it is to collect and maintain complete registration information, does not actively review Schedule B forms as they come in; Schedule Bs have not been used to trigger investigations; and the Attorney General can obtain a Schedule B through subpoenas and audits when a case-specific need arises. *See Americans for Prosperity Found.*, 182 F. Supp. 3d at 1053–54.

We addressed these same arguments, of course, in *Center for Competitive Politics*, 784 F.3d at 1317, where we expressly rejected the proposition that the Schedule B requirement is insufficiently tailored because the state could achieve its enforcement goals through use of its subpoena power or audit letters. We noted that the state's quick access to Schedule B filings "increases [the Attorney General's] investigative efficiency" and allows him to "flag suspicious activity." *Id.* For example, as the Attorney General argued in that case,

> having significant donor information allows the Attorney General to determine when an organization has inflated its revenue by overestimating the value of "in kind" donations. Knowing the significant donor's identity allows her to determine what the "in kind" donation actually was, as well as its real value. Thus, having the donor's information immediately available allows her to identify suspicious behavior. She also argues that requiring unredacted versions of Form 990

> Schedule B increases her investigative efficiency and obviates the need for expensive and burdensome audits.

Id. at 1311.

The evidence at trial confirms our earlier conclusions. Belinda Johns, the senior assistant attorney general who oversaw the Charitable Trusts Section for many years, testified that attempting to obtain a Schedule B from a regulated entity after an investigation began was unsatisfactory. She testified that her office would want "to look at [the] Schedule B . . . the moment we thought there might be an issue with the charity." "[I]f we subpoenaed it or sent a letter to the charity, that would tip them off to our investigation, which would allow them potentially to dissipate more assets or hide assets or destroy documents, which certainly happened several times; or it just allows more damage to be done to [the] charity if we don't have the whole document at the outset." Rather than having "to wait extra days," she wanted to "take the action that needs to be taken as quickly as possible." She explained that her office relied on Schedule Bs to "tell us whether or not there was an illegal activity occurring." Where such activity was found, she would "go into court immediately and . . . request a [temporary restraining order] from the court to freeze assets."

Johns' successor, Tania Ibanez, testified similarly that "getting a Schedule B through a[n] audit letter is not the best use of my limited resources."

> Because it's time-consuming, and you are tipping the charity off that they are

> about to be audited. And it's been my experience when the charity knows or when the charity gets the audit letter, it's not the best way of obtaining records. We have been confronted in situations where the charity will fabricate records. Charities have given us incomplete records, nonresponsive records. Charities have destroyed records, and charities have engaged in other dilatory tactics.

Sonja Berndt, a deputy attorney general in the Charitable Trusts Section, confirmed that attempting to obtain Schedule Bs through the auditing process would entail substantial delay.

The district court's other conclusions are equally flawed. Although the state may not routinely use Schedule B information *as it comes in*, the Attorney General offered ample evidence of the ways his office uses Schedule B information in investigating charities that are alleged to have violated California law. *See* Cal. Corp. Code §§ 5227, 5233, 5236 (providing examples of the role the Attorney General plays in investigating nonprofit organizations that violate California law). Current and former members of the Charitable Trusts Section, for example, testified that they found the Schedule B particularly useful in several investigations over the past few years, and provided examples. They were able to use Schedule B information to trace money used for improper purposes in connection with a charity serving animals after Hurricane Katrina; to identify a charity's founder as its principal contributor, indicating he was using the research

charity as a pass-through; to identify self-dealing in that same charity; to track a for-profit corporation's use of a non-profit organization as an improper vessel for gain; and to investigate a cancer charity's gift-in-kind fraud.[3]

In sum, the record demonstrates that the state has a strong interest in the collection of Schedule B information from regulated charities. We agree with the Second Circuit that the disclosure requirement "clearly further[s]" the state's "important government interests" in "preventing fraud and self-dealing in charities . . . by making it easier to police for such fraud." *Schneiderman*, 882 F.3d at 384.

The district court reached a different conclusion, but it did so by applying an erroneous legal standard. The district court required the Attorney General to demonstrate that collection of Schedule B information was "necessary," *Thomas More Law Ctr.*, 2016 WL 6781090, at *2, that it was no "more burdensome than necessary" and that the state could not achieve its ends "by more narrowly tailored means," *id.* at *2–3. Because it was "possible for the Attorney General to monitor charitable organizations without Schedule B," the court

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[3] The Foundation points out that the Attorney General identified only five investigations in the past 10 years in which the state has used Schedule B information to investigate a charity. The Attorney General, however, identified an additional five investigations that were still ongoing. The district court did not allow the Attorney General's witnesses to testify about those ongoing investigations, because the Attorney General understandably refused to name the charities under current investigation.

concluded the requirement is unconstitutional. *Id.* at *2. The "more burdensome than necessary" test the district court applied, however, is indistinguishable from the narrow tailoring and least-restrictive-means tests that we have repeatedly held do not apply here. The district court's application of this standard, therefore, constituted legal error.

Because the district court applied an erroneous legal standard, it consistently framed the legal inquiry as whether it was *possible* "that the Attorney General could accomplish her goals without the Schedule B." *Id.* at *3. Under the substantial relation test, however, the state was not required to show that it could accomplish its goals *only* by collecting Schedule B information. The state instead properly and persuasively relied on evidence to show that the up-front collection of Schedule B information improves the efficiency and efficacy of the Attorney General's important regulatory efforts. Even if the Attorney General can achieve his goals through other means, nothing in the substantial relation test requires him to forgo the most efficient and effective means of doing so, at least not absent a showing of a significant burden on First Amendment rights. As Steven Bauman, a supervising investigative auditor for the Charitable Trusts Section testified, "We could complete our investigations if you took away many of the tools that we have. We just wouldn't be as effective or as efficient."

Because the strict necessity test the district court applied is not the law, the district court's analysis does not alter our conclusion that the state has a strong interest in the collection of Schedule B information from regulated charities.

B. The Seriousness of the Actual Burden on First Amendment Rights

Having considered the strength of the governmental interest, we turn to the actual burden on the plaintiffs' First Amendment rights.

The Supreme Court has concluded that "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). To assess "the possibility that disclosure will impinge upon protected associational activity," *id.* at 73, we consider "any deterrent effect on the exercise of First Amendment rights," *id.* at 65.

We may examine, for example, the extent to which requiring "disclosure of contributions . . . will deter some individuals who otherwise might contribute," including whether disclosure will "expose contributors to harassment or retaliation." *Id.* at 68. "[T]hat one or two persons refused to make contributions because of the possibility of disclosure" will not establish a significant First Amendment burden. *Id.* at 72. Nor will a showing that "people may 'think twice' about contributing." *Family PAC*, 685 F.3d at 807. "[D]isclosure requirements," however, "can chill donations to an organization by exposing donors to retaliation," *Citizens United*, 558 U.S. at 370, and "[i]n some instances fears of reprisal may deter contributions to the point where the movement cannot survive," *Buckley*, 424 U.S. at 71. In such cases, the First Amendment burdens are indeed significant.

A party challenging a disclosure requirement, therefore, may succeed by proving "a substantial

threat of harassment." *Id.* at 74. As a general matter, "those resisting disclosure can prevail under the First Amendment if they can show 'a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe*, 561 U.S. at 200 (alteration omitted) (quoting *Buckley*, 424 U.S. at 74); *see also Citizens United*, 558 U.S. at 370.[4]

Here, the plaintiffs contend requiring them to comply with the Attorney General's Schedule B disclosure requirement will impose a significant First Amendment burden in two related ways. First, they contend requiring them to comply with the Schedule B requirement will deter contributors. Second, they argue disclosure to the Attorney General will subject their contributors to threats, harassment and reprisals. We consider these contentions in turn.

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[4] In making this showing, we agree with the Attorney General that the plaintiffs must show a reasonable probability of threats, harassment or reprisals arising from the Schedule B requirement itself. But this does not mean the plaintiffs cannot rely on evidence showing, for example, that their members have been harassed for other reasons, or evidence that similar organizations have suffered a loss in contributions as a result of Schedule B disclosure. To be sure, the extent to which the plaintiffs' evidence is tied directly to, or is attenuated from, the experience of the plaintiffs themselves and the California Attorney General's Schedule B requirement in particular goes to the weight of that evidence. But the plaintiffs may rely on any evidence that "has any tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401(a).

1. Evidence That Disclosure Will Deter Contributors

We begin by considering whether disclosure will deter contributors. We first consider evidence presented by the Foundation. We then consider evidence presented by the Law Center.

Christopher Joseph Fink, the Foundation's chief operating officer, testified that prospective contributors' "number one concern is about being disclosed." He testified that "they are afraid to have their information in the hands of state government or a federal government or in the hands of the public." He testified that business owners "are afraid if they are associated with our foundation or with Americans for Prosperity, their businesses would be targeted or audited from the state government." Teresa Oelke, the Foundation's vice president of state operations, described two individuals who, she believed, stopped supporting the Foundation in light of actual or feared retaliation by the IRS. One contributor "did business with the Government," and he and his business associates "did not feel like they could take on the risk of continuing to give to us." Another contributor allegedly stopped giving "because he, his business partner and their business had experienced seven different reviews from government agencies, including individual IRS audits, both personally and their businesses, and their family was not willing to continue enduring the emotional, financial, time stress and the stress that it placed on their business." Oelke testified that, on average, the Foundation and Americans for Prosperity combined lose "roughly three donors a year" due to "their concern that they are going to be disclosed and the threats that they

believe that being disclosed lays to either their business, their families or just their employees." Paul Schervish, an emeritus professor of sociology, testified that, in his opinion, disclosure to the California Attorney General would chill contributions to the Foundation, although he conceded that he had not actually spoken to any of the Foundation's contributors. Foundation President Tim Phillips testified that contributors see the California Attorney General's office as "a powerful partisan office." The Foundation also points to evidence that, in its view, shows that some California officials harbor a negative attitude toward Charles and David Koch.

The Law Center introduced a letter from a contributor who chose to make a $25 contribution anonymously out of fear that ISIS would break into the Law Center's office, obtain a list of contributors and target them. Schervish, the sociology professor, opined that the Law Center's "disclosure of Schedule B to the registry would chill contributions." He acknowledged, however, that he had not spoken with any of the Law Center's existing or prospective contributors, and he could not point to any contributor who had reduced or eliminated his or her support for the Law Center due to the fear of disclosure – a common weakness in the Law Center's evidence.

For example, Thomas Monaghan, the Law Center's co-founder and most well-known contributor, testified that he is not aware of any Law Center contributor who was "harassed in some way because they made a donation." Despite being included "at the top of a list . . . of the most antigay persons in the country" (allegedly because of his financial support for the Law Center), he remains "perfectly willing" to

be listed on the Law Center's website as "one of the people who helped to establish" the Law Center. Similarly, the Law Center's president testified that he has never had a conversation with a potential contributor who was unwilling to contribute to the Law Center because of the public controversy surrounding the Law Center or its disclosure requirements. For years, moreover, the Law Center has *over*-disclosed contributor information on Schedule Bs filed with the IRS. Although by law the Law Center is required to disclose only those contributors furnishing 2 percent or more of the organization's receipts (about five to seven contributors a year), it has instead chosen to disclose all contributors providing $5,000 or more in financial support (about 23 to 60 contributors a year). This voluntary over-disclosure tends to undermine the Law Center's contention that Schedule B disclosure meaningfully deters contributions.

Considered as a whole, the plaintiffs' evidence shows that *some* individuals who have or would support the plaintiffs *may* be deterred from contributing if the plaintiffs are required to submit their Schedule Bs to the Attorney General. The evidence, however, shows at most a modest impact on contributions. Ultimately, neither plaintiff has identified a single individual whose willingness to contribute hinges on whether Schedule B information will be disclosed to the California Attorney General. Although there may be a small group of contributors who are comfortable with disclosure to the IRS, but who would not be comfortable with disclosure to the Attorney General, the evidence does not show that

this group exists or, if it does, its magnitude. As the Second Circuit explained:

> While we think it plausible that some donors will find it intolerable for law enforcement officials to know where they have made donations, we see no reason to believe that this risk of speech chilling is more than that which comes with any disclosure regulation. In fact, all entities to which these requirements apply already comply with the federal law mandating that they submit the selfsame information to the IRS. Appellants offer nothing to suggest that their donors should more reasonably fear having their identities known to New York's Attorney General than known to the IRS.

Schneiderman, 882 F.3d at 384.

The mere possibility that *some* contributors *may* choose to withhold their support does not establish a substantial burden on First Amendment rights. A plaintiff cannot establish a significant First Amendment burden by showing only "that one or two persons refused to make contributions because of the possibility of disclosure," *Buckley*, 424 U.S. at 72, or that "people may 'think twice' about contributing," *Family PAC*, 685 F.3d at 807. The evidence presented by the plaintiffs here does not show that disclosure to the Attorney General will "actually and meaningfully deter contributors," *id.*, or that disclosure would entail "the likelihood of a substantial restraint upon the exercise by [their contributors] of their right to

freedom of association," *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).[5] *Cf. Bates v. City of Little Rock*, 361 U.S. 516, 521 n.5 (1960) (between 100 and 150 members declined to renew their NAACP membership, citing disclosure concerns); *Dole v. Serv. Emps. Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (placing particular weight on two letters explaining that because meeting minutes might be disclosed, union members would no longer attend meetings).

The Schedule B requirement, moreover, is not a sweeping one. It requires the Foundation and the Law Center to disclose only their dozen or so largest contributors, and a number of these contributors are already publicly identified, because they are private foundations which by law must make their expenditures public. As applied to these plaintiffs, therefore, the Schedule B requirement is a far cry from the broad and indiscriminate disclosure laws passed in the 1950s to harass and intimidate members of unpopular organizations. *See, e.g.*, *Gremillion*, 366 U.S. at 295 (invalidating a state law requiring every organization operating in the state "to file with the Secretary of State annually 'a full, complete and true list of the names and addresses of all of the members and officers' in the State"); *Shelton*,

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[5] "In *NAACP*, the Court was presented . . . with 'an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed those members to economic reprisal, loss of employment, [and] threat of physical coercion,' and it was well known at the time that civil rights activists in Alabama and elsewhere had been beaten and/or killed." *Schneiderman*, 882 F.3d at 385 (second alteration in original) (quoting *NAACP*, 357 U.S. at 462).

364 U.S. at 480 (invalidating a state law "compel[ing] every teacher, as a condition of employment in a state-supported school or college, to file annually an affidavit listing without limitation every organization to which he has belonged or regularly contributed within the preceding five years").

In sum, the plaintiffs have not shown a significant First Amendment burden on the theory that complying with the Attorney General's Schedule B nonpublic disclosure requirement will chill contributions.

2. Evidence That Disclosure to the Attorney General Will Subject Contributors to Threats, Harassment and Reprisals

Alternatively, the plaintiffs seek to establish a First Amendment burden by showing that, if they are required to disclose their Schedule B information to the Attorney General, there is "a reasonable probability that the compelled disclosure of personal information will subject [their contributors] to threats, harassment, or reprisals from either Government officials or private parties." *Doe*, 561 U.S. at 200 (alteration omitted) (quoting *Buckley*, 424 U.S. at 74). This inquiry necessarily entails two questions: (1) what is the risk of public disclosure; and (2), if public disclosure does occur, what is the likelihood that contributors will be subjected to threats, harassment or reprisals? We consider these questions in reverse order.

a. Likelihood of Retaliation

The first question, then, is whether the plaintiffs have shown that contributors are likely to

be subjected to threats, harassment or reprisals if Schedule B information were to become public. We again consider the Foundation's evidence first, followed by the Law Center's evidence.

The Foundation's evidence undeniably shows that some individuals publicly associated with the Foundation have been subjected to threats, harassment or economic reprisals. Lucas Hilgemann, the Foundation's chief executive officer, testified that he was harassed and targeted, and his personal information posted online, in connection with his work surrounding union "right to work" issues in Wisconsin. Charles and David Koch have received death threats, and Christopher Fink, the Foundation's chief operating officer, has received death threats for publicly contributing to the Foundation through his family's private foundation. Art Pope, a member of the Foundation's board of directors, and a contributor through his family foundation, testified that he received a death threat and has been harassed by "a series of articles" that falsely accuse him of "funding global warming deni[al]." His businesses have been boycotted, although we hesitate to attribute those boycotts to Pope's association with the Foundation.[6]

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[6] Pope says his business, Variety Wholesalers, was boycotted in part because of his affiliation with the Foundation. But Pope was the state budget director of North Carolina and is publicly associated with a large number of organizations and candidates. Despite publicly contributing to the Foundation since 2004, and to the Foundation's predecessor since 1993, he did not receive threats or negative attention until 2010, in connection with his involvement in the North Carolina elections. This same problem plagues much of the plaintiffs' evidence. In many instances, the

In some cases, moreover, the Foundation's actual or perceived contributors may have faced economic reprisals or other forms of harassment. Teresa Oelke, for instance, cited

> a donor whose business was targeted by an association, a reputable association in that state. A letter was sent to all the school boards in that state encouraging [them] to discontinue awarding this individual's business contracts because of his assumed association with Americans for Prosperity and Americans for Prosperity Foundation. . . . That individual reduced his contributions in half, so from $500,000 annually to 250,000 based on the pressure from his board that remains in place today.

Hilgemann, the Foundation's CEO, suggested that during the "right to work" campaign in Wisconsin in 2012, an opposition group "pulled together a list of suspected donors to the Foundation because of their interactions with groups like ours in the past that had

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evidence of harassment pertains to individuals who are publicly identified with a number of controversial activities or organizations, making it difficult to assess the extent to which the alleged harassment was caused by a connection to the Foundation or the Law Center in particular. Most of the individuals who have experienced harassment, moreover, have been more than mere contributors, again making it difficult to isolate the risk of harassment solely from being a large contributor. The plaintiffs have presented little evidence bearing on whether harassment has occurred, or is likely to occur, simply because an individual or entity provided a large financial contribution to the Foundation or the Law Center.

been publicized. [Opponents] boycotted their businesses. They made personal and private threats against them, their families and their business and their employees."[7]

The Law Center, too, has presented some evidence to suggest individuals associated with the Law Center have experienced harassment, although it is less clear to what extent it results solely from that association. The Law Center, for instance, points to: a smattering of critical letters, phone calls and emails it has received over the years; the incident in which Monaghan was placed on a list of "the most antigay persons in the country" after the Law Center became involved in a controversial lawsuit; and threats and harassment its clients, such as Robert Spencer and Pamela Geller, have received based on their controversial public activities. As noted, however, Monaghan could not recall any situation in which a contributor to the Law Center was harassed, or expressed concerns about being harassed, on account of having contributed to the Law Center.

On the one hand, this evidence plainly shows at least the *possibility* that the plaintiffs' Schedule B contributors would face threats, harassment or

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[7] Like much of the plaintiffs' evidence, the harassment allegations recounted by Oelke and Hilgemann are conclusory rather than detailed. Although we understand the plaintiffs' interest in protecting their contributors' identities from disclosure, we cannot imagine why the plaintiffs have not provided more detailed evidence to substantiate and develop their allegations of retaliation – something we are confident they could have accomplished without compromising their contributors' anonymity.

reprisals if their information were to become public. Such harassment, however, is not a foregone conclusion. In 2013, after acquiring copies of the Foundation's 2001 and 2003 Schedule B filings, the National Journal published an article publicly identifying many of the Foundation's largest contributors.[8] If, as the plaintiffs contend, public disclosure of Schedule B information would subject their contributors to widespread retaliation, we would expect the Foundation to present evidence to show that, following the National Journal's unauthorized Schedule B disclosure, its contributors were harassed or threatened. No such evidence, however, has been presented.

Ultimately, we need not decide whether the plaintiffs have demonstrated a reasonable probability that the compelled disclosure of Schedule B information would subject their contributors to a constitutionally significant level of threats, harassment or reprisals if their Schedule B information were to become public. *See Doe*, 561 U.S. at 200.[9] As we explain next, we are not persuaded that there exists a reasonable probability that the

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[8] The record does not reflect how the National Journal acquired this information. No one has suggested that the California Attorney General's office was the source, nor could it have been, as the Foundation was not reporting its Schedule B contributors to the state in 2001 or 2003.

[9] The district court concluded the plaintiffs *have* shown a "reasonable probability" that public disclosure of their Schedule B contributors would subject them to such threats and harassment. Because this constitutes a mixed question of law and fact, however, we review the question de novo. *See In re Cherrett*, 873 F.3d 1060, 1066 (9th Cir. 2017).

plaintiffs' Schedule B information will become public as a result of disclosure to the Attorney General. Thus, the plaintiffs have not established a reasonable probability of retaliation from compliance with the Attorney General's disclosure requirement.

b. Risk of Public Disclosure

The parties agree that, as a legal matter, public disclosure of Schedule B information is prohibited. California law allows for public inspection of charitable trust records, with the following exception:

> Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:
>
> (1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or
>
> (2) In response to a search warrant.

Cal. Code Regs. tit. 11, § 310(b).[10] The plaintiffs argue, however, that their Schedule B information may become public because the Attorney General has

[10] The plaintiffs suggest California's regulations are not as protective as federal regulations because federal law imposes criminal penalties for unauthorized disclosure of information on tax returns. *See* 26 U.S.C. § 7213. Federal law, however, criminalizes only *willful* unauthorized disclosure; the differences between federal and California law are therefore immaterial to risk of inadvertent public disclosure at issue here.

a poor track record of shielding the information from the public view.

We agree that, in the past, the Attorney General's office has not maintained Schedule B information as securely as it should have, and we agree with the plaintiffs that this history raises a serious concern. The state's past confidentiality lapses are of two varieties: first, human error when Registry staff miscoded Schedule B forms during uploading; and second, a software vulnerability that failed to block access to the Foundation's expert, James McClave, as he probed the Registry's servers for flaws during this litigation.

We are less concerned with the latter lapse. McClave discovered that by manipulating the hexadecimal ending of the URL corresponding to each file on the Registry website, he could access a file that was confidential and did not correspond to a clickable link on the website. That is, although documents were deemed "confidential," that meant only that they were not *visible* to the public; it did not mean they were not still housed on the public-facing Registry website. By altering the single digit at the end of the URL, McClave was able to access, one at a time, all 350,000 of the Registry's confidential documents. This lapse was a singularity, stemming from an issue with the Attorney General's third-party security vendor. When it was brought to the Attorney General's attention during trial, the vulnerability was quickly remedied. There is no evidence to suggest that this type of error is likely to recur.

We are more concerned with human error. As part of an iterative search on the public-facing

website of the Registry, McClave found approximately 1800 confidential Schedule Bs that had been misclassified as public over several years. The Attorney General promptly removed them from public access, but some had remained on the website since 2012, when the Registry began loading its documents to servers.

Much of this error can be traced to the large amount of paper the Registry Unit processes around the same time each year. The Registry Unit receives over 60,000 registration renewals annually, and 90 percent are filed in hard copy. It processes each by hand before using temporary workers and student workers to scan them into an electronic record system. The volume and tediousness of the work seems to have resulted in some staff occasionally mismarking confidential Schedule Bs as public and then uploading them to the public-facing site.

Recognizing the serious need to protect confidentiality, however, the Registry Unit has implemented stronger protocols to prevent human error. It has implemented "procedural quality checks . . . to sample work as it [is] being performed" and to ensure it is "in accordance with procedures on handling documents and [indexing them] prior to uploading." It has further implemented a system of text-searching batch uploads before they are scanned to the Registry site to ensure none contains Schedule B keywords. At the time of trial in 2016, the Registry Unit had halted batch uploads altogether in favor of loading each document individually, as it was refining the text-search system. After forms are loaded to the Registry, the Charitable Trusts Section runs an automated weekly script to identify and remove any

documents that it had inadvertently misclassified as public. There is also no dispute that the Registry Unit immediately removes any information that an organization identifies as having been misclassified for public access.

Nothing is perfectly secure on the internet in 2018, and the Attorney General's data are no exception, but this factor alone does not establish a significant risk of public disclosure. As the Second Circuit recently explained, "[a]ny form of disclosure-based regulation – indeed, any regulation at all – comes with some risk of abuse. This background risk does not alone present constitutional problems." *Schneiderman*, 882 F.3d at 383.

Although the plaintiffs have shown the state could afford to test its own systems with more regularity, they have not shown its cybersecurity protocols are deficient or substandard as compared to either the industry or the IRS, which maintains the same confidential information.[11] We agree with the Second Circuit that "there is always a risk somebody in the Attorney General's office will let confidential

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[11] Although the plaintiffs contend that the Charitable Trusts Section's protective measures are inadequate because they impose no physical or technical impediments to prevent employees from emailing Schedule Bs externally or printing them in the office, the record does not show that the IRS maintains a more secure internal protocol for its handling of Schedule B information or that the Charitable Trusts Section is failing to meet any particular security standard. Nonetheless, we take seriously the concerns raised here by the plaintiffs and amici, and we encourage all interested parties to work cooperatively to ensure that Schedule B information in the hands of the Attorney General remains confidential.

information slip notwithstanding an express prohibition. But if the sheer possibility that a government agent will fail to live up to her duties were enough for us to assume those duties are not binding, hardly any government action would withstand our positively philosophical skepticism." *Id.* at 384.

Although the district court appears to have concluded that there is a high risk of public disclosure notwithstanding the promulgation of § 310 and the Attorney General's adoption of additional security measures, the court appears to have rested this conclusion solely on the state's *past* "inability to ensure confidentiality." *Thomas More Law Ctr.*, 2016 WL 6781090, at *5. In light of the changes the Attorney General has adopted since those breaches occurred, however, the evidence does not support the inference that the Attorney General is likely to inadvertently disclose either the Law Center's or the Foundation's Schedule B in the future. The risk of inadvertent disclosure of *any* Schedule B information in the future is small, and the risk of inadvertent disclosure of *the plaintiffs'* Schedule B information in particular is smaller still. To the extent the district court found otherwise, that finding was clearly erroneous.

Given the slight risk of public disclosure, we cannot say that the plaintiffs have shown "a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals." *See Doe*, 561 U.S. at 200 (alteration omitted) (quoting *Buckley*, 424 U.S. at 74).

In sum, the plaintiffs have not shown that compliance with the Attorney General's Schedule B requirement will impose significant First Amendment burdens. The plaintiffs have not demonstrated that compliance with the state's disclosure requirement will meaningfully deter contributions. Nor, in light of the low risk of public disclosure, have the plaintiffs shown a reasonable probability of threats, harassment or reprisals. Because the burden on the First Amendment right to association is modest, and the Attorney General's interest in enforcing its laws is important, *Ctr. for Competitive Politics*, 784 F.3d at 1317, "the strength of the governmental interest . . . reflect[s] the seriousness of the actual burden on First Amendment rights." *Doe*, 561 U.S. at 196 (quoting *Davis*, 554 U.S. at 744). As applied to the plaintiffs, therefore, the Attorney General's Schedule B requirement survives exacting First Amendment scrutiny.

IV.

The plaintiffs' facial challenges also fail. In *AFPF I*, we held that we were "bound by our holding in *Center for Competitive Politics*, 784 F.3d at 1317, that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional." *AFPF I*, 809 F.3d at 538. That holding constitutes the law of the case. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007) ("[T]he general rule [is] that our decisions at the preliminary injunction phase do not constitute the law of the case. Any of our conclusions on pure issues of law, however, are binding." (citations and internal quotation marks omitted)). Even if we were to consider the facial

challenges anew, the evidence adduced at these trials does not prove the Schedule B requirement "fails exacting scrutiny in a 'substantial' number of cases, 'judged in relation to [its] plainly legitimate sweep.'" *Ctr. for Competitive Politics*, 784 F.3d at 1315 (quoting *United States v. Stevens*, 559 U.S. 460, 473 (2010)).

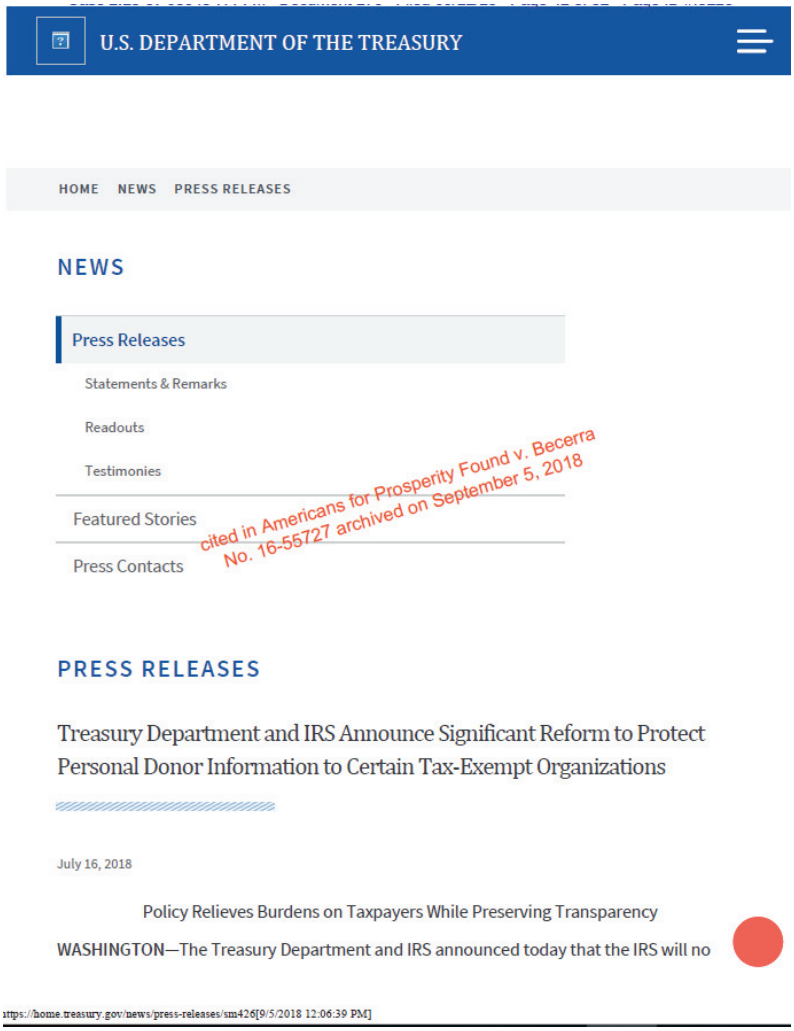
We also reject the Law Center's cross-appeal as to its Fourth Amendment and preemption claims. These claims were not proved at trial. We decline to consider the Law Center's motion for attorney's fees because it was not presented to the district court. Finally, we deny the Law Center's motion for judicial notice and the Attorney General's motion to strike portions of the Law Center's reply brief.

The judgments of the district court are reversed. The permanent injunctions are vacated. The case is remanded for entry of judgments in favor of the Attorney General.

INJUNCTIONS VACATED; JUDGMENTS REVERSED; CASES REMANDED.

The Law Center's motion for judicial notice, filed February 12, 2018 (Dkt. 45, No. 16-56855) is **DENIED**.

The Attorney General's motion to strike, filed February 13, 2018 (Dkt. 47, No. 16-56855), is **DENIED**.



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PRESS RELEASES

Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations

July 16, 2018

Policy Relieves Burdens on Taxpayers While Preserving Transparency

WASHINGTON—The Treasury Department and IRS announced today that the IRS will no

longer require certain tax-exempt organizations to file personally-identifiable information about their donors as part of their annual return. The revenue procedure released today does not affect the statutory reporting requirements that apply to tax-exempt groups organized under section 501(c)(3) or section 527, but it relieves other tax-exempt organizations of an unnecessary reporting requirement that was previously added by the IRS.

Nearly fifty years ago, Congress directed the IRS to collect donor information from charities that accept tax-deductible contributions. That statutory requirement applies to the majority of tax-exempt organizations, known as section 501(c)(3) organizations, receiving contributions that can be claimed by donors as charitable deductions. This policy provided the IRS information that could be used to confirm contributions to those organizations.

By regulation, however, the IRS extended the donor reporting requirement to all other tax-exempt organizations—labor unions and volunteer fire departments, issue-advocacy groups and local chambers of commerce, veterans groups and community service clubs. These groups do not generally receive tax deductible contributions, yet they have been required to list the names and addresses of their donors on Schedule B of their annual returns (Form 990).

"Americans shouldn't be required to send the IRS information that it doesn't need to effectively enforce our tax laws, and the IRS simply does not need tax returns with donor names and addresses to do its job in this area," said U.S. Treasury Secretary Steven T. Mnuchin. "It is important to emphasize that this change will in no way limit transparency. The same information about tax-exempt organizations that was previously available to the public will continue to be available, while private taxpayer information will be better protected. The IRS's new policy for certain tax-exempt organizations will make our tax system simpler and less susceptible to abuse."

Summary of New IRS Policy

- Tax-exempt organizations described by section 501(c), other than section 501(c)(3) organizations, are no longer required to report the names and addresses of their contributors on the Schedule B of their Forms 990 or 990-EZ.

- These organizations must continue to collect and keep this information in their records and make it available to the IRS upon request, when needed for tax administration.

- Form 990 and Schedule B information that was previously open to public inspection will continue to be reported and open to public inspection.

- The Internal Revenue Code expressly governs the tax-return reporting of donor information by charities that primarily receive tax-deductible contributions (under section 501(c)(3)) and political organizations (under section 527). The IRS action today does not affect those organizations.

After careful review, Treasury and the IRS have decided to relieve these tax-exempt organizations (other than organizations described in section 501(c)(3) or section 527) of a requirement that Congress never imposed for several reasons:

- First, the IRS makes no systematic use of Schedule B with respect to these organizations in administering the tax code. Donor information for many of these organizations was once relevant to the federal gift tax, but Congress eliminated that need in 2015 by making gifts to many of these tax-exempt organizations tax-free. The IRS has no tax administration need for continuing the routine collection of donor names and addresses as part of an exempt organization's annual tax return. If the information is needed for purposes of an examination, the IRS will be able ask the organization for it directly.

- Second, the new policy will better protect taxpayers by reducing the risk of inadvertent disclosure or misuse of confidential information—an especially important safeguard for organizations engaged in free speech and free association protected by the First Amendment. Unfortunately, the IRS has accidentally released confidential Schedule B information in the past. In addition, conservative tax-exempt groups were disproportionately impacted by improper screening in the previous Administration, including what the Treasury Inspector General for Tax Administration concluded were inappropriate inquiries related to donors. Ending the unnecessary collection of sensitive donor information will reinforce the reforms already implemented by the IRS in the wake of the political targeting scandal and enhance public trust in the agency.

- Third, the new policy will save both private and government resources. On the taxpayer side, the previous policy added needless paperwork. On the government side, the IRS has been forced to devote scarce resources to redacting donor names and addresses (as required by federal law) before making Schedule B filings public. Now, the IRS will no longer require personally-identifiable donor information that the IRS does not regularly need and the public does not see. The public information will continue to be available, just as before.

The IRS's new policy will relieve thousands of organizations of an unnecessary regulatory burden, while better protecting sensitive taxpayer information and ensuring appropriate transparency.

The IRS guidance is available here.

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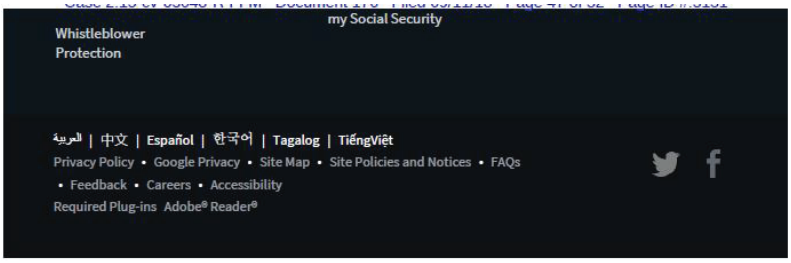

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS MORE LAW CENTER, Plaintiff, v. KAMALA HARRIS, in her Official Capacity as Attorney General of California, Defendant.	CASE NO. CV 15-3048-R ORDER FOR JUDGMENT IN FAVOR OF PLAINTIFF

For the reasons that follow, this Court grants Thomas More Law Center's ("TMLC") motion for a permanent injunction to enjoin the Attorney General of California from demanding its Schedule B form and enters judgment in favor of TMLC. After conducting a full bench trial, this Court finds the Attorney General's Schedule B disclosure requirement unconstitutional as applied to TMLC.

Plaintiff TMLC is a nonprofit corporation organized under Internal Revenue Code section 501(c)(3) that funds its activities by raising charitable contributions from donors throughout the country, including California. California state law requires charitable organizations, such as TMLC, to file a copy of its IRS Form 990, including its Schedule B, with the State Registry of Charitable Trusts ("the Registry"). Cal. Code Regs. tit. 11, § 301. An

organization's Schedule B includes the names and addresses of every individual nationwide who donated more than $5,000 to a charity during a given tax year. While a nonprofit's IRS Form 990 must be made available to the public, an organization's Schedule B is not publicly available. 26 U.S.C. § 6104(b), (d)(3)(A).

Since 2001, TMLC filed its Form 990 as part of its periodic reporting with the Attorney General, without including its Schedule B. For each year from 2001 through 2009, the Attorney General accepted TMLC's registration renewal and listed TMLC as an active charity in compliance with the law. In a letter dated March 6, 2012, the Attorney General indicated that TMLC's 2010 filing was insufficient due to its failure to include a Schedule B. In April 2015, TMLC brought the present action seeking an order preliminarily enjoining the Attorney General from demanding its Schedule B. Among other claims, TMLC argued that the California law requiring disclosure of its Schedule B to the Attorney General was facially unconstitutional. TMLC also brought an as-applied challenge against the disclosure requirement.

This Court granted Plaintiff a preliminary injunction, which the Ninth Circuit vacated. *Americans for Prosperity Found. v. Harris*, 809 F.3d 536 (9th Cir. 2015). In its remand, the Ninth Circuit held that this Court is bound by its previous decision in *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015)—that the Attorney General's nonpublic Schedule B disclosure regime was not facially unconstitutional. *Americans for Prosperity Found.*, 809 F.3d at 538. The Ninth Circuit

did, however, instruct this Court to have a trial on the as-applied challenge. *Id.* at 543. Accordingly, the Court now focuses on TMLC's as-applied challenge.

Courts review First Amendment challenges to disclosure requirements under an "exacting scrutiny" standard. *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010); *Citizens United v. FEC*, 558 U.S. 310, 366 (2010). Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Center for Competitive Politics*, 784 F.3d at 1312 (citations omitted). This encompasses a balancing test. In order for a government action to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1*, 561 U.S. at 196.

I. Substantial Relation to a Sufficiently Important Governmental Interest

Defendant argues that the state law requiring that all charities file a complete copy of IRS Form 990 Schedule B is substantially related to the Attorney General's compelling interest in protecting the public and ensuring that charitable organizations are not abusing their legal privileges. The Attorney General argues that the disclosure of Schedule B allows the Registry to determine how much revenue a charity receives and who is donating to the charitable organization and in what form. According to the Attorney General, the Schedule B information assists her office in determining whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons, or illegal or unfair

business practices. The Court finds that as applied, the disclosure of the Schedule B form is not substantially related to the Attorney General's interest in monitoring and investigating charitable organizations. First, the Attorney General's arguments that Schedule B is necessary is undercut by the fact that she has only recently determined a need for the information and has access to the same information from other sources. Second, even assuming arguendo that this information does genuinely assist in the Attorney General's investigations, its disclosure demand of Schedule B is more burdensome than necessary.

Although *Center for Competitive Politics* found that the Attorney General's "disclosure requirement bears a 'substantial relation' to a 'sufficiently important' government interest," this Court, for the second time, held a bench trial and was left unconvinced that the Attorney General's collection of Schedule B forms substantially assists the investigation of charitable organizations. TMLC, like Americans for Prosperity, was registered with the Registry for years and was never required to disclose its Schedule B. It was not until 2012 that the Attorney General first notified TMLC that it was required to file its Schedule B. This fact alone indicates that it is indeed possible for the Attorney General to monitor charitable organizations without Schedule B. The Attorney General undoubtedly had the same interest in protecting the public and monitoring charitable organizations prior to 2012. Yet, she was able to further this interest without the collection of TMLC's Schedule B.

Portions of the *Americans for Prosperity* testimony and evidence were admitted in the TMLC trial. Particularly relevant here is the testimony of a supervising investigative auditor for the Attorney General, Steve Bauman. Mr. Bauman's trial testimony confirmed that auditors and attorneys seldom use Schedule B when auditing or investigating charities. Bauman testified that out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section, only five instances involved the use of a Schedule B. (Exhibit 913, *AFPF v. Harris*, Bauman Test., 3/4/16, p. 19:15-19). Even in the few instances in which a Schedule B was relied on, the relevant information it contained could have been obtained from other sources. (Exhibit 913, *AFPF v. Harris*, Bauman Test. 3/4/16, p. 31:8–32:10).

At trial in the present case, the Attorney General presented the testimony of Tania Ibanez, the head of the Attorney General's Charitable Trusts Section. Ms. Ibanez testified that her office uses Schedule B regularly to assist in the evaluation of the merits of complaints and assess the legality of a charitable organization's finances. Additionally, Joseph Zimring, a Deputy Attorney General in the Charity and Trusts section, testified that he has used a Schedule B in an investigation he was involved in. However, Zimring also testified that it was "very likely" that he could have completed a successful investigation without a Schedule B and that other sources, such as Schedule L, contain the same information as Schedule B. (Zimring Test., 9/14/16, p. 80:11-18, 81:18-19). Ms. Ibanez's testimony establishes nothing more than a convenience and

general usage of Schedule B. This Court does not doubt that the Attorney General does in fact use the Schedule Bs it collects. However, Mr. Zimring's testimony also indicates that the Attorney General is more than capable of protecting the public and enforcing the laws by other means. The numerous other means by which the Attorney General could obtain the information she needs to investigate charitable organizations show that the collection of the Schedule B is not substantially related to her important interest.

It is apparent to this Court that the Attorney General's requirement of Schedule B is not substantially related to its interest in regulating charitable organizations. Furthermore, the Attorney General's interest could be more narrowly achieved.

In the context of associational rights, "even though the governmental purpose [may] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Louisiana v. NAACP*, 366 U.S. 293, 296 (1961). This differs from the electoral context. The Ninth Circuit has held that disclosure of electoral donations and financing information is not subject to a least-restrictive-means analysis. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 541 (9th Cir. 2015). This Court does not hold the Attorney General to a least-restrictive-means standard. However, the Attorney General is limited to pursuing its interest in protecting the public from illegal charitable organizations by means which do not "broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Here, like in *NAACP*, the Attorney General's interests can be more narrowly achieved as evidenced by the testimony of Zimring and Bauman. As was the case in the Americans for Prosperity Foundation ("*AFPF*") trial, there is substantial evidence that the Attorney General could accomplish her goals without the Schedule B. During the *AFPF* trial, the Attorney General's investigators testified that they have successfully completed their investigations without using Schedule Bs, even in instances where they knew Schedule Bs were missing. For example, Mr. Bauman testified that he reviewed Form 990s in connection with audits that did not include Schedule Bs. (Bauman Test. 3/4/16, p. 27:12–14). Specifically, he admitted that he successfully audited those charities and found wrongdoing without the use of Schedule Bs. (*Id.* at 27:18–23). In fact, Mr. Bauman admitted that he successfully audited charities for years before the Schedule B even existed. (Bauman Dep., TX-731, p. 49:2–15). In the TMLC trial, Mr. Zimring testified that he had simply asked individuals who filed complaints against charitable organizations for information which would otherwise appear on a Schedule B. Additionally, Mr. Zimring testified that in an investigation into fraudulent loans to a charitable organization, much of the information he pursued could have been obtained through a different attachment to the organization's Form 990, Schedule L. (Zimring Test., 9/14/16, p.81:15-22). Taken together, the testimony of multiple lawyers within the Attorney General's office clearly indicate that the Attorney General could have achieved its end by more narrowly tailored means. While this Court cannot find such a disclosure requirement facially

invalid, it is prepared to find it unconstitutional as applied to TMLC, especially in light of the requirement's burdens on TMLC's First Amendment rights.

II. Burden on First Amendment Rights

Setting aside the Attorney General's failure to establish a substantial relationship between her demand for TMLC's Schedule B and a compelling governmental interest, TMLC would independently prevail on its as-applied challenge because it has proven that disclosing its Schedule B to the Attorney General would create a burden on its First Amendment rights. While the Ninth Circuit in *Center for Competitive Politics* foreclosed any facial challenge to the Schedule B requirement, it specifically left open the possibility that a party could show "'a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisal from either Government officials or private parties' that would warrant relief on an as-applied challenge." 784 F.3d at 1317 (quoting *McConnell v. FEC*, 540 U.S. 93, 199 (2003)). The Supreme Court has noted a particular need for protection of "minor political part[ies] which historically ha[ve] been the object of harassment by government officials and private parties." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88 (1982). "A strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought would make the task even more difficult." *Id.* at 74. Examples of the type of evidence sufficient to succeed on an as-applied challenge include past or present harassment of members due to their associational

ties, or of harassment directed against the organization itself, or a pattern of threats or specific manifestations of public hostility. *Id.* TMLC produced evidence of such harassment and hostility at trial.

TMLC is an advocate for issues which arouse intense passions by its supporters and its opponents. The Law Center represents clients who are in the midst of intense public scrutiny and often times on the receiving end of extremely negative criticism and insults. These positions taken by TMLC have led to threats, harassing calls, intimidating and obscene emails, and even pornographic letters sent to TMLC. (*See*, *e.g.*, Exhibit 38, 39). In one particularly angry letter to TMLC in response to a request for donations an opponent wrote, "YOU FU**ING FEAR MONGERING PIECE OF S**T F**K YOU!!!" (Exhibit 38). Opponents also mailed pornographic images to TMLC. (Exhibit 39). The level of harassment and "vehement criticism" directed towards TMLC has necessitated the Law Center's President, Richard Thompson, to train his employees how to effectively handle and respond to the negativity. Members and donors of TMLC obviously share the same views as TMLC. Thus, the evidence of threats and harassment directed toward TMLC because of their views indicates a high likelihood of similar treatment towards donors. It also satisfies the requirement of *Center for Competitive Politics* that an organization show "a reasonable probability" that the disclosure of TMLC's donors would subject them to threats or harassment.

Additionally, TMLC produced evidence of one donor who suffered negative consequences as a result of his support of TMLC issues and another donor who

supported TMLC but wished to remain anonymous for fear of harassment as a result of his affiliation. Tom Monaghan was the founder of TMLC and also a donor. Mr. Monaghan was listed at the top of a list of "most antigay persons in the country." (Exhibit 908, Monaghan Dep., at p. 33:21, 34:5-23). Due to his opposition to abortion, an issue which TMLC consistently advances, Mr. Monaghan's business was boycotted by the National Organization for Women. (Id. at p. 43:23-44:9). Furthermore, TMLC produced a donation accompanied by a letter which stated that the donor did not want to provide his personal information because the donor feared there would be consequences of being personally tied to TMLC. (Thompson Test., 9/13/16, Vol. 1, p. 62:9-24).

The Attorney General argues that little can be drawn from the testimony of Mr. Monaghan and the letter from the anonymous donor. First, the Attorney General argues that Mr. Monaghan and TMLC do not "connect Mr. Monaghan's inclusion on [the antigay list] to his donations to the Law Center, as opposed to his public status as a member of the Law Center's board." (Defendant's Proposed Order, p. 6). However, this misunderstands the level of proof required to prevail on an as-applied challenge to a disclosure requirement. The Supreme Court in *Brown* explicitly held that a plaintiff need not show that he was harassed directly as a result of a disclosed donation. Rather, evidence of harassment of a member of an organization due to that membership is sufficient. Here, Mr. Monaghan was certainly harassed at minimum because he shared the same views as TMLC. He testified that his inclusion on the antigay list was possibly a product of his association with

TMLC. (Exhibit 908, Monaghan Dep., at p. 33:11-17, 34:5-23). Secondly, the Attorney General disputes the relevance of the anonymous donor's request to remain anonymous. The Attorney General argues that the donor wished to remain anonymous from TMLC (not the Government) and that the donor would not have appeared on the Schedule B. Neither argument is persuasive. The anonymous donor evidence is informative because it is illustrative. The anonymous donor likely did not know the intricacies of tax filings and whether or not the donor would be included on a Schedule B. What is illustrative about the anonymous donor is that the donor was afraid of the repercussions of being affiliated with TMLC as a donor. It is highly likely that other donors felt the same fear as this anonymous donor and equally likely that at least some of those donors withheld contributions because of that fear. Compelling the disclosure of donors' identities would only compound such fears and difficulties for TMLC.

The evidence of harassment, opposition, and threats directed at TMLC, its donors, and those supporting the very same issues as the Law Center is sufficient to establish a "reasonable probability" that the compelled disclosure of the identity of TMLC donors would burden the donor's First Amendment Rights. This Court finds that the TMLC has shown harm sufficient to outweigh the Attorney General's interest in protecting the public from illegal charitable organizations and her overly burdensome means of achieving that interest.

The Court spent significant time in the *Americans for Prosperity Foundation* case examining the factual underpinnings of the inadvertent public

disclosures of Schedule B by the Attorney General. *AFPF*, ___ F. Supp. 3d ____, 2016 WL 1610591 at *5 (C.D. Cal., 2016). This Court stands by its finding that the Attorney General's history of inadvertent disclosures raises significant concerns for donors who desire to have their affiliations remain confidential. However, the Attorney General has since modified the approach by the Registry to protect the confidentiality of Schedule Bs and prevent inadvertent disclosures. As such, this Court will examine the new evidence presented at the TMLC trial.

Since the conclusion of the *AFPF* litigation, the Registry's confidentiality policy was codified in a formal regulation. California Code of Regulations, title 11, section 310(b) now requires donor information be maintained as confidential and not be disclosed except in limited scenarios. The Registry also implemented a system of automated and personal reviews to identify documents that were incorrectly classified as not confidential. Ultimately, given the history of the Registry completely violating the "longstanding confidentiality policy," the Attorney General's assurances that a regulatory codification of the same exact policy will prevent future inadvertent disclosures rings hollow. The Attorney General's steps to attempt to rectify the disclosures and prevent future disclosures is commendable. Yet, trial testimony supported what should be an obvious fact, the Registry cannot assure that documents will not be inadvertently disclosed no matter what steps it takes. The Registry is not required to have a perfectly secure, fool-proof system to prevent disclosures. However, taken in the context of a proven and substantial history of inadvertent disclosures, this

inability to assure confidentiality increases the "reasonable probability" that compelled disclosure of Schedule B would chill Plaintiff's First Amendment rights. Donors and potential donors would be reasonably justified in a fear of disclosure given such a context.

III. Plaintiff's Remaining Claims

Finally, TMLC has advanced, albeit briefly, several additional arguments against the collection of its Schedule B. First, TMLC claims that the required disclosure of Schedule B constitutes an unreasonable search and seizure in violation of the Fourth Amendment. TMLC cites no case law in support of its novel theory. The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." As is apparent from the plain text, a search violates the Fourth Amendment only when it is "unreasonable." This Court discussed above the legitimacy of the Attorney General's interest in protecting the public from illegal activities of charitable organizations. In her attempt to further that interest, the Attorney General requests information from all charitable organizations registered in the state. These requests are not unreasonable. This Court has found that the disclosure requirement is overly burdensome in the freedom of association context, but it is not prepared to find it unreasonable in the context of the Fourth Amendment. Given the lack of unreasonableness shown by TMLC, this Court need not determine whether a search occurred within the meaning of the Fourth Amendment.

Next, TMLC argues that the Schedule B disclosure requirement violates the Supremacy Clause and the Free Exercise Clause. TMLC failed to produce evidence sufficient to satisfy either claim. The mere fact that the IRS also collects Schedule Bs does not mean that federal law preempts the Attorney General's collection of Schedule B. Similarly, the mere fact that TMLC is an organization promoting religious beliefs does not mean that the Attorney General cannot regulate such an organization by means of a neutral, generally applicable law.

Plaintiff's claims under the Fourth Amendment, Supremacy Clause, and Free Exercise Clause all fail.

IV. Injunctive Relief

Because AFP has prevailed on its First Amendment as-applied challenge, it is entitled to declaratory and injunctive relief. A "plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Specifically, the plaintiff "must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* Each of these factors weighs in favor of an injunction here.

TMLC has suffered an irreparable injury as a result of its required disclosure of Schedule B. As discussed above, given donors' desire to remain

anonymous, the Attorney General's required disclosure of Schedule B chills First Amendment speech and the Freedom of Association. TMLC presented evidence that significant harassment can and has occurred to both individuals associated with the Law Center as well as those who donate to it. If TMLC refused to comply with the Attorney General's required disclosure, it would be prevented from operating as a charitable organization in the state of California. Forcing the Law Center to choose between operating in the state and revealing its donors in violation of their desires to remain anonymous is an irreparable injury. Any "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *accord*, *e.g.*, *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013); *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012); *Farris v. Seabrook*, 677 F.3d 858, 868 (9th Cir. 2012); *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011). In particular, the government causes "irreparable injury" when, as here, it places individuals "in fear of exercising their constitutionally protected rights of free expression, assembly, and association." *Allee v. Medrano*, 416 U.S. 802, 814–15 (1974).

TMLC's irreparable First Amendment injuries cannot adequately be compensated by damages or any other remedy available at law. Unlike a monetary injury, violations of the First Amendment "cannot be adequately remedied through damages." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009).

The balance of hardships also favors granting an injunction. As discussed above, the primary advantage of the Schedule B is one of convenience and efficiency. This Court finds that losing such an advantage, though undoubtedly difficult for the Attorney General, is far outweighed by the hardship placed on TMLC by forcing it to disclose its donors. The Attorney General operated without Schedule Bs for decades and still managed to further its interest of protecting the public. By contrast, the Thomas More Law Center would be hard-pressed to regain the trust of its donors and continue the exercise of its First Amendment rights should it be required to violate the trust and desires of its donors. Thus, it is clear that the balance of hardships supports enjoining the Attorney General from collecting TMLC's Schedule B.

Finally, the public interest favors an injunction. As the Ninth Circuit has "consistently recognized," there is a "significant public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d at 683 (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)). In sum, the four-factor test establishes that injunctive relief is appropriate to bar the Attorney General from demanding Schedule Bs from TMLC as part of their annual registration renewal. *Brown*, 492 U.S. at 101–02; *Louisiana v. NAACP*, 366 U.S. at 297.

In sum, this Court finds, for the second time, after a full bench trial, that the Attorney General has failed to prove a substantial relation between her collection of Schedule B and the investigation of charitable organizations. Investigators and attorneys testified that they completed investigations without Schedule B, accessed information contained in

Schedule B from different sources, and conducted investigations for years before Schedule B was ever collected. Collectively, this Court is convinced that the Attorney General has a myriad of less-burdensome means available to further her interest of protecting the public from fraudulent and illegal charitable organizations.

IT IS HEREBY ORDERED that the Attorney General is permanently enjoined from requiring the Thomas More Law Center to file with the registry a periodic written report containing a copy of its Schedule B to IRS Form 990. TMLC shall no longer be considered deficient or delinquent in its reporting requirement because it does not file its confidential Schedule B with the Attorney General. Each party shall bear its own costs.

Dated: November 16, 2016.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS MORE LAW CENTER, Plaintiff, v. KAMALA HARRIS, in her Official Capacity as Attorney General of California, Defendant.	CASE NO. CV 15-3048-R ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court are Plaintiff Thomas More Law Center's Motion for Summary Judgment (Dkt. No. 52) and Defendant Kamala Harris's Cross Motion for Partial Summary Judgment. (Dkt. No. 75). After full briefing by the parties, this Court took the matter under submission on July 12, 2016.

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). To meet its burden of production, "the moving party must either produce evidence negating an essential element of the non-moving party's claim or defense or

show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party meets its initial burden of showing there is no genuine issue of material fact, the opposing party has the burden of producing competent evidence and cannot rely on mere allegations or denials in the pleadings. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Id.*

Both Plaintiff and Defendant move for summary judgment on Plaintiff's claim that the Attorney General's nonpublic Schedule B reporting requirement is unconstitutional as applied to Plaintiff because it allegedly burdens First Amendment rights to free speech and association. Plaintiff argues that this Court's prior bench trial in *Americans for Prosperity Foundation v. Harris* ("*AFPF*"), 2016 WL 1610591 (C.D. Cal. Apr. 21, 2016), precludes Defendant from relitigating three related issues from *AFPF* under the doctrine of issue preclusion.

Issue preclusion "prevents relitigation of issues actually litigated and necessarily decided, after a full and fair opportunity for litigation, in a prior proceeding." *Shaw v. Hahn*, 56 F.3d 1128, 1131 (9th Cir. 1995). In order for this Court's previous decision in *AFPF* to have a preclusive effect, the issue necessarily decided in *AFPF* must be "identical" to the one which is sought to be re-litigated. *See Wabakken v. California Dep't of Corr. & Rehab.*, 801 F.3d 1143,

1148 (9th Cir. 2015). Plaintiff contends that this Court's ruling in *AFPF* established that: (1) Plaintiff Thomas More, like Americans for Prosperity Foundation, has an actual burden on its First Amendment rights; (2) the Attorney General's Schedule B requirement does not serve a compelling government interest and is not "narrowly tailored"; and (3) the Attorney General cannot guarantee the confidentiality of Schedule Bs once they are collected. Plaintiff misstates this Court's ruling in *AFPF*.

First, this Court explicitly denied Americans for Prosperity Foundation's facial challenge to the Schedule B requirement. *See AFPF*, at *1. Therefore, by definition, this Court's specific finding of actual harm to donors of the Americans for Prosperity Foundation cannot be applied to Plaintiff's organization in this case. To succeed on its own as-applied challenge, Plaintiff must demonstrate "a reasonable probability that the compelled disclosure of [its Schedule B] will subject them to threats, harassment, or reprisal from either Government officials or private parties . . ." *Center for Comparative Politics v. Harris* ("*CCP*"), 784 F.3d 1307, 1314 (9th Cir. 2015). The trial testimony of American for Prosperity Foundation's donors, employees and board members had nothing to do with the Plaintiff in this case, and does not satisfy Plaintiff's burden of establishing First Amendment harm. Accordingly, a genuine issue of material fact exists as to whether Plaintiff's donors are subjected to threats, harassment, or reprisal from either Government officials or private parties as a result of Defendant's Schedule B disclosure requirement.

Next, while the Attorney General's weak interest in Schedule B forms was established during the *AFPF* trial, the Court nevertheless had to balance that interest against American for Prosperity Foundation's particularized First Amendment harm. First Amendment challenges to disclosure requirements are evaluated under "exacting scrutiny," *see John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010), which encompasses a "balancing test" between First Amendment harm caused by the requirement and the government's need for the information sought. *See CCP*, 784 F.3d at 1314. Accordingly, without specific evidence demonstrating Plaintiff's particularized First Amendment harm, it is not possible to conduct the required balancing test. Thus, even if this Court's findings in *AFPF* regarding the utility of Schedule B were to govern in this case, Plaintiff still would not be entitled to summary judgment.

Finally, while the ability of the Attorney General to keep Schedule Bs confidential was an important part of the Court's analysis in *AFPF*, the ultimate decision in the case was reached under a totality of circumstances. Moreover, that trial was heard in early 2016. The Court's findings from months ago does not prevent the Attorney General from providing new testimony regarding the current state of its policies and practices regarding the confidentiality of Schedule B forms. While there is a possibility that these policies and practices have not changed at all, it cannot be said at this stage that there is no genuine issue of material fact as to its current state. Accordingly, Plaintiff would again not be entitled to summary judgment on this basis.

For these same reasons, Defendant is likewise not entitled to summary judgment. The only argument put forth by Defendant is that Plaintiff has no evidence that donors would experience harm flowing from the nonpublic Schedule B reporting requirement. However, as articulated above, Plaintiff will have the opportunity at its own trial to establish the alleged existence of actual harm to its First Amendment rights. While Plaintiff will ultimately bear the burden of proof at trial, a nonmoving party is not required to come forward with evidence demonstrating material issues of fact as to every element of its case to defeat a summary judgment motion. *See Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991). All Plaintiff must demonstrate at this stage is a specific fact or facts showing that there is a genuine issue for trial. Federal Rule of Civil Procedure 56(e).

To show there is a genuine issue for trial, Plaintiff contends that its founder, Thomas Monaghan, will testify that he has been subject to harassment for his association with Plaintiff Thomas More Law Center. Additionally, Plaintiff plans on producing a handwritten letter that it received from a donor who donated in cash because he feared that the Law Center's records could be disseminated. While Defendant argues that Plaintiff, at this stage, must prove that donors have been deterred from financially supporting Plaintiff's organization as a result of Defendant's Schedule B requirement, Plaintiff overcomplicates the requisite showing. As established in *CCP*, a case Defendant repeatedly cites, to succeed on its own as-applied challenge, Plaintiff must demonstrate "a reasonable probability that the

compelled disclosure of [its Schedule B] will subject them to threats, harassment, or reprisal from either Government officials or private parties . . .” *CCP*, 784 F.3d at 1314. Therefore, testimony by Mr. Monaghan and the letter received by Plaintiff’s organization clearly create a genuine issue of whether the Attorney General’s compelled disclosure subjects those associated with Plaintiff’s organization to threats, harassment, or reprisal from Government or private parties. Because a genuine issue of material fact exists, summary judgment is inappropriate.

IT IS HEREBY ORDERED that Plaintiff’s Motion for Summary Judgment is DENIED. (Dkt. No. 52).

IT IS FURTHER ORDERED that Defendant’s Cross Motion for Partial Summary Judgment is DENIED. (Dkt. No. 75).

Dated: July 18, 2016.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS MORE LAW CENTER, Plaintiff, v. KAMALA HARRIS, Attorney General in her Official Capacity, Defendant.	CASE NO. CV 15-3048-R ORDER ENJOINING ATTORNEY GENERAL FROM PUBLICLY DISCLOSING SCHEDULE B FORMS

On May 19, 2015, this Court entered a preliminary injunction preventing the Attorney General from demanding Plaintiff's Schedule B forms pending a trial on the merits. This was based, in large part, on the Ninth Circuit's January 6, 2015 order granting a temporary injunction in a nearly identical case between the Center for Competitive Politics and Kamala Harris. *Center For Competitive Politics v. Harris*, No. 14-15978, Dkt. 34 (9th Cir.). On May 1, 2015, the Ninth Circuit's order granting preliminary injunction in *Center for Competitive Politics* was vacated. *See Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir.) cert. denied, 136 S. Ct. 480 (2015). Shortly thereafter, the Ninth Circuit vacated this Court's grant of preliminary injunction. *Americans for Prosperity Found. v. Harris*, No. 15-55446, 2015 WL 9487728 (9th Cir. Dec. 29, 2015).

Bound by its previous holding in *Center for Competitive Politics*, the court reaffirmed that "the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional." *Id.* at *1. The court once again noted that "a future litigant might 'show a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals … warrant[ing] relief on an as-applied challenge," however, it found that the Plaintiff failed to demonstrate any actual burden on its First Amendment rights flowing from the Attorney General's demand for and collection of its Schedule B forms for nonpublic use. *Id.* (citing *Center for Competitive Politics*, 784 F.3d at 1317).

As for this Court's order enjoining public disclosure of the Plaintiff's Schedule B forms, the Ninth Circuit held, notwithstanding the Attorney General's pledge to refrain from public disclosure, that there is "no harm in allowing that aspect of the injunction that serves to prevent public disclosure to remain in effect on a temporary basis." *Id.* at *5.

IT IS HEREBY ORDERED that the Attorney General shall be permitted to obtain and use Plaintiff's Schedule B forms for its nonpublic enforcement purposes, but is strictly prohibited from making the Schedule B information public in any manner or under any circumstances.

Dated: January 5, 2016.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION, Plaintiff - Appellee, v. KAMALA D. HARRIS, Attorney General, in her Official Capacity as Attorney General of California, Defendant - Appellant.	No. 15-55446 D.C. No.2:14-cv-09448-R-FFM OPINION
THOMAS MORE LAW CENTER, Plaintiff - Appellee, v. KAMALA D. HARRIS, Attorney General, in her Official Capacity, Defendant-Appellant.	No. 15-55911 D.C. No. 2:15-cv-03048-R-FFM

Appeals from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued and Submitted December 9, 2015
Pasadena, California

Before: Stephen Reinhardt, Raymond C. Fisher and Jacqueline H. Nguyen, Circuit Judges.

PER CURIAM:

Nonprofit organizations Americans for Prosperity Foundation and Thomas More Law Center challenge the Attorney General of California's collection of Internal Revenue Service (IRS) Form 990 Schedule B, which contains identifying information for their major donors. They argue the nonpublic disclosure requirement is unconstitutional as applied to them because it impermissibly burdens First Amendment rights to free speech and association by deterring individuals from financially supporting them. The district court entered preliminary injunctions preventing the Attorney General from demanding the plaintiffs' Schedule B forms pending a trial on the merits. We have jurisdiction under 28 U.S.C. § 1292, and we vacate the injunctions with instructions to enter new orders preliminarily enjoining the Attorney General from publicly disclosing, but not from collecting, the plaintiffs' Schedule B forms.

I.

California's Supervision of Trustees and Fundraisers for Charitable Purposes Act (Charitable Purposes Act) requires the Attorney General to maintain a Registry of Charitable Trusts and authorizes her to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the

[Registry]." Cal. Gov't Code § 12584. An organization must maintain membership in the Registry to solicit tax-deductible donations from California residents, *see id.* § 12585, and as one condition of membership, the Attorney General requires each organization to annually submit the complete IRS Form 990 Schedule B, *see* Cal. Code Regs. tit. 11, § 301. Schedule B, which a charitable organization files with the IRS, lists the names and addresses of persons who have given $5,000 or more to the organization during the preceding year.

The Attorney General's Schedule B disclosure requirement seeks only *nonpublic* disclosure of these forms, and she seeks them solely to assist her in enforcing charitable organization laws and ensuring that charities in the Registry are not engaging in unfair business practices. *See Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1311 (9th Cir. 2015). The Attorney General does not assert any state interest in *public* disclosure of Schedule B forms. To the contrary, her longstanding policy of treating Schedule B forms as confidential, as well as her proposed regulation formalizing that policy, confirm that the state has no interest in public disclosure.[1] This regime is readily distinguishable from state requirements mandating public disclosure — such as those often found in the regulation of elections — that are intended to inform the public and promote

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[1] We take judicial notice of the Attorney General's proposed regulation. *See* California Regulatory Notice Register, 50–Z Cal. Regulatory Notice Register 2280–84 (Dec. 11, 2015), http://www.oal.ca.gov/res/docs/pdf/notice/50z–2015.pdf; *see also Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004).

transparency. *See*, *e.g.*, *John Doe No. 1 v. Reed*, 561 U.S. 186, 197 (2010); *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976); *Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012).

We are bound by our holding in *Center for Competitive Politics*, 784 F.3d at 1317, that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional. Compelled disclosure requirements are evaluated under exacting scrutiny, which requires the strength of the governmental interest to reflect the seriousness of the actual burden on a plaintiff's First Amendment rights. *See id.* at 1312. In that case, brought as a facial challenge, we held the Attorney General's authority to demand and collect charitable organizations' Schedule B forms falls within "her general subpoena power" and furthers California's compelling interest in enforcing its laws. *Id.* at 1317. Applying exacting scrutiny, we rejected the facial challenge to the disclosure requirement because the plaintiff failed to show it placed an actual burden on First Amendment rights. *See id.* at 1314–15, 1317. We left open the possibility, however, that a future litigant might "show a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties that would warrant relief on an as-applied challenge." *Id.* at 1317 (alteration and internal quotation marks omitted).

The plaintiffs here, two charitable organizations engaged in advocacy some may consider controversial, argue they have made such a showing. They contend disclosure to the state will infringe First Amendment rights by deterring donors

from associating with and financially supporting them, and therefore that the Attorney General should be enjoined from collecting their Schedule B forms, even for nonpublic use in enforcing the law.

The district court preliminarily enjoined the Attorney General from demanding and enforcing her demand for IRS Form 990 Schedule B from the plaintiffs.[2] The Attorney General has appealed these orders.

II.

We review the district court's grant of a preliminary injunction for abuse of discretion, reviewing findings of fact for clear error and conclusions of law de novo. *See id.* at 1311. Reversal for clear error is warranted when the district court's factual determination is illogical, implausible or lacks support in inferences that may be drawn from facts in the record. *See United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). A court may grant a preliminary injunction when a party shows "serious questions" going to the merits of its claim, a balance of hardships that tips sharply in its favor, a likelihood of irreparable harm and that an injunction is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

The plaintiffs argue the Attorney General must be enjoined from demanding and collecting their Schedule B forms on two theories. First, they argue

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[2] The district court's orders expressly enjoin only the collection of the plaintiffs' Schedule B forms, but, in doing so, necessarily prevent the Attorney General from disclosing those forms to the public.

confidential disclosure to her office itself chills protected conduct or would lead to persecution and harassment of their donors by the state or the public. Second, they argue that, notwithstanding her voluntary policy against disclosing Schedule B forms to the public, the Attorney General may change her policy or be compelled to release the forms under California law, and that the resulting *public disclosure* will lead to harassment of their donors by members of the public, chilling protected conduct. We address these theories in turn.

A. The District Court Abused its Discretion by Enjoining the Attorney General from Collecting the Plaintiffs' Schedule B Forms for Law Enforcement Use.

Neither plaintiff has shown anything more than "broad allegations or subjective fears" that *confidential* disclosure to the Attorney General will chill participation or result in harassment of its donors by the state or the public. *Dole v. Serv. Emps. Union, Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (quoting *McLaughlin v. Serv. Emps. Union, Local 280*, 880 F.2d 170, 175 (9th Cir. 1989)) (internal quotation mark omitted). The district court abused its discretion by enjoining the Attorney General from demanding the plaintiffs' Schedule B forms given the absence of evidence showing confidential disclosure would cause actual harm. *See Ctr. for Competitive Politics*, 784 F.3d at 1316 ("[N]o case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury."); *see also Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Trust*, 636 F.3d 1150, 1160 (9th Cir. 2011) (explaining that an overbroad injunction is an abuse of

discretion). To the extent the district court found actual chilling or a reasonable probability of harassment from confidential disclosure to the Attorney General, those findings are clearly erroneous.

First, the plaintiffs have not shown the demand for nonpublic disclosure of their Schedule B forms to the Attorney General has *actually chilled* protected conduct or would be likely to do so. *See Ctr. for Competitive Politics*, 784 F.3d at 1314 (finding no "actual burden" on First Amendment rights). Notably, neither plaintiff has alleged that annual disclosure of Schedule B forms to the IRS had any chilling effect. Americans for Prosperity Foundation proffered a declaration from its vice president for development asserting its donors "worry that disclosure to the Attorney General will lead to their own persecution at the hands of state officials."[3] The declaration, however, does not show that any donor has declined, or would decline, to support the Foundation as a result of this worry. No evidence supports the district court's conclusion that donors have expressed "their unwillingness to continue to participate if such limited disclosure [to the Attorney General] is made."

Thomas More Law Center's evidence similarly fails to show its donors have been or would be chilled

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[3] Although much of the plaintiffs' evidence includes hearsay, the district court did not abuse its discretion by considering it at the preliminary injunction stage. *See Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013) ("Due to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings.").

from contributing by the Attorney General's mere collection of Schedule B forms. The declaration from its president and chief counsel states only that donors "would be deterred" from donating if exposed to the type of harassment the Law Center incurs for its *public activities*, but says nothing to suggest donors have been or would be deterred by confidential disclosure of their identifying information to the Attorney General.

Second, the plaintiffs have not shown a "reasonable probability" of harassment at the hands of the state if the Attorney General is permitted to collect their Schedule B forms for nonpublic use. *See Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 99–101 (1982) (detailing "a past history of government harassment," including "massive" FBI surveillance and a concerted effort to interfere with an organization's political activities); *Ctr. for Competitive Politics*, 784 F.3d at 1316. Americans for Prosperity Foundation has offered no evidence that it has been subjected to government harassment or hostility. It relies on an October 24, 2013 press release from the California Fair Political Practices Commission that, in announcing a settlement with two nonprofit organizations accused of violating campaign finance laws, inaccurately characterized those organizations as part of Charles and David Koch's network of "dark money" nonprofit corporations. This error was later corrected, but Americans for Prosperity Foundation argues that because Charles and David Koch are closely associated with the Foundation, the release demonstrates the type of past government harassment sufficient to support its challenge. This

single, isolated incident, directed not against the Foundation but against prominent public figures, falls far short of "suggest[ing] that [government] hostility toward" Americans for Prosperity Foundation "is ingrained and likely to continue." *Brown*, 459 U.S. at 101.

Similarly, Thomas More Law Center has produced no evidence of state harassment or targeting beyond its bare and unsubstantiated allegation that enforcement of the Schedule B disclosure requirement is politically motivated. The district court concluded the Center raised serious questions on the merits by "pos[ing] questions . . . whether the groups [the Attorney General] is demanding donor information from are being particularly selected for such inquiries." But here, as in *Center for Competitive Politics*, there is "no indication in the record that the Attorney General's disclosure requirement was adopted or is enforced in order to harass members of the registry in general or [the plaintiffs] in particular." *Ctr. for Competitive Politics*, 784 F.3d at 1313.

Nor have the plaintiffs shown a "reasonable probability," *id.* at 1317, of harassment by members of the public due to disclosure to the Attorney General for nonpublic use. The plaintiffs' allegations that technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure of their Schedule B forms are too speculative to support issuance of an injunction.

The district court also erred in concluding an injunction was warranted because there were serious questions about the Attorney General's right to collect

Schedule B information as to non-California donors. The district court's conclusion that the Attorney General's demand for national donor information may be more intrusive than necessary does not raise serious questions because "exacting scrutiny is not a least-restrictive-means test." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 541 (9th Cir. 2015) (en banc). The government "need only ensure that its means are substantially related" to a sufficiently important interest. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1013 (9th Cir. 2010); *see also Ctr. for Competitive Politics*, 784 F.3d at 1312.

In sum, the plaintiffs have failed to demonstrate any actual burden on First Amendment rights flowing from the Attorney General's demand for and collection of their Schedule B forms for nonpublic use. As we have held, compelled nonpublic disclosure of Schedule B forms to the Attorney General is not itself First Amendment injury. *See Ctr. for Competitive Politics*, 784 F.3d at 1314. Without showing actual harm, the plaintiffs cannot enjoin the Attorney General from enforcing the disclosure requirement.[4] *See id.*

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[4] Even had the plaintiffs shown some First Amendment harm from the disclosure requirement, they would not necessarily have raised serious questions entitling them to an injunction. Under exacting scrutiny, they would have to demonstrate serious questions as to whether the state's "compelling interest" in enforcing the law reflected the "actual burden" on their First Amendment rights. *Ctr. for Competitive Politics*, 784 F.3d at 1312, 1314.

B. The District Court Did Not Abuse its Discretion by Enjoining Public Disclosure of the Plaintiffs' Schedule B Forms.

The plaintiffs have raised serious questions, however, as to whether Schedule B forms collected by the state could be available for public inspection under California law, notwithstanding the Attorney General's good faith policy to the contrary. We are not convinced the evidence offered by either plaintiff sufficiently establishes that such public disclosure would result in First Amendment harm. Nevertheless, under our narrow and deferential review at this stage in the proceedings, and given the Attorney General's own position that Schedule B forms should not be publicly disclosed, we need not hold that the district court abused its discretion to the extent it preliminarily enjoined public disclosure pending trial.

This court's earlier dictum that "it appears doubtful" the Attorney General would be compelled to make Schedule B information publicly available focused on the California Public Records Act (CPRA). *See Ctr. for Competitive Politics*, 784 F.3d at 1316 n.9. CPRA allows the public to request certain records except those, as relevant here, "the disclosure of which is exempted or prohibited pursuant to federal or state law." *See* Cal. Gov't Code § 6254(k). The Attorney General argues that because 26 U.S.C. § 6103 and 26 U.S.C. § 6104 prevent *the IRS* from disclosing Schedule B forms to the public, she too is prohibited from disclosing Schedule B forms "pursuant to federal . . . law." But § 6103 prevents disclosure of return information filed directly with the IRS; it does not prevent state officials from publicly

disclosing return information collected by the state directly from taxpayers. *See Stokwitz v. United States*, 831 F.2d 893, 894 (9th Cir. 1987). The same is likely true of § 6104. *See Ctr. for Competitive Politics*, 784 F.3d at 1319. It is therefore unclear whether the Attorney General could avoid disclosing Schedule B forms under Government Code § 6254(k) based on § 6103 or § 6104.

Even if the Attorney General is not required to publicly disclose Schedule B forms under CPRA, *Center for Competitive Politics* did not address the independent public inspection requirement under the Charitable Purposes Act, which provides that filings in the Registry of Charitable Trusts "shall be open to public inspection" subject to "reasonable *rules and regulations* adopted by the Attorney General." Cal. Gov't Code § 12590 (emphasis added). Although the Attorney General has proposed a regulation limiting public inspection of Schedule B forms, no such rule or regulation is currently in force. The Charitable Purposes Act might require public inspection under these circumstances.

The plaintiffs therefore have raised serious questions as to whether the Attorney General's current policy actually prevents public disclosure. Because the Attorney General agrees with the plaintiffs that Schedule B information should not be publicly disclosed, and because she is in the process of promulgating a regulation prohibiting such public disclosure, a preliminary injunction prohibiting public disclosure of donor information promotes, rather than undermines, the state's policy. It serves the interests of the state by allowing it to resist efforts to compel public disclosure pending formal adoption

of a regulation to accomplish the plaintiffs' and the state's shared objective of preventing disclosure to the public. As a preliminary injunction of this nature would further the state's public policy as well as allay the concerns of the plaintiffs, there is no harm in allowing that aspect of the injunction that serves to prevent public disclosure to remain in effect on a temporary basis.

In the absence of harm to the state, the plaintiffs or the public from a modified injunction, we decline to use our appellate authority to hold that the district court abused its discretion with respect to that part of the injunction that helps enforce the state's public policy.

III.

An injunction properly tailored to the plaintiffs' concerns would address the risk of public disclosure by enjoining the Attorney General and her agents from making Schedule B information public, pending a decision on the merits of the plaintiffs' as-applied challenges. The plaintiffs have not, however, shown they are entitled to an injunction preventing the Attorney General from demanding their Schedule B forms, enforcing that demand, and using the forms to enforce California law.

We therefore vacate the district court's orders granting preliminary injunctions and instruct the district court to enter new orders preliminarily enjoining the Attorney General only from making Schedule B information public. The injunctions may not preclude the Attorney General from obtaining and using Schedule B forms for enforcement purposes. The district court shall permit the parties to address

whether the injunctions should include exceptions to the bar against public disclosure, such as those enumerated in the Attorney General's proposed regulation. Each party shall bear its own costs on appeal.

ORDERS VACATED.

Counsel

Kamala D. Harris, Attorney General of California, Douglas J. Woods, Senior Assistant Attorney General, Sacramento, California; Tamar Pachter, Supervising Deputy Attorney General, Emmanuelle S. Soichet, Deputy Attorney General, Alexandra Robert Gordon (argued), Deputy Attorney General, San Francisco, California; Kim L. Nguyen (argued), Deputy Attorney General, Los Angeles, California, for defendant-appellant.

Harold A. Barza and Carolyn Homer Thomas, Quinn Emanuel Urquhart & Sullivan, LLP, Los Angeles, California; Derek L. Shaffer (argued), William A. Burck, Jonathan G. Cooper and Crystal R. Nwaneri, Quinn Emanuel Urquhart & Sullivan, LLP, Washington, D.C., for plaintiff-appellee Americans for Prosperity Foundation.

Louis H. Castoria (argued) and Sheila M. Pham, Kaufman Dolowich & Voluck, LLP, San Francisco, California, for plaintiff-appellee Thomas More Law Center.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS MORE LAW CENTER, Plaintiff, v. KAMALA HARRIS, in her Official Capacity as Attorney General of California, Defendant.	CASE NO. 2:15-cv-3048-R ORDER ISSUING PRELIMINARY INJUNCTION

This Court previously granted Plaintiff Thomas More Law Center ("Plaintiff" or "Law Center")'s Temporary Restraining Order enjoining Defendant Kamala Harris ("Defendant" or "Harris") and those in concert from demanding or taking any action to implement or enforce her demand for, the names and addresses of the Law Center's donors, particularly as contained in Schedule B to IRS Form 990, and from taking the other adverse actions threatened in her March 24, 2015, letter, or otherwise. (Dkt. No. 13). A hearing on an order to show cause why a preliminary injunction should not issue was set for Monday May 11, 2015. (*Id.*). The Parties having briefed the motion thoroughly, this Court took the matter under submission on May 8, 2015. (Dkt. No. 20).

"[S]ervice of process is the means by which a court asserts its jurisdiction over [a] person." *SEC v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007). "A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4." *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986).

Plaintiff timely served Defendant in this case both personally and by mail on May 6, 2015. Accordingly, any concerns regarding this Court's jurisdiction on this basis are also moot.

Defendant's contention that the TRO was facially defective is incorrect. Plaintiff notified the Registry of Charitable Trusts by sending a letter, via facsimile, to the facsimile number associated with the Registry. That letter informed Defendant of the nature and date of the application. Plaintiff clearly acted with intent to provide Defendant notice of the TRO; indeed, Defendant does not claim that she did not receive such notice. That such notice did not expressly inform Defendant of the 24 hour period to respond is irrelevant here, where Defendant, the Attorney General for the State of California, is not an unsophisticated party. Moreover, the Court waited *6 days*, well over the 24-hour limit, to issue its order granting the TRO application; however, even in that long period of time, Defendant never filed any opposition. Accordingly, the TRO was not facially defective.

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of

equities tips in his favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Preliminary injunctive relief is available if the party meets one of two tests: (1) a combination of probable success and the possibility of irreparable harm, or (2) the party raises serious questions and the balance of hardship tips in its favor. *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Id.* Under both formulations, however, the party must demonstrate a "fair chance of success on the merits" and a "significant threat of irreparable injury." *Id.*

The Ninth Circuit's recent decision in *Center for Competitive Politics v. Kamala Harris*, 2015 WL 1948168 (9th Cir. May 1, 2015) (hereinafter referred to as "*CCP*") impacts, but is not dispositive of, the current proceedings. In that case the Ninth Circuit recognized that exacting scrutiny applied to challenges to disclosure requirements under the First Amendment. The court there determined that a 501(c)(3) charity's facial challenge to the Attorney General's demand for donor information on the charity's Schedule B did not pass exacting scrutiny.

Importantly, here, Plaintiff is not simply advancing a facial challenge. Rather, the Law Center asserts both a facial *and* an as-applied challenge to Defendant's demand for donor names and addresses. Accordingly, the recent decision in *CCP* is not dispositive of the instant matter.

Plaintiff has, at the very least, raised serious questions going to the merits. In *CCP*, the Ninth Circuit noted that "there [was] no indication in the record that the Attorney General's disclosure requirement was adopted or [was] enforced in order to harass members of the registry in general or [the plaintiff] in particular." *CCP*, 2015 WL 1948168, at *3. By contrast, here the Law Center has posed questions challenging this very proposition: whether the groups Defendant is demanding donor information from are being particularly selected for such inquiries.

Additionally, the Law Center challenges the constitutionality of Defendant's request for donor information of citizens of states nationwide, not just those in California, based on the Law Center's specific donor base, 95% of which the Law Center has presented evidence demonstrating is comprised of non-California resident. Defendant's own website indicates that her purpose is to "protect charitable assets for their intended use and ensure that the charitable donations contributed by *Californians* are not misapplied and squandered through fraud or other means." *See* http://oag.ca.gov/charities (emphasis added). Thus, absent explanation, serious questions as to Defendant's exercise of jurisdiction over such individuals remain. Accordingly, at the very least Plaintiff has raised serious questions going to the merits of Plaintiff's as-applied challenge.

Moreover, in *CCP*, the Ninth Circuit recognized that "compelled disclosure, without any additional state action, can infringe on First Amendment rights when that disclosure leads to private discrimination against those whose identities are disclosed." *CCP*,

2015 WL 1948168, at *3. The Ninth Circuit also recognized that "[o]f course, compelled disclosure can also infringe First Amendment rights when the disclosure requirement is itself a form of harassment intended to chill protected expression." *Id.*

Crucial to the Ninth Circuit's decision to deny injunctive relief in *CCP* was the lack of evidence or argument proffered by the plaintiff in that case as to purported harassing and discriminating retaliation to donors as a result of disclosure. This is simply not the case here. In *CCP*, the Ninth Circuit was clear that the Plaintiff had not "claim[ed] and produce[d] no evidence to suggest that their significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirement." *CCP*, 2015 WL 1948168, at *6.

This is in stark contrast to the record now before the Court, which is replete with allegations and supporting evidence showing that persons associated with the Law Center have experienced threats, harassment, or other potentially chilling conduct. Plaintiff has alleged and provided evidence demonstrating that the Law Center has been subjected to the sort of threats and harassment contemplated by the Ninth Circuit and by the United States Supreme Court in *NAACP v. Alabama*, 357 U.S. 449 (1958). (*See* Dkt. No. 19-2; *Id.* at Exs. L, M, N).

Any such harm resulting from disclosure of donor information would be irreparable here. The primary purpose of a preliminary injunction is to preserve the status quo. *See Chalk v. United States*

District Court, 840 F.2d 701, 704 (9th Cir. 1988). Information, however, once disclosed cannot so easily be retracted. Accordingly, once donor names and addresses are disseminated, the harm resultant therefrom would be irreparable and impossible to undo.

In sum, the Law Center has proffered sufficient evidence of retaliatory injury to its donors to warrant issuance of a preliminary junction at this point.

Regarding the balancing of the hardships, Defendant has, for well over a decade, sufficiently performed her function in maintaining the Registry and enforcing its governing laws without need for the now sought Schedule B information. Accordingly, there can be little burden to her by not obtaining it now. By contrast, as explained, dissemination of donor information could have a very negative, and lasting, effect on the Law Center's contributors.

Finally, the Ninth Circuit has "consistently recognized" that there is a "significant public interest in upholding First Amendment principles. *Thalheimer*, 645 F.3d at 1129 (9th Cir. 2011)(citation omitted). Here absent injunctive relief the Law Center would be compelled to comply with Defendant's request, and risk infringing its and its donors' First Amendment rights via exposing them to the harassing, discriminatory, and potentially chilling reactions as explained, or be forced to face revocation of its status and imposition of other draconian sanctions, including imposition of the fees on the Law Center's directors, trustees, officers and return preparers personally. Accordingly, the public interest favors issuance of an injunction here.

In sum, all factors support issuance of an injunction here. First, Plaintiff has, at the very least, raised serious questions as to the merits of its as-applied challenge. Second, the harassing and discriminatory harm likely to flow absent relief is inherently irreparable. Third, the balance of the equities tips sharply in favor of injunctive relief owing to Defendant's successful function for over a decade without the now sought information. Fourth, the public interest heavily favors protection of the Plaintiff's and its donors' First Amendment rights. Accordingly, injunctive relief is proper here.

IT IS HEREBY ORDERED that a preliminary injunction is ISSUED that Defendant and those in concert with Defendant are restrained from demanding, or taking any action to implement or enforce Defendant's demand for, the names and addresses of Plaintiff's donors, particularly as contained in Schedule B to IRS Form 990, and from taking the other adverse actions threatened in Defendant's March 24, 2015, letter.

Dated: May 19, 2015

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THOMAS MORE LAW CENTER, Plaintiff, v. KAMALA HARRIS, in her Official Capacity as Attorney General of California, Defendant.	)	CASE NO. 2:15-cv-3048-R ORDER GRANTING PLAINTIFF'S APPLICATION FOR TEMPORARY PROTECTIVE ORDER

Before the Court is Plaintiff Thomas More Law Center ("Plaintiff" or "Law Center")'s Application for Temporary Restraining Order ("TRO"). (Dkt. No. 10). Plaintiff is seeking a TRO to enjoin Defendant Kamala Harris ("Defendant" or "Harris") from demanding, or from enforcing her demand for a list of the Law Center's donors' names and addresses, particularly as contained in Schedule B to IRS Form 990. Plaintiff also requests this Court to issue an Order to Show Cause why a preliminary injunction should not issue after the TRO expires and to continue prohibiting Harris and those in concert from demanding or taking any action to implement or enforce her demand for, the names and addresses of the Law Center's donors, particularly as contained in Schedule B to IRS Form 990, and from taking the

other adverse actions threatened in her March 24, 2015, letter, or otherwise.

District Courts have the power to issue a temporary restraining order to preserve the status quo while it decides whether or not to grant injunctive relief. *See*, *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947). The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction. *See Dumas v. Gommerman*, 865 F.2d 1093, 1095 (9th Cir. 1989). To obtain preliminary injunctive relief, a plaintiff must show that he is likely to succeed on the merits, he is likely to suffer irreparable harm, the balance of the equities tips in the plaintiff's favor, and an injunction is in the public interest. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

"In this *circuit* there are two interrelated legal tests for the issuance of a preliminary injunction. These tests are "not separate" but rather represent 'the outer reaches 'of a single continuum.' . . . At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. . . . At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor. . . . '[T]he relative hardship to the parties' is the 'critical element' in deciding at which point along the continuum a stay is justified. . . . In addition, in cases such as the one before us, the public interest is a factor to be strongly considered. . . ." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir. 1983) (citations omitted).

Instructive here are two related cases, *Center for Competitive Politics v. Harris*, No. 14-15978 (9th Cir.) (hereinafter, "*CCP*") and *Americans for Prosperity Foundation v. Kamala Harris*, No. 14-09448 (C.D. Cal. 2014) (hereinafter, "*Americans*"). In both cases a plaintiff 501(c)(3) organization challenged Defendant's demand for their donors' names and addresses as contained in the plaintiff's Form 990 Schedule B. The plaintiffs in those cases made such challenges based on First Amendment and preemption grounds.

On January 6, 2015, the Ninth Circuit issued an injunction pending appeal in *CCP*. That injunction prohibits the Attorney General from taking "any action against the Center for Competitive Politics for failure to file an un-redacted IRS Form 990 Schedule B pending further order of this court." *CCP*, No. 14-5978, Dkt. 34 (9th Cir. Jan. 6, 2015). The Ninth Circuit issued such injunction following the Attorney General's letter to that plaintiff threatening to fine the Center's employees and suspend its registration if it did not hand over its Schedule B. An almost identical letter was sent to Plaintiff's in this case.

"In deciding whether to issue a stay pending appeal, the court considers '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Humane Soc'y of U.S. v. Gutierrez*, 523 F. 3d 990 (9th Cir. 2008). Thus, the four factor test for evaluating a preliminary injunction

pending appeal appears to be identical to that for a preliminary injunction or TRO.

Plaintiff has, at the very least, raised serious questions going to the merits. In a First Amendment case, once any necessary prima facie showing has been made, the burden shifts and a defendant must demonstrate the existence of both a "compelling" state interest exists and "a substantial relationship between the information sought and [that] overriding and compelling state interest." *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 92 (1982). The Ninth Circuit's recent grant of a preliminary injunction pending appeal in *CCP* strongly suggests that Plaintiff, whose claims are all but identical to those of the plaintiff in that case, either has a strong likelihood of prevailing or has raised serious questions going to the merits. Moreover, the Ninth Circuit issued the injunction following Defendant's letter threatening sanctions against the *CCP* plaintiff. Defendant has made identical threats here. Accordingly, whether because it raised serious questions as to the merits or demonstrated a likelihood of success, the Ninth Circuit's issuance of a preliminary injunction pending appeal in *CCP*, a case almost identical to that before the Court governs that the Law Center's application for preliminary appeal should be granted.

Additionally, Plaintiff here challenges the constitutionality of Harris' request for donor information of citizens of states nationwide, not just those in California. As Defendant seeks information outside her jurisdiction, Plaintiff has sufficiently raised serious questions as to whether Defendant is entitled to such information. Even if jurisdiction did

exist, Plaintiff has further raised sufficient questions as to the supposed need for such information. Thus, this factor weighs heavily in favor of granting the application for TRO.

Just as in CCP and *Americans*, Plaintiff here is likely to suffer irreparable harm if a TRO is not granted enjoining Defendant from taking the drastic actions threatened. Disclosure of donor name and address information would be harmful and could not be remedied once the information was disseminated. Such donors would be open to negative retaliation for their support of Plaintiff and Plaintiff's causes, which would result in a chilling effect on free speech and freedom of association. Accordingly, this factor weighs heavily in favor of granting a TRO.

Once again, just as in the other nearly identical cases, Defendant has operated for well over a decade without the donor name and address information now sought. No explanation has been given as to why the continued absence of such information would now constitute a drastic burden. By contrast, as explained, dissemination of donor information could have a very negative, and lasting, effect on the Law Center's contributors and result in the chilling of First Amendment rights. Accordingly, this factor also weighs heavily in favor of granting a TRO.

Finally, the Ninth Circuit has "'consistently recognized'" that there is a "'significant public interest in upholding First Amendment principles.'" *Thalheime v. City of San Diego*, 645 F.3d 1109, 1129 (9th Cir. 2011) (quoting *Sammartano v. First Judicial Dist. Court, in and for Cnty of Carson City*, 303 F. 3d 959, 974 (9th Cir. 2002)). Here absent a TRO the Law

Center would be compelled to comply with Defendant's request, risking disclosure of donor information and jeopardizing their First Amendment rights via exposing them to negative and potentially chilling reaction, the public interest heavily favors issuance of a TRO.

For all these reasons, a TRO is proper here, where Plaintiff has, at the very least raised serious questions as to the merits, shown irreparable harm is likely, and demonstrated that both the balance of hardships and public interest sharply favor granting Plaintiff's application for a TRO.

IT IS HEREBY ORDERED that Plaintiff's Application for Temporary Restraining Order (Dkt. No. 10) is GRANTED. Under this temporary restraining order, Defendant and those in concert with Defendant are restrained from demanding, or taking any action to implement or enforce Defendant's demand for, the names and addresses of Plaintiff's donors, particularly as contained in Schedule B to IRS Form 990, and from taking the other adverse actions threatened in Defendant's March 24, 2015, letter. The Court hereby sets an **Order to Show Cause as to why a preliminary injunction should not issue on the same bases on May 11, 2015 at 10:00 a.m.** Any opposition is due on or before May 4, 2015. Any reply to such opposition will be due on or before May 6, 2015. All hard copies of papers are to be delivered to chambers the following morning no later than 9:00 AM PST. The temporary restraining order will remain in effect until the hearing on the Preliminary Injunction.

Dated: April 29, 2015.

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellee*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellant*.	No. 16-55727 D.C. No. 2:14-cv-09448-R-FFM
AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellant*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellee*.	No. 16-55786 D.C. No. 2:14-cv-09448-R-FFM

THOMAS MORE LAW CENTER, *Plaintiff-Appellee*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellant*.	No. 16-56855 D.C. No. 2:15-cv-03048-R-FFM
THOMAS MORE LAW CENTER, *Plaintiff-Appellant*, v. XAVIER BECERRA, in his Official Capacity as Attorney General of the State of California, *Defendant-Appellee*.	No. 16-56902 D.C. No. 2:15-cv-03048-R-FFM ORDER DENYING PETITIONS FOR REHEARING EN BANC

Filed March 29, 2019

Before: Raymond C. Fisher, Richard A. Paez, and Jacqueline H. Nguyen, Circuit Judges.

Order;
Dissent by Judge Ikuta;
Reply to Dissent by Judges Fisher, Paez, and Nguyen

SUMMARY*

Civil Rights

The panel denied petitions for rehearing en banc on behalf of the court.

In its opinion, the panel held that California Attorney General's Service Form 990, Schedule B requirement, which obligates charities to submit the information they file each year with the Internal Revenue Service pertaining to their largest contributors, survived exacting scrutiny as applied to the plaintiffs because it was substantially related to an important state interest in policing charitable fraud.

Dissenting from the denial of rehearing en banc, Judge Ikuta, joined by Judges Callahan, Bea, Bennett and R. Nelson, stated that the panel's reversal of the district court's decision was based on appellate factfinding and was contrary to the reasoning and spirit of decades of Supreme Court jurisprudence, which affords substantial protections to persons whose associational freedoms are threatened. Judge Ikuta wrote that under the panel's analysis, the government can put the First Amendment associational rights of members and contributors at risk for a list of names it does not need, so long as it promises to do better in the future to avoid public disclosure of the names. Judge Ikuta

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

wrote that given the inability of governments to keep data secure, the panel's standard puts anyone with controversial views at risk.

Responding to the dissent from the denial of rehearing en banc, Judge Fisher, Paez and Nguyen stated that the panel's decision to apply exacting scrutiny was consistent with Supreme Court precedent, Ninth Circuit precedent, and out-of-circuit precedent. The panel noted that the two circuits that have addressed the issue both have held that exacting, rather than strict scrutiny apply and that the nonpublic Schedule B reporting requirements satisfy the First Amendment because they allow state and federal regulators to protect the public from charitable fraud without subjecting major contributors to the threats, harassment or reprisals that could flow from public disclosure.

ORDER

Judge Paez and Judge Nguyen have voted to deny the petitions for rehearing en banc and Judge Fisher has so recommended.

The full court was advised of the petitions for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing en banc (Nos. 16-55727 and 16-55786, filed September 25, 2018 - Dkt.

106; and Nos. 16-56855 and 16-56902, filed September 26, 2018 - Dkt. 67) are **DENIED**.

IKUTA, Circuit Judge, with whom CALLAHAN, BEA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from denial of rehearing en banc:

Controversial groups often face threats, public hostility, and economic reprisals if the government compels the organization to disclose its membership and contributor lists. The Supreme Court has long recognized this danger and held that such compelled disclosures can violate the First Amendment right to association. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

For this reason, the Supreme Court has given significant protection to individuals who may be victimized by compelled disclosure of their affiliations. Where government action subjects persons to harassment and threats of bodily harm, economic reprisal, or "other manifestations of public hostility," *NAACP v. Alabama*, 357 U.S. at 462, the government must demonstrate a compelling interest, *id.* at 463; *Bates v. Little Rock*, 361 U.S. 516, 524 (1960), there must be a substantial relationship between the information sought and the compelling state interest, *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963), and the state regulation must "be narrowly drawn to prevent the supposed evil," *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961) (internal quotation marks omitted) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940)).

This robust protection of First Amendment free association rights was desperately needed here. In this case, California demanded that organizations that were highly controversial due to their conservative positions disclose most of their donors, even though, as the district court found, the state did not really need this information to accomplish its goals. Although the state is required to keep donor names private, the district court found that the state's promise of confidentiality was illusory; the state's database was vulnerable to hacking and scores of donor names were repeatedly released to the public, even up to the week before trial. *See Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016). Moreover, as the district court found, supporters whose affiliation had previously been disclosed experienced harassment and abuse. *See id.* at 1055–56. Their names and addresses, and even the addresses of their children's schools, were posted online along with threats of violence. Some donors' businesses were boycotted. In one incident, a rally of the plaintiff's supporters was stormed by assailants wielding knives and box cutters, who tore down the rally's tent while the plaintiff's supporters struggled to avoid being trapped beneath it. In light of the powerful evidence at trial, the district court held the organizations and their donors were entitled to First Amendment protection under the principles of *NAACP v. Alabama*. *See id.* at 1055.

The panel's reversal of the district court's decision was based on appellate factfinding and crucial legal errors. First, the panel ignored the district court's factfinding, holding against all evidence that the donors' names would not be made

public and that the donors would not be harassed. *See Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000, 1017, 1019 (9th Cir. 2018) ("*AFPF II*"). Second, the panel declined to apply *NAACP v. Alabama*, even though the facts squarely called for it. *See id.* at 1008–09. Instead, the panel applied a lower form of scrutiny adopted by the Supreme Court for the unique electoral context. *See Buckley v. Valeo*, 424 U.S. 1, 64, 68 (1976). The panel's approach will ensure that individuals affiliated with controversial organizations effectively have little or no protection from compelled disclosure. We should have taken this case en banc to correct this error and bring our case law in line with Supreme Court jurisprudence.

I

The Supreme Court has established a clear test for cases like this one. While the Court has modified the test to fit different contexts, it has not wavered from the principle that the First Amendment affords organizations and individuals substantial protection when the government tries to force disclosure of ties that could impact their freedom of association.

A

The Supreme Court decisions protecting against forced disclosures that threaten individuals' freedom of association arose in a series of cases involving the NAACP. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449; *Bates*, 361 U.S. 516; *Gremillion*, 366 U.S. 293; *Gibson*, 372 U.S. 539. The Court considered numerous attempts by states to compel disclosure of NAACP membership information at a time when those members faced a well-known risk of "economic reprisal, loss of employment, threat of physical

coercion, and other manifestations of public hostility." *NAACP v. Alabama*, 357 U.S. at 462; *see also Gremillion*, 366 U.S. at 295–96; *Bates*, 361 U.S. at 523–24.

In this broader context, the Court recognized that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as more direct restrictions on speech. *NAACP v. Alabama*, 357 U.S. at 462. "[F]reedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States . . . not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates*, 361 U.S. at 523 (citations omitted).

Because state disclosure requirements can abridge First Amendment associational rights, the Court held such requirements were subject to heightened scrutiny. Once a plaintiff carries the burden of showing that a state-required disclosure may result "in reprisals against and hostility to the members," *Gremillion*, 366 U.S. at 296, the state has to show: (1) a sufficiently compelling interest for requiring disclosure, *see NAACP v. Alabama*, 357 U.S. at 462–63; (2) that the means were substantially related to that interest, *Gibson*, 372 U.S. at 549; and (3) that the means were narrowly tailored, *Gremillion*, 366 U.S. at 296. While the Supreme Court has articulated this three-part test in various ways, it has made clear that the test affords substantial protection to persons whose associational freedoms are threatened.

B

The Court modified the *NAACP v. Alabama* test for application in the electoral context. *See Buckley*, 424 U.S. at 64, 68. *Buckley* recognized the importance of applying "[t]he strict test established by *NAACP v. Alabama* . . . because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights," but it adjusted the test for government action that affects elections when the plaintiffs could not establish that disclosure would subject them to threats or harassment. *Id.* at 66. It makes sense to adapt the *NAACP v. Alabama* test for the electoral context, where the government's interest is uniquely important. Influence in elections may result in influence in government decisionmaking and the use of political power; therefore, the government's crucial interest in avoiding the potential for corruption and hidden leverage outweighs incidental infringement on First Amendment rights. *Id.* at 66–68, 71. The interests served by disclosure outside the electoral context, such as policing types of charitable fraud, pale in comparison to the crucial importance of ensuring our election system is free from corruption or its appearance.

Given the unique electoral context, *Buckley* held that, for the first prong, the governmental interest must be "sufficiently important to outweigh the possibility of infringement" of First Amendment rights; the government did not need to show a compelling government interest. *Id.* at 66. For the second prong, it still held there must be a "substantial relation between the governmental interest and the information required to be disclosed." *Id.* at 64

(footnote and internal quotation marks omitted) (quoting *Gibson*, 372 U.S. at 547).

As to the third prong of the test, *Buckley* fashioned a per se rule: it deemed the disclosure requirement to be "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. *Buckley* based this conclusion on its recognition that Congress always has a substantial interest in combating voter ignorance by providing the electorate with information about the sources and recipients of funds used in political campaigns in order to deter actual corruption and avoid the appearance of corruption, and in gathering data necessary to detect violations of separate political contribution limits. *Id.* at 66–68. Because, "in most applications," disclosure is "the least restrictive means of curbing the evils of campaign ignorance and corruption," the narrow tailoring prong of the *NAACP v. Alabama* test is satisfied. *Id.* at 68.

Recognizing the distinction between elections and other justifications for disclosure, the Supreme Court has applied *Buckley*'s test only in cases that involve election-related disclosures, a context in which the Supreme Court has already established that disclosure is the least restrictive means of reaching Congress's goals. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186, 196–97 (2010); *Citizens United v. FEC*, 558 U.S. 310, 369–70 (2010). These cases did not discuss whether disclosure was narrowly tailored to address the government's concern; *Buckley* already held that it is. For example, *Doe v. Reed* recognized the government's interest in "preserving the integrity of the electoral process" and "promoting transparency

and accountability in the electoral process," and thus there was no need to discuss narrow tailoring. 561 U.S. at 197–98. The Court likewise did not focus on the narrow tailoring requirement in *Citizens United*, noting *Buckley*'s holdings that "disclosure could be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending," and that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." 558 U.S. at 367, 369 (quoting *Buckley*, 424 U.S. at 66).

The Court's limited application of the *Buckley* test, confined to cases in the electoral context in which the government's aim is to serve goals like "transparency and accountability," has not displaced the stringent standard set out in *NAACP v. Alabama*. Indeed, the *NAACP v. Alabama* standard was likely not triggered in the election cases, given that they did not involve evidence that compelled disclosure would give rise to public hostility to the plaintiff's members or donors. The Court has maintained *NAACP v. Alabama*'s standard outside of the electoral context, thus reasserting the validity of that standard after *Buckley*. *See, e.g.*, *In re Primus*, 436 U.S. 412, 432 (1978) (holding that where a state seeks to infringe upon a party's First Amendment freedom of association, the state must justify that infringement with "a subordinating interest which is compelling" and must use means that are "closely drawn to avoid unnecessary abridgment of associational freedoms") (first quoting *Bates*, 361 U.S. at 524; then quoting *Buckley*, 424 U.S. at 25); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (holding that infringement of the right to associate "may be

justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"). Thus, there is no doubt that the *NAACP v. Alabama* test—requiring a compelling government interest, a substantial relation between the sought disclosure and that interest, and narrow tailoring so the disclosure does not infringe on First Amendment rights more than necessary—remains applicable for cases arising outside of the electoral context, where a plaintiff needs its crucial protection against forced disclosures that threaten critical associational rights.

C

Until recently, the circuit courts, including the Ninth Circuit, have agreed that *NAACP v. Alabama* is still good law, and they have applied it when considering state action that has the effect of burdening individuals' First Amendment rights by requiring disclosure of associational information.[1]1 In

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[1] *See, e.g.*, *United States v. Comley*, 890 F.2d 539, 543–44 (1st Cir. 1989) ("Once [a prima facie showing of First Amendment infringement] is made, the burden then shifts to the government to show both a compelling need for the material sought and that there is no significantly less restrictive alternative for obtaining the information."); *Wilson v. Stocker*, 819 F.2d 943, 949 (10th Cir. 1987) ("The law must be substantially related to a compelling governmental interest, and must be narrowly drawn so as to be the least restrictive means of protecting that interest."); *Humphreys, Hutcheson, & Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985) (upholding the challenged provisions in part because they "are carefully tailored so that first amendment freedoms are not needlessly curtailed"); *Clark v. Library of Cong.*, 750 F.2d 89, 94 (D.C. Cir. 1984) ("[T]he government must demonstrate that the means chosen to further its compelling

Familias Unidas v. Briscoe, for instance, the Fifth Circuit struck down a Texas statute that empowered a county judge to compel public disclosure of the names of organizations that interfered with the operation of public schools. 619 F.2d 391, 394 (5th Cir. 1980). In that case, the judge had compelled disclosure of the names of Mexican-American students and adults who were members of a group seeking reform of the Hondo public schools. The Fifth Circuit recognized that the Supreme Court had upheld compulsory disclosures of membership lists only when the underlying state interest is compelling and legitimate, and the disclosure requirement is "drawn with sufficiently narrow specificity to avoid impinging more broadly upon First Amendment liberties than is absolutely necessary." *Id.* at 399 (citing *Buckley*, 424 U.S. at 68).

Our cases have likewise remained faithful to *NAACP v. Alabama*. For example, *Brock v. Local 375, Plumbers International Union of America* recognized that once a plaintiff shows that disclosure will result in "harassment, membership withdrawal, or discouragement of new members," or otherwise chill

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interest are those least restrictive of freedom of belief and association."); *Master Printers of Am. v. Donovan*, 751 F.2d 700, 705 (4th Cir. 1984) ("To survive the 'exacting scrutiny' required by the Supreme Court, . . . the government must show that the disclosure and reporting requirements are justified by a compelling government interest, and that the legislation is narrowly tailored to serve that interest."); *see also Perry v. Schwarzenegger*, 591 F.3d 1147, 1159–61 (9th Cir. 2010); *Dole v. Serv. Emps. Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1461 (9th Cir. 1991); *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 350 (9th Cir. 1988).

associational rights, heightened scrutiny applies: the government must demonstrate that the information sought "is rationally related to a compelling governmental interest," and that the disclosure requirement is the least restrictive means of obtaining that information. 860 F.2d 346, 350 (9th Cir. 1988) (citing *Buckley*, 424 U.S. at 64, 68; *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). We reaffirmed this approach in *Perry v. Schwarzenegger*, where we emphasized that "[i]nfringements on [the freedom to associate] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." 591 F.3d 1147, 1159 (9th Cir. 2010) (quoting *Roberts*, 468 U.S. at 623).[2]

In recent years, a few outliers have emerged and broken from the uniform application of *NAACP v. Alabama* when considering challenges to government-required disclosure. We applied *Buckley*, rather than *NAACP v. Alabama*, in two cases involving state disclosure requirements outside the electoral context. *See Ams. for Prosperity Found. v. Harris*, 809 F.3d 536, 538–39 (9th Cir. 2015) (per curiam) ("*AFPF I*"); *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1312–14 (9th Cir. 2015) ("*CCP*"). The Second Circuit has also recently applied *Buckley*'s test—without a narrow tailoring requirement—to a challenge to a government

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[2] Although these cases cite both to *Buckley* and to cases setting out the *NAACP v. Alabama* test, see, e.g., *Brock*, 860 F.2d at 350, they remain faithful to the principles of *NAACP v. Alabama* by applying its heightened scrutiny and requiring narrow tailoring.

disclosure requirement outside of the electoral context. *See Citizens United v. Schneiderman*, 882 F.3d 374, 382, 385 (2d Cir. 2018). But none of these outliers offered a convincing rationale for extending *Buckley* outside of the electoral context. Equally important, none addressed a situation in which a plaintiff showed a reasonable probability of threats or hostility in the event of disclosure, *see Schneiderman*, 882 F.3d at 385; *AFPF I*, 809 F.3d at 541; *CCP*, 784 F.3d at 1314, which is a threshold requirement for the application of *NAACP v. Alabama*'s test. Accordingly, these cases do not bear on whether *NAACP v. Alabama*'s standard must be applied when a plaintiff does make such a showing, regardless whether the application of *Buckley* is appropriate outside of the electoral context.

II

The facts of this case make clear that the Foundation is entitled to First Amendment protection under *NAACP v. Alabama* and that California's disclosure requirement cannot be constitutionally applied to the Foundation.

The Americans for Prosperity Foundation is a conservative organization dedicated to "educating and training citizens to be advocates for freedom."[3] It develops educational programs to "share knowledge and tools that encourage participants to apply the

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[3] *Ams. for Prosperity Found.*, http://americansforprosperityfoundation.org (last visited March 11, 2019).

principles of a free and open society in their daily lives."[4]4

People publicly affiliated with the Foundation have often faced harassment, hostility, and violence, as shown by the evidence adduced at trial in this case. For example, supporters have received threatening messages and packages, had their addresses and children's school addresses posted online in an effort to intimidate them, and received death threats. One blogger posted a message stating he contemplated assassinating a Foundation supporter: "I'm a trained killer, you know, courtesy of U.S. taxpayers, and it would be easy as pie to . . . take [him] out." In the same vein, a consultant working for the Foundation posted threats of physical violence against Foundation employees. On a different blog site, a person claiming that he worked at the Foundation posted that he was "inside the belly of the beast," and could "easily walk in and slit [the Foundation CEO's] throat."

Foundation supporters have also been subjected to violence, not just threats. For instance, at a rally in Michigan, several hundred protestors wielding knives and box cutters surrounded the Foundation's tent and sawed at the tent ropes until they were severed. Foundation supporters were caught under the tent when it collapsed, including elderly supporters who could not get out on their own. At least one supporter was punched by the protestors.

Opponents of the Foundation have also targeted its supporters with economic reprisal. For instance, after an article published by *Mother Jones*

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[4] *Id.*

magazine in February 2013 revealed donor information, protesters called for boycotts of the businesses run by six individuals mentioned in the article. Similarly, Art Pope, who served on the Foundation's board of directors, suffered boycotts of his business.

Given this history of harassment, the Foundation was reluctant to make information about its donors public. This concern became acute in 2010, when California suddenly decided to enforce a long dormant disclosure law.

California law requires any entity that wishes to register as a charitable organization to submit a multitude of tax forms to the state. *See* Cal. Code Regs. tit. 11, § 301. Among other requirements, California requires charitable organizations to file a confidential federal tax form, Schedule B to IRS Form 990, which contains the names and addresses of any donors who meet certain criteria. *See id.*; 26 U.S.C. § 6033(b); 26 C.F.R. § 1.6033-2(a)(2)(iii)(a). Under its regulations, California may release Schedule B only in response to a search warrant or as needed in an enforcement proceeding brought against a charity by the Attorney General. *See* Cal. Code Regs. tit. 11, § 310(b). But as discussed below, the state's confidential information is so vulnerable to hacks and inadvertent disclosure that Schedule B information is effectively available for the taking.

In light of the Foundation's confidentiality concerns, from 2001 to 2010, it registered as a charity in California without submitting the donor

information its Schedule B contains.[5] Over that entire period, California did not request the Foundation's Schedule B or list the Foundation's registration as a charity as deficient in any way. *See AFPF II*, 903 F.3d at 1006–07.

In 2010, California suddenly increased its efforts to collect charities' Schedule Bs, and in 2013 the state notified the Foundation that its registration was deficient because it had not submitted Schedule B donor information. *See id.* at 1006. In an effort to protect its donors from likely threats and hostility as backlash for their affiliation with the Foundation, it filed suit seeking to enjoin California from enforcing this requirement against it.

After a multi-day trial, the district court ruled that the First Amendment protects the Foundation from forced disclosure of its donor information,[6] and it entered a permanent injunction against California's enforcement of the Schedule B requirement as applied to the Foundation. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1059.

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[5] The Foundation's Schedule B includes the names and addresses of any person who donated more than 2 percent of the Foundation's annual contributions. *See* 26 C.F.R. § 1.6033-2(a)(2)(iii)(a).

[6] The district court initially entered a preliminary injunction against California's enforcement against the Foundation. *See AFPF II*, 903 F.3d at 1006. A panel of our court reversed in part on the ground that the Foundation had not shown evidence of past hostility toward Foundation donors or a reasonable probability of future hostility. *See AFPF I*, 809 F.3d at 539–41. On remand, the Foundation presented evidence of both. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d 1049.

III

The panel reversed, holding that California's interest in Schedule B information was "sufficiently important" and that there was a substantial relation between the requirement and the state's interest. *AFPF II*, 903 F.3d at 1008 (quoting *Doe*, 561 U.S. at 196). In reaching this conclusion, the panel made crucial factual and legal errors.

The panel's legal error is evident. Although this case arose outside of the election context, and the Foundation established that its members might be exposed to harassment and abuse if their identities were made public, the panel mistakenly applied *Buckley*'s "exacting scrutiny" and rejected the Foundation's argument that a narrow tailoring requirement applied in this context. *See AFPF II*, 903 F.3d at 1008–09.

The panel's factual errors are equally egregious. As a general rule, appellate courts may not override the facts found by a district court unless they are clearly erroneous. In our circuit, "we will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc). Here, the panel not only failed to defer to the district court, but reached factual conclusions that were unsupported by the record.

First, the district court held that disclosure of the Schedule B information to the state could result in the names of the Foundation's donors being released to the public. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1057. The district court squarely

rejected the state's argument that no donor information disclosed to the state would be *publicly* disclosed because it would remain confidential on the state's servers. *See id*. The evidence produced at trial in this case provided overwhelming support for the court's findings. There was ample evidence of human error in the operation of the state's system. State employees were shown to have an established history of disclosing confidential information inadvertently, usually by incorrectly uploading confidential documents to the state website such that they were publicly posted. Such mistakes resulted in the public posting of around 1,800 confidential Schedule Bs, left clickable for anyone who stumbled upon them. *AFPF II*, 903 F.3d at 1018. And the public did find them. For instance, in 2012 Planned Parenthood become aware that a complete Schedule B for Planned Parenthood Affiliates of California, Inc., for the 2009 fiscal year was publicly posted; the document included the names and addresses of hundreds of donors.

There was also substantial evidence that California's computerized registry of charitable corporations was shown to be an open door for hackers. In preparation for trial, the plaintiff asked its expert to test the security of the registry. He was readily able to access every confidential document in the registry—more than 350,000 confidential documents—merely by changing a single digit at the end of the website's URL. *See AFPF II*, 903 F.3d at 1018. When the plaintiff alerted California to this vulnerability, its experts tried to fix this hole in its system. Yet when the expert used the exact same method the week before trial to test the registry, he

was able to find 40 more Schedule Bs that should have been confidential.

In rejecting the district court's factual conclusions, the panel violated our standard of review as well as common sense. The panel concluded that in the future, all Schedule B information would be kept confidential. It reasoned that because the state technician was able to fix the security vulnerability exposed by the Foundation's expert, "[t]here is no evidence to suggest that this type of error is likely to recur." *Id.* at 1018. The panel did not address the fact that even a week before trial, the state could not prevent a second disclosure based on the same security vulnerability. Further, the panel claimed that despite the state's long history of inadvertent disclosure of Schedule B information through human error, the state's new efforts to correct human errors through additional "procedural quality checks" and "a system of text-searching batch uploads before they are scanned to the Registry site to ensure none contains Schedule B keywords" would obviate future disclosures. *Id.* But no evidence supports this claim, and it is contrary to any real-world experience.

Second, the district court found that the state did not have a strong interest in obtaining the Schedule B submissions to further its enforcement goals. Instead, it held that California's up-front Schedule B submission requirement "demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years." *Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1055. Indeed, California could not point to "even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the

Attorney General's investigative, regulatory or enforcement efforts." *Id.* The panel rejected this well-supported finding based solely on the conclusory, blanket assertions made by state witnesses that up-front disclosure of donor names increases "investigative efficiency." *AFPF II*, 903 F.3d at 1010. Yet the Supreme Court has made clear that a state's "mere assertion" that there was a substantial relationship between the disclosure requirement and the state's goals is not enough to establish such a relationship. *See Bates*, 361 U.S. at 525; *Gibson*, 372 U.S. at 554–55. And the record does not otherwise support the panel's conclusion.

Finally, the district court found ample evidence that Foundation supporters would likely be subject to threats or hostility should their affiliations be disclosed. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1055–56. But based on its unsupported assumption that public disclosure would not occur, the panel felt justified in disregarding this well-supported conclusion. *AFPF II*, 903 F.3d at 1017.

Given the panel's erroneous factual determinations that there would be no public disclosure of Foundation donors and that California's disclosure requirement was substantially related to its enforcement goals, and its mistaken legal decision that no narrow tailoring was required, it is not surprising that the panel easily arrived at the conclusion that the donors were not entitled to any protection of their First Amendment rights.

IV

But contrary to the panel, the full protection of *NAACP v. Alabama* was warranted in this case,

because the Foundation's donors may be exposed to harassment and abuse if their identities are disclosed, and the special considerations regarding government-required disclosures for elections are not present. *See*, *e.g.*, *Primus*, 436 U.S. at 432; *Brock*, 860 F.2d at 350. Had the panel properly recognized *NAACP v. Alabama*'s applicability, it would have considered (1) whether California presented a compelling interest that is (2) substantially related to the disclosure requirement, and (3) whether the requirement was narrowly tailored to the articulated interest. *See* 357 U.S. at 462–63; *Gibson*, 372 U.S. at 546; *Gremillion*, 366 U.S. at 297.

Applying the correct test, it is clear that California failed to show that its Schedule B disclosure requirement is "substantially related" to any interest in policing charitable fraud. A state's "mere assertion" that there was a substantial relationship between the disclosure requirement and the state's goals is not enough to establish such a relationship, *see Bates*, 361 U.S. at 525; *Gibson*, 372 U.S. at 554–55, and the district court's well-supported factual findings establish that the Schedule Bs are rarely used to detect fraud or to enhance enforcement efforts.

Nor is California's disclosure requirement narrowly tailored; rather, the means "broadly stifle fundamental personal liberties" and "the end can be more narrowly achieved." *Gremillion*, 366 U.S. at 296 (quoting *Shelton*, 364 U.S. at 488). The state requires blanket Schedule B disclosure from every registered charity when few are ever investigated, and less restrictive and more tailored means for the Attorney General to obtain the desired information are readily

available. In particular, the Registry can obtain an organization's Schedule B through a subpoena or a request in an audit letter once an investigation is underway without any harm to the government's interest in policing charitable fraud. Moreover, the state failed to provide any example of an investigation obscured by a charity's evasive activity after receipt of an audit letter or subpoena requesting a Schedule B, although state witnesses made assertions to that effect. *See AFPF II*, 903 F.3d at 1010–11. The panel's erroneous application of *Buckley* led it to ignore this requirement completely, and it demanded no explanation from California for why such a sweeping disclosure requirement—imposed before the state has any reason to investigate a charity—is justified given equally effective, less restrictive means exist. *See id.* at 1011–12.

Accordingly, under the proper application of the test to the facts found by the district court, the Foundation was entitled to First Amendment protection of its donor lists. Because California failed to show a substantial relation between its articulated interest and its disclosure requirement, and because it failed to show that the requirement was narrowly tailored, California's Schedule B disclosure requirement fails the test provided by *NAACP v. Alabama*, and it should have been struck down as applied to the Foundation.

The panel's contrary conclusion eviscerates the First Amendment protections long-established by the Supreme Court. By applying *Buckley* where *NAACP v. Alabama*'s higher standard should have been triggered, the panel lowered the bar governments must surmount to force disclosure of sensitive

associational ties. Under the panel's standard, a state's self-serving assertions about efficient law enforcement are enough to justify disclosures notwithstanding the threats, hostility, and economic reprisals against socially disfavored groups that may ensue. And by rejecting the district court's factual findings that disclosed donor lists will become public and expose individuals to real threats of harm, the panel imposes a next-to-impossible evidentiary burden on plaintiffs seeking protection of their associational rights. Indeed, if the Foundation's evidence is not enough to show that California cannot adequately secure its information, no plaintiff will be able to overcome a state's empty assurances. "The possibility of prevailing in an as-applied challenge provides adequate protection for First Amendment rights only if . . . the showing necessary to obtain the exemption is not overly burdensome." *Doe*, 561 U.S. at 203 (Alito, J., concurring).

V

In short, the panel's conclusion is contrary to the reasoning and spirit of decades of Supreme Court jurisprudence. Under the panel's analysis, the government can put the First Amendment associational rights of members and contributors at risk for a list of names it does not need, so long as it promises to do better in the future to avoid public disclosure of the names. Given the inability of governments to keep data secure, this standard puts anyone with controversial views at risk. We should have reheard this case en banc to reaffirm the vitality of *NAACP v. Alabama*'s protective doctrine, and to clarify that *Buckley*'s watered-down standard has no place outside of the electoral context.

The First Amendment freedom to associate is vital to a functioning civil society. For groups with "dissident beliefs," it is fragile. The Supreme Court has recognized this time and time again, but the panel decision strips these groups of First Amendment protection. I dissent from our decision not to correct this error.

FISHER, PAEZ and NGUYEN, Circuit Judges, responding to the dissent from the denial of rehearing en banc:

The State of California, like the federal government, requires tax-exempt § 501(c)(3) organizations to file annual returns with regulators charged with protecting the public against charitable fraud. Among other things, these organizations are required to report the names and addresses of their largest contributors on IRS Form 990, Schedule B. The information is provided to regulators, who use it to prevent charitable fraud, but it is *not* made public. Both circuits to consider the question have concluded that First Amendment challenges to these requirements are subject to exacting, rather than strict, scrutiny, and both circuits have held that these requirements satisfy exacting scrutiny. *See Ams. for Prosperity Found. v. Becerra* (*AFPF II*), 903 F.3d 1000 (9th Cir. 2018); *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018); *Ams. for Prosperity Found. v. Harris* (*AFPF I*), 809 F.3d 536 (9th Cir. 2015); *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir.), *cert. denied*, 136 S. Ct. 480 (2015). As these courts have recognized, requiring the *nonpublic*

disclosure of Schedule B information comports with the freedom of association protected by the First Amendment because it allows state and federal regulators to protect the public from fraud without exposing contributors to the threats, harassment or reprisals that might follow *public* disclosure.

I

Organizations operated exclusively for religious, charitable, scientific or educational purposes are eligible for an exemption from federal and state taxes under § 501(c)(3) of the Internal Revenue Code and § 23701 of the California Revenue & Tax Code. Organizations avail themselves of this status to avoid taxes and collect tax-deductible contributions.

Because this favored tax treatment presents opportunities for self-dealing, fraud and abuse, organizations availing themselves of § 501(c)(3) status are subject to federal and state oversight. Congress has required every organization exempt from taxation under § 503(c)(3) to file an annual information return (Form 990 series) with the Internal Revenue Service, setting forth detailed information on its income, expenditures, assets and liabilities, including, as relevant here, "the total of the contributions and gifts received by it during the year, and the names and addresses of all substantial contributors." 26 U.S.C. § 6033(b)(5). Organizations such as plaintiffs Americans for Prosperity Foundation and Thomas More Law Center are required to report the name and address of any person who contributed the greater of $5,000 or 2 percent of the organization's total contributions for the year. *See*

26 C.F.R. § 1.6033-2(a)(2)(iii)(a). An organization with $10 million in annual revenue, for example, must report contributors who have given in excess of $200,000 for the year. Between 2010 and 2015, the Thomas More Law Center was required to report no more than seven contributors; Americans for Prosperity Foundation was required to report no more than 10 contributors — those contributing over $250,000. Organizations report this information on IRS Form 990, Schedule B.

This information is reported not only to the IRS but also to state regulators. California's Supervision of Trustees and Charitable Trusts Act requires the Attorney General to maintain a registry of charitable organizations and authorizes the Attorney General to obtain "whatever information, copies of instruments, reports, and records are needed" for the registry's "establishment and maintenance." Cal. Gov't Code § 12584. To solicit tax-deductible contributions from California residents, an organization must maintain membership in the registry, *see id.* § 12585, and as one condition of registry membership, charities must submit a complete copy of the IRS Form 990 they already file with the IRS, including Schedule B, *see* Cal. Code Regs. tit. 11, § 301.

This contributor information is *not* made public. *See* 26 U.S.C. § 6104(d)(1)(A)(i), (3)(A); Cal. Gov't Code § 12590; Cal. Code Regs. tit. 11, § 310. The California Attorney General keeps Schedule Bs in a separate file from other submissions to the registry and excludes them from public inspection on the registry website. *See AFPF II*, 903 F.3d at 1005. Only information that does not identify a contributor is available for public inspection.

II

Some § 501(c)(3) organizations object to the Schedule B reporting requirement. They argue that by submitting their Schedule B information to regulators, they expose their major contributors to threats, harassment and reprisals — from those regulators and from the public — which in turn discourages contributions. They argue, therefore, that this requirement violates the freedom of association protected by the First Amendment.

The two federal appellate courts to have addressed the issue, ours and the Second Circuit, have rejected these claims. *See AFPF II*, 903 F.3d 1000; *Schneiderman*, 882 F.3d 374; *AFPF I*, 809 F.3d 536; *Ctr. for Competitive Politics*, 784 F.3d 1307. These courts have agreed that exacting rather than strict scrutiny applies, *see AFPF II*, 903 F.3d at 1008; *Schneiderman*, 882 F.3d at 381–82; *AFPF I*, 809 F.3d at 541; *Ctr. for Competitive Politics*, 784 F.3d at 1312, and that the Schedule B requirement survives exacting scrutiny, because the requirement serves an important governmental interest in preventing charitable fraud without imposing a substantial burden on the exercise of First Amendment rights.

The dissent from the denial of rehearing en banc challenges these decisions, arguing that a form of strict scrutiny applies and that California's Schedule B requirement is unconstitutional. In our view, the dissent's arguments are not well taken.

III

The bulk of the dissent is devoted to the argument that we erred by applying exacting

scrutiny. According to the dissent, First Amendment challenges to disclosure requirements are subject to two different tests:

1. In the electoral context, "exacting scrutiny" applies. This "standard requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Doe v. Reed*, 561 U.S. 186, 196 (2010) (citations and internal quotation marks omitted).

2. Outside the electoral context, "heightened scrutiny" applies. This standard requires (1) a "compelling interest," (2) "a substantial relationship between the information sought and the compelling state interest" and (3) narrow tailoring. Dissent at 5. The dissent refers to this strict-scrutiny-like test as "heightened scrutiny" or the "*NAACP v. Alabama* test."

This case does not arise in the electoral context. Hence, according to the dissent, we should have applied the dissent's proposed "heightened scrutiny" test rather than exacting scrutiny. Had we done so, the dissent says, we would have invalidated California's Schedule B requirement.

We respectfully disagree with the dissent's contention that First Amendment challenges to disclosure requirements are subject to two different tests. In our view, there is only a single test —

exacting scrutiny — that applies both within and without the electoral context. This test originated in *NAACP v. Alabama*, 357 U.S. 449 (1958), and the other Civil Rights Era cases — *Bates v. City of Little Rock*, 361 U.S. 516 (1960), *Shelton v. Tucker*, 364 U.S. 479 (1960), *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) — and has been applied more recently in *Buckley v. Valeo*, 424 U.S. 1 (1976), *Doe* and other cases arising in the electoral context. As *Doe* explains, the exacting scrutiny test:

> requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest. To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.

561 U.S. at 196 (citations and internal quotation marks omitted).

Whereas strict scrutiny requires a compelling interest and narrow tailoring in every case, the interest and tailoring required under exacting scrutiny varies from case to case, depending on the actual burden on First Amendment rights at stake: the governmental interest must be "*sufficiently* important" to justify the "*actual burden* on First Amendment rights" in the case at hand. *Id.* (emphasis added). Thus, where the burden that a disclosure requirement places on First Amendment rights is great, the interest and the fit must be as well. *See, e.g.*, *Buckley*, 424 U.S. at 25 ("Even a *significant*

interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." (emphasis added) (internal quotation marks omitted)); *Gibson*, 372 U.S. at 546 ("Where there is a *significant* encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (emphasis added) (quoting *Bates*, 361 U.S. at 524)); *Gremillion*, 366 U.S. at 296 ("[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that *broadly* stifle fundamental personal liberties when the end can be more narrowly achieved." (emphasis added) (quoting *Shelton*, 364 U.S. at 488)); *Shelton*, 364 U.S. at 488 (same); *Bates*, 361 U.S. at 524 ("Where there is a *significant* encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." (emphasis added) (citing *NAACP v. Alabama*, 357 U.S. 449)); *see also* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. Rev. 207, 210 (2016). But where, as here, the actual burden is slight, a weaker interest and a looser fit will suffice.

The dissent's contention that there are two different tests is based on the premise that *NAACP v. Alabama* applied something other than exacting scrutiny. We are not persuaded. First, the Supreme Court has already told us that *NAACP v. Alabama* applied exacting scrutiny: "Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny." *Buckley*,

424 U.S. at 64. Second, there is simply no way to read *NAACP v. Alabama* as applying anything other than the exacting scrutiny test described in *Doe*. The only question the Court decided in *NAACP v. Alabama* was whether the state had "demonstrated an interest in obtaining the disclosures it seeks from petitioner which is *sufficient to justify the deterrent effect* which we have concluded these disclosures may well have on the free exercise by petitioner's members of their constitutionally protected right of association." *NAACP v. Alabama*, 357 U.S. at 463 (emphasis added). The disclosure requirement failed solely because "Alabama has fallen short of showing a controlling justification for the deterrent effect on the free enjoyment of the right to associate which disclosure of membership lists is likely to have." *Id.* at 466. There is no light between the test applied in *NAACP v. Alabama* and the one described in *Doe*.

In sum, we properly applied exacting scrutiny.

IV

The dissent also challenges our conclusion that California's Schedule B requirement survives exacting scrutiny. As noted, a disclosure requirement withstands scrutiny under this test if the strength of the governmental interest reflects the seriousness of the actual burden on First Amendment rights. *See Doe*, 561 U.S. at 196. Here, the state's strong interest in collecting Schedule B information justifies the modest burden that nonpublic disclosure places on the exercise of First Amendment rights.

A. *Strength of the Governmental Interest*

With respect to the state's interest in collecting Schedule B information, the evidence was undisputed that the state uses Schedule B information to investigate charitable fraud. *See AFPF II*, 903 F.3d at 1011. "Current and former members of the Charitable Trusts Section, for example, testified that they found the Schedule B particularly useful in several investigations over the past few years, and provided examples. They were able to use Schedule B information to trace money used for improper purposes in connection with a charity serving animals after Hurricane Katrina; to identify a charity's founder as its principal contributor, indicating he was using the research charity as a pass-through; to identify self-dealing in that same charity; to track a for-profit corporation's use of a non-profit organization as an improper vessel for gain; and to investigate a cancer charity's gift-in-kind fraud." *Id.* Circuits have consistently recognized the strength of this interest. *See*, *e.g.*, *Schneiderman*, 882 F.3d at 384; *Ctr. for Competitive Politics*, 784 F.3d at 1311, 1317.

The evidence also was undisputed that up-front collection of Schedule B information provides the only effective means of obtaining the information. State regulators testified that attempting to obtain a Schedule B from a regulated entity *after* an investigation begins is ineffective "[b]ecause it's time-consuming, and you are tipping the charity off that they are about to be audited." *AFPF II*, 903 F.3d at 1010. Using a subpoena or audit letter "would tip them off to our investigation, which would allow them potentially to dissipate more assets or hide assets or destroy documents, which certainly happened several times; or it just allows more damage to be done to [the]

charity." *Id.*; *accord Ctr. for Competitive Politics*, 784 F.3d at 1317.

Although the district court questioned the strength of the governmental interest, it did so by applying an erroneous legal standard, requiring the state to establish that up-front collection of Schedule B information was the least restrictive means of obtaining the information, *see Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1053–55 (C.D. Cal. 2016), and that it would be impossible for the state to regulate charitable organizations without collecting Schedule B information, *see Thomas More Law Ctr. v. Harris*, No. CV 15-3048-R, 2016 WL 6781090, at *2 (C.D. Cal. Nov. 16, 2016). By applying the wrong legal standard, the district court abused its discretion, *see United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (en banc), and disregarded a previous ruling by this court in this very case, *see AFPF I*, 809 F.3d at 541 (rejecting a least restrictive means test).

B. *Actual Burden on First Amendment Rights*

To determine the actual burden on First Amendment rights, we looked at two questions: (1) the likelihood that the plaintiffs' Schedule B contributors would face threats, harassment or reprisals *if* their Schedule B information were made public and (2) the likelihood that the information would become public. *See AFPF II*, 903 F.3d at 1015.

We ultimately declined to reach any conclusion with respect to the first question. *See id.* at 1017. The evidence on that question was mixed. Neither plaintiff, for example, identified a single contributor

who would withhold financial support based on the plaintiffs' compliance with California's Schedule B disclosure requirement. *See id.* at 1014. The Thomas More Law Center, moreover, has consistently *over*-reported contributor information on its Schedule B filings, undermining its contention that reporting deters contributions. *See id.* Furthermore, many of the plaintiffs' Schedule B contributors are already publicly known. Private foundations, for example, are required by law to publicly disclose their contributions to the plaintiffs. *See id.* at 1015. Other Schedule B contributors — such as Charles and David Koch — are already publicly identified with the plaintiffs. In addition, although the evidence showed that individuals who are associated with the plaintiffs, such as the Koch brothers, have faced threats or harassment based on their controversial activities, the plaintiffs "presented little evidence bearing on whether harassment has occurred, or is likely to occur, simply because an individual or entity provided a large financial contribution to the Foundation or the Law Center." *Id.* at 1016 & n.6. In 2013, the National Journal published copies of the Foundation's Schedule Bs, but the Foundation presented no evidence that contributors suffered retaliation as a result. *See id.* at 1017.

Ultimately, because California, like the federal government and other states, requires only the *nonpublic* disclosure of Schedule B information, we did not need to decide whether, *in the event of public disclosure of the Schedule B information*, the plaintiffs' Schedule B contributors were likely to encounter threats, harassment or reprisals. *See id.* at 1017. We acknowledged the risk of inadvertent public

disclosure based on past confidentiality lapses by the state. *See id.* at 1018. We explained, however, that "[t]he state's past confidentiality lapses [were] of two varieties: first, human error when Registry staff miscoded Schedule B forms during uploading; and second, a software vulnerability that failed to block access to a plaintiff's expert as he probed the Registry's servers for flaws during this litigation." *Id.* at 1018. We explained that the software problem stemmed from a third-party vendor, had been "quickly remedied" and was not "likely to recur." *Id.* With respect to the problem of human error, we explained that

> the Registry Unit has implemented stronger protocols to prevent human error. It has implemented "procedural quality checks . . . to sample work as it [is] being performed" and to ensure it is "in accordance with procedures on handling documents and [indexing them] prior to uploading." It has further implemented a system of text-searching batch uploads before they are scanned to the Registry site to ensure none contains Schedule B keywords. At the time of trial in 2016, the Registry Unit had halted batch uploads altogether in favor of loading each document individually, as it was refining the text-search system. After forms are loaded to the Registry, the Charitable Trusts Section runs an automated weekly script to identify and remove any documents that it had inadvertently misclassified as public.

> There is also no dispute that the Registry Unit immediately removes any information that an organization identifies as having been misclassified for public access.

Id. There was no evidence that these "cybersecurity protocols are deficient or substandard as compared to either the industry or the IRS, which maintains the same confidential information." *Id.* at 1019.

We also emphasized that we were addressing an *as-applied* challenge. *See id.* The key question, therefore, was not whether there was a "risk of inadvertent disclosure of *any* Schedule B information in the future," but rather whether there was a significant "risk of inadvertent disclosure of *the plaintiffs'* Schedule B information in particular." *Id.* There can be no question that this risk — which the district court failed to consider — is exceedingly small, so the plaintiffs did not show "a reasonable probability that the compelled disclosure of [their major] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. The state's interest in obtaining the plaintiffs' Schedule B information therefore was sufficient under *Doe* to justify the modest burden on First Amendment rights. *See AFPF II*, 903 F.3d at 1019.

V

Our colleagues sensibly declined to rehear this case en banc. Our decision to apply exacting scrutiny is consistent with Supreme Court precedent, *see Doe*, 561 U.S. at 196; *Buckley*, 424 U.S. at 64, *NAACP v.*

Alabama, 357 U.S. at 463, Ninth Circuit precedent, *see Ctr. for Competitive Politics*, 784 F.3d at 1312–13, and out-of-circuit precedent, *see Schneiderman*, 882 F.3d at 381–82. Likewise, our conclusion that the Schedule B reporting requirement survives exacting scrutiny is consistent with both Ninth Circuit and out-of-circuit precedent. *See Schneiderman*, 882 F.3d at 383–85; *Ctr. for Competitive Politics*, 784 F.3d at 1312–17. Although only two circuits have addressed the issue, they have uniformly held that nonpublic Schedule B reporting requirements satisfy the First Amendment because they allow state and federal regulators to protect the public from charitable fraud *without* subjecting major contributors to the threats, harassment or reprisals that could flow from public disclosure.

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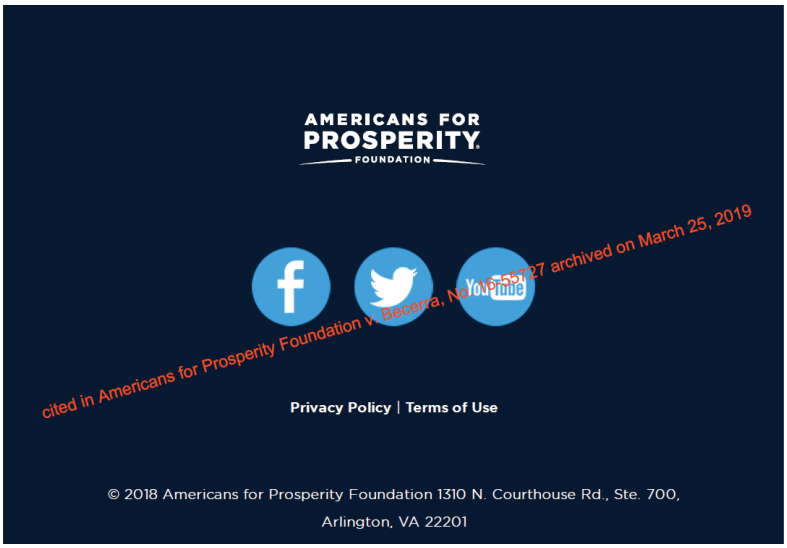


NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION, *Plaintiff-Appellee*, v. KAMALA D. HARRIS, Attorney General, in her Official Capacity as Attorney General of California, *Defendant-Appellant*.	No. 15-55446 D.C. No.2:14-cv-09448-R-FFM Central District of California, Los Angeles ORDER
THOMAS MORE LAW CENTER, *Plaintiff-Appellee*, v. KAMALA D. HARRIS, Attorney General, in her Official Capacity, *Defendant-Appellant*.	No. 15-55911 D.C. No. 2:15-cv-03048-R-FFM Central District of California, Los Angeles

Before: REINHARDT, FISHER and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Nguyen have voted to deny the petition for rehearing en banc, and Judge Fisher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for panel rehearing and rehearing en banc, filed January 11, 2016, is **DENIED**.

Cal. Gov. Code § 12585
Filing of initial registration form; registration of trustee

(a) Every charitable corporation, unincorporated association, and trustee subject to this article shall file with the Attorney General an initial registration form, under oath, setting forth information and attaching documents prescribed in accordance with rules and regulations of the Attorney General, within 30 days after the corporation, unincorporated association, or trustee initially receives property. A trustee is not required to register as long as the charitable interest in a trust is a future interest, but shall do so within 30 days after any charitable interest in a trust becomes a present interest.

(b) The Attorney General shall adopt rules and regulations as to the contents of the initial registration form and the manner of executing and filing that document or documents.

Cal. Gov. Code § 12586
Filing of additional reports as to nature of assets held and administration thereof; rules and regulations; time for filing; additional requirements concerning preparation of annual financial statements and auditing

(a) Except as otherwise provided and except corporate trustees which are subject to the jurisdiction of the Commissioner of Financial Institutions of the State of California under Division 1 (commencing with Section 99) of the Financial Code or to the Comptroller of the Currency of the United States, every charitable corporation, unincorporated association, and trustee subject to this article shall, in addition to filing copies of the instruments previously required, file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation, unincorporated association, or trustee, in accordance with rules and regulations of the Attorney General.

(b) The Attorney General shall make rules and regulations as to the time for filing reports, the contents thereof, and the manner of executing and filing them. The Attorney General may classify trusts and other relationships concerning property held for a charitable purpose as to purpose, nature of assets, duration of the trust or other relationship, amount of assets, amounts to be devoted to charitable purposes, nature of trustee, or otherwise, and may establish different rules for the different classes as to time and nature of the reports required to the ends (1) that he

or she shall receive reasonably current, periodic reports as to all charitable trusts or other relationships of a similar nature, which will enable him or her to ascertain whether they are being properly administered, and (2) that periodic reports shall not unreasonably add to the expense of the administration of charitable trusts and similar relationships. The Attorney General may suspend the filing of reports as to a particular charitable trust or relationship for a reasonable, specifically designated time upon written application of the trustee filed with the Attorney General and after the Attorney General has filed in the register of charitable trusts a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports are not required for proper supervision by his or her office.

* * * * *

Cal. Gov. Code § 12590
Public inspection of register and reports

Subject to reasonable rules and regulations adopted by the Attorney General, the register, copies of instruments, and the reports filed with the Attorney General shall be open to public inspection. The Attorney General shall withhold from public inspection any instrument so filed whose content is not exclusively for charitable purposes.

Cal. Code of Regulations § 300
Initial Registration

(a) Every charitable corporation, unincorporated association, trustee or other person subject to the registration requirements of that act entitled the "Supervision of Trustees and Fundraisers for Charitable Purposes Act" (Article 7, Chapter 6, Part 2, Division 3, Title 2, of the Government Code commencing with Section 12580, hereafter "Act") shall file with the Attorney General a copy of the articles of incorporation and bylaws, trust agreement, decree of distribution or other instrument governing its operation, as provided below. Filing of the Initial Registration Form, the supporting documents required by that form, and the required registration fee of $25 shall constitute the initial registration. Required information and supplemental documents identified in the Initial Registration Form that are not available at the time of filing of the form may be submitted within ninety (90) days of submittal of the form.

(b) An Initial Registration Form and supplemental documents identified in that form shall be submitted to the Registry of Charitable Trusts. The Initial Registration Form shall require the following:

* * * * *

(8) If the organization is based outside of California, comment fully on the extent of activities in California and how the California activities relate to total activities. In addition, list all funds, property, and other assets held or expected to be held in California. Indicate whether you are monitored in your home state and, if so, by whom;

Cal. Code of Regulations § 301
Periodic Written Reports

Except as otherwise provided in the Act, every charitable corporation, unincorporated association, trustee, or other person subject to the reporting requirements of the Act shall also file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by such corporation, unincorporated association, trustee, or other person. Except as otherwise provided in these regulations, these reports include the Annual Registration Renewal Fee Report, ("RRF-1" 08/2017), hereby incorporated by reference, which must be filed with the Registry of Charitable Trusts annually by all registered charities, as well as the Internal Revenue Service Form 990, which must be filed on an annual basis with the Registry of Charitable Trusts, as well as with the Internal Revenue Service. At the time of the annual renewal of registration filing the RRF-1, the registrant must submit a fee, as set forth in section 311.

A tax-exempt charitable organization which is allowed to file form 990-PF or 990-EZ with the Internal Revenue Service, may file that form with the Registry of Charitable Trusts in lieu of Form 990.

A charitable organization that is not exempt from taxation under federal law shall use Internal Revenue Service Form 990 to comply with the reporting provisions of the Supervision of Trustees and Fundraisers for Charitable Purposes Act. The form shall include, at the top of the page, in 10-point type,

all capital letters, "THIS ORGANIZATION IS NOT EXEMPT FROM TAXATION."

Registration requirements for commercial fundraisers for charitable purposes, fundraising counsel for charitable purposes, and commercial coventurers are set forth in section 308.

Cal. Code of Regulations § 303
Filing Forms

All periodic written reports required to be filed under the provisions of section 12586 of the Government Code and section 301 of these regulations shall be filed with the Registry of Charitable Trusts, and include: (1) the Annual Registration Renewal Fee Report ("RRF-1" 08/2017); and (2) Internal Revenue Service Form 990, 990-EZ or 990-PF, as applicable.

Cal. Code of Regulations § 305
Annual Filing of Reports

After the first periodic report is filed as required by section 304 of these regulations, periodic written reports shall thereafter be filed on an annual basis unless specifically required or permitted to be filed on other than an annual basis as set forth in these regulations, or when filing has been suspended by the Attorney General pursuant to Government Code section 12586. The time for filing any periodic report subsequent to the first periodic report shall be not later than four (4) months and fifteen (15) days following the close of each calendar or fiscal year subsequent to the filing of the first report, but in no event less than once annually, unless for good cause extension of such annual filing has been granted by the Attorney General, or otherwise excused. If the Internal Revenue Service grants an extension to file the Form 990, 990-PF or 990-EZ that extension will be honored by the Registry of Charitable Trusts for purposes of filing the Form 990, 990-PF or 990-EZ and the Annual Registration Renewal Fee Report ("RRF-1") with the Registry of Charitable Trusts. The RRF-1 and the Form 990, 990-PF or 990-EZ shall be filed simultaneously with the Registry of Charitable Trusts.

Cal. Code of Regulations § 306
Contents of Reports

(a) Periodic reports shall be submitted under oath and shall set forth in detail all of the information required by the applicable forms set forth in these regulations. Incomplete or incorrect reports will not be accepted as meeting the requirements of the law.

* * * * *

(c) When requested by the Attorney General any periodic report shall be supplemented to include such additional information as the Attorney General deems necessary to enable the Attorney General to ascertain whether the corporation, trust or other relationship is being properly administered.

Cal. Code of Regulations § 310
Public Inspection of Charitable Trust Records

(a) The register, copies of instruments and the reports filed with the Attorney General, except as provided in subdivision (b) and pursuant to Government Code section 12590, shall be open to public inspection at the Registry of Charitable Trusts in the office of the Attorney General, Sacramento, California, at such reasonable times as the Attorney General may determine. Such inspection shall at all times be subject to the control and supervision of an employee of the Office of the Attorney General.

(b) Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104 (d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows:

(1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or

(2) In response to a search warrant.

Cal. Code of Regulations § 315
Imposition of Penalty

(a) The Attorney General may assess a penalty pursuant to Government Code section 12591.1, not to exceed $1,000 for each act or omission that constitutes a violation. To assess a penalty, the Attorney General shall serve a written notice by certified mail that states the basis of the violation and the amount of the penalty.

* * * * *

(3) If the act or omission that constitutes a violation is ongoing, the notice may include a statement that penalties shall continue to accrue at a rate of $100 per day for each day until the violation is corrected. The notice shall advise the recipient how to correct the violation and how to inform the Attorney General that the violation has been corrected. When the Attorney General determines that the violation has been corrected, the Attorney General shall issue a written notice identifying the beginning and ending dates of the violation along with the total amount of the penalty.

* * * * *

Cal. Code of Regulations § 316
Suspension of Registration

(a) If the Attorney General assesses penalties under section 315, the Attorney General may suspend the registration of that person or entity in accordance with the procedures set forth in section 999.6 et seq. of Title 11 of the California Code of Regulations.

* * * * *

26 U.S.C. 6104
Publicity of information required from certain exempt organizations and certain trusts

* * * * *

(b) Inspection of annual returns.--The information required to be furnished by sections 6033, 6034, and 6058, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe. Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information.

* * * * *

(d) Public inspection of certain annual returns, reports, applications for exemption, and notices of status.--

* * * * *

(3) Exceptions from disclosure requirement.--

(A) Nondisclosure of contributors, etc.--In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization.

* * * * *

26 U.S.C. 7213
Unauthorized disclosure of information

(a) Returns and return information.--

(1) Federal employees and other persons.--It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

* * * * *

(3) Other persons.--It shall be unlawful for any person to whom any return or return information (as defined in section 6103(b)) is disclosed in a manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(4) Solicitation.--It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

* * * * *

26 U.S.C. 7213A
Unauthorized inspection of returns or return information

(a) Prohibitions.--

(1) Federal employees and other persons.--It shall be unlawful for--

(A) any officer or employee of the United States, or

(B) any person described in subsection (l)(18) or (n) of section 6103 or an officer or employee of any such person,

willfully to inspect, except as authorized in this title, any return or return information.

(2) State and other employees.--It shall be unlawful for any person (not described in paragraph (1)) willfully to inspect, except as authorized in this title, any return or return information acquired by such person or another

person under a provision of section 6103 referred to in section 7213(a)(2) or under section 6104(c).

(b) Penalty.--

(1) In general.--Any violation of subsection (a) shall be punishable upon conviction by a fine in any amount not exceeding $1,000, or imprisonment of not more than 1 year, or both, together with the costs of prosecution.

(2) Federal officers or employees.--An officer or employee of the United States who is convicted of any violation of subsection (a) shall, in addition to any other punishment, be dismissed from office or discharged from employment.

* * * * *

26 C.F.R. 1.6033-2
Returns by exempt organizations (taxable years beginning after December 31, 1969) and returns by certain nonexempt organizations (taxable years beginning after December 31, 1980)

(a) In general. * * *

(2)(ii) The information generally required to be furnished by an organization exempt under section 501(a) is:

* * * * *

(f) The total of the contributions, gifts, grants and similar amounts received by it during the taxable year, and the names and addresses of all persons

who contributed, bequeathed, or devised $5,000 or more (in money or other property) during the taxable year. In the case of a private foundation (as defined in section 509(a)), the names and addresses of all persons who became substantial contributors (as defined in section 507(d)(2)) during the taxable year shall be furnished. In addition, for its first taxable year beginning after December 31, 1969, each private foundation shall furnish the names and addresses of all persons who became substantial contributors before such taxable year. For special rules with respect to contributors and donors, see subdivision (iii) of this subparagraph.

* * * * *

(iii) Special rules. In providing the names and addresses of contributors and donors under subdivision (ii)(f) of this subparagraph:

(a) An organization described in section 501(c)(3) which meets the 33 ⅓ percent-of-support test of the regulations under section 170(b)(1)(A)(vi) (without regard to whether such organization otherwise qualifies as an organization described in section 170(b)(1)(A)) is required to provide the name and address of a person who contributed, bequeathed, or devised $5,000 or more during the year only if his amount is in excess of 2 percent of the total contributions, bequests and devises received by the organization during the year.

* * * * *

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF
JUSTICE

1300 I Street
P.O. Box 903447
Sacramento, CA 94203-4470
Telephone: (916) 445-2021
Fax: (916) 445-3651
E-Mail Address: RCT@doj.ca.gov

March 6, 2012

THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. BOX 393
ANN ARBOR MI 48106

CT FILE
NUMBER:
118144

RE: IRS Form 990, Schedule B, Schedule of Contributors

We have received the IRS Form 990, 990-EZ or 990-PF submitted by the above-named organization for filing with the Registry of Charitable Trusts (Registry) for the fiscal year ending 12/31/10. The filing is incomplete because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.

The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service. The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Within 30 days of the date of this letter, please submit a complete copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service. Please address all correspondence to the undersigned.

Sincerely,

Kim Lewin
Office Technician
Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

THOMAS MORE
Law Center

Richard Thompson
President and Chief Counsel
Admitted in Michigan

March 14, 2012

Kim Lewin, Office Technician
Registry of Charitable Trusts
1300 I Street
PO Box 903447
Sacramento, CA 94203-4470

Re: CT File Number 118144

Dear Ms. Lewin:

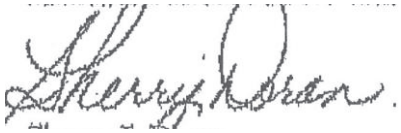
I am in receipt of your letter dated March 6, 2012 regarding Schedule B of the filed IRS 990 in the calendar year 2010 for the Thomas More Law Center.

To this date, Schedule B has never been included in any previous filing for the State of California. I respectfully request that you provide legal documentation of this new requirement.

Thank you for your attention and response to this matter.

Sincerely,

THOMAS MORE LAW CENTER



Sherry J. Doran
Assistant to the President

B U T Z E L L O N G
ATTORNEYS AND COUNSELORS
a professional corporation

Paul R. Fransway
734 248 3288
fransway@butzel.com

Stoneridge West Bldg.
41000 Woodward Ave.
Bloomfield Hills, MI 48304
T: 248 258 1616 F: 248 258 1439
Butzel.com

April 11, 2012

Via First Class Mail

Kim Lewin
Office Technician
Registry of Charitable Trusts
1300 I Street
P.O. Box 903477
Sacramento, CA 94203-4470

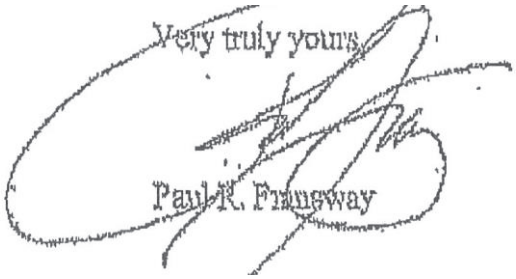
Re: Thomas More Law Center
CT File Number 118144

Dear Ms. Lewin,

We have been retained by the Thomas More Law Center of Ann Arbor, Michigan with regard to your request for Schedule B of Form 990. Please communicate with this office exclusively in the future regarding this request and issue.

Please provide the legal authority you reply upon in order to demand release of this schedule. As you know, this schedule contains confidential

information. As I am sure you are also aware, this schedule has not been routinely demanded from either the Thomas More Law Center or many of the tax exempt organizations filing Form 990 with your office.



PRF/ms

cc: Thomas More Law Center

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF
JUSTICE

1300 I Street
P.O. Box 903447
Sacramento, CA 94203-4470
Telephone: (916) 445-2021
Fax: (916) 445-3651
E-Mail Address: RCT@doj.ca.gov

April 19, 2013

THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. BOX 393
ANN ARBOR MI 48106

CT FILE
NUMBER:
118144

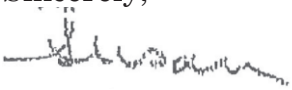
RE: IRS Form 990, Schedule B, Schedule of Contributors

We have received the IRS Form 990, 990-EZ or 990-PF submitted by the above-named organization for filing with the Registry of Charitable Trusts (Registry) for the fiscal year ending 12/31/11. The filing is incomplete because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.

The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service. The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Within 30 days of the date of this letter, please submit a complete copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service. Please address all correspondence to the undersigned.

Sincerely,



Office Technician
Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

THOMAS MORE
Law Center

Richard Thompson
President and Chief Counsel
Admitted in Michigan

April 24, 2013

Susan, Office Technician
Registry of Charitable Trusts
1300 I Street
PO Box 903447
Sacramento, CA 94203-4470

Re: CT File Number 118144

Dear Susan:

I am in receipt of your letter dated April 19, 2013 regarding Schedule B of the filed IRS 990 in the calendar year 2011 for the Thomas More Law Center.

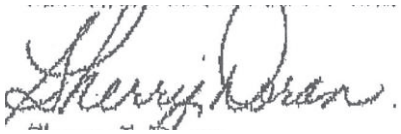
To this date, Schedule B has never been included in any previous filing for the State of California.

Thomas More Law Center retained Paul R. Fransway of Butzel Long, Attorneys and Counselors to assist in this matter in 2012. To the best of my knowledge, no response to his attached letter has been received.

As was previously requested, please communicate with his office exclusively in the future regarding this issue.

Sincerely,

THOMAS MORE LAW CENTER



Sherry J. Doran
Assistant to the President

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF
JUSTICE

1300 I Street
P.O. Box 903447
Sacramento, CA 94203-4470
Telephone: (916) 445-2021
Fax: (916) 445-3651
E-Mail Address: RCT@doj.ca.gov

October 22, 2013

THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. BOX 393
ANN ARBOR MI 48106

CT FILE
NUMBER:
118144

RE: IRS Form 990, Schedule B, Schedule of Contributors

We have received the IRS Form 990, 990-EZ or 990-PF submitted by the above-named organization for filing with the Registry of Charitable Trusts (Registry) for the fiscal years ending 12/31/2010, 12/31/2011, and 12/31/2012. The filing is incomplete because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.

The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service.

The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Within 30 days of the date of this letter, please submit a complete copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service. Please address all correspondence to the undersigned.

Sincerely,

Office Technician
Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

THOMAS MORE
Law Center

Richard Thompson
President and Chief Counsel
Admitted in Michigan

October 28, 2013

A.B., Office Technician
Registry of Charitable Trusts
1300 I Street
PO Box 903447
Sacramento, CA 94203-4470

Re: CT File Number 118144

Dear A.B.:

I am in receipt of your letter dated October 22, 2013 regarding Schedule B of the filed IRS 990 in the calendar years 2010, 2011 and 2012 for the Thomas More Law Center.

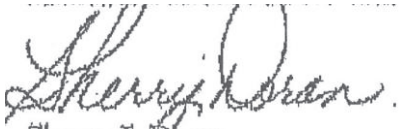
To this date, Schedule B has never been included in any previous filing for the State of California.

Thomas More Law Center retained Paul R. Fransway, Esq., to assist with this matter. Please contact him at BUTZEL LONG, 350 South Main Street, Suite 300, Ann Arbor, MI 48104. His phone number is 734-995-3110.

As was previously requested, please communicate with his office exclusively in the future regarding this issue.

Sincerely,

THOMAS MORE LAW CENTER



Sherry J. Doran
Assistant to the President

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF
JUSTICE

1300 I Street
P.O. Box 903447
Sacramento, CA 94203-4470
Telephone: (916) 445-2021
Fax: (916) 445-3651
E-Mail Address: RCT@doj.ca.gov

April 23, 2014

THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. BOX 393
ANN ARBOR MI 48106

CT FILE
NUMBER:
118144

RE: SECOND NOTICE; IRS Form 990, Schedule B, Schedule of Contributors

We have received the IRS Form 990, 990-EZ or 990-PF submitted by the above-named organization for filing with the Registry of Charitable Trusts (Registry) for the fiscal year ending 12/31/2010, 12/31/2011, and 12/31/2012. The filing is incomplete because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.

The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service.

The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Within 30 days of the date of this letter, please submit a complete copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service. Please address all correspondence to the undersigned.

Sincerely,

Office Technician
Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF
JUSTICE

1300 I Street
P.O. Box 903447
Sacramento, CA 94203-4470
Telephone: (916) 445-2021
Fax: (916) 445-3651
E-Mail Address: RCT@doj.ca.gov

October 31, 2014

THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. BOX 393
ANN ARBOR MI 48106

CT FILE
NUMBER:
118144

RE: IRS Form 990, Schedule B, Schedule of Contributors

We have received the IRS Form 990, 990-EZ or 990-PF submitted by the above-named organization for filing with the Registry of Charitable Trusts (Registry) for the fiscal year ending 12/31/2013, 12/31/2012, 12/31/2011, and 12/31/2010. The filing is incomplete because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.

The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service.

The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Within 30 days of the date of this letter, please submit a complete copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service. Please address all correspondence to the undersigned.

Sincerely,

Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF
JUSTICE

1300 I Street
P.O. Box 903447
Sacramento, CA 94203-4470
Telephone: (916) 445-2021
Fax: (916) 445-3651
E-Mail Address: Delinquency@doj.ca.gov

March 24, 2015

THOMAS MORE LAW CENTER
24 FRANK LLOYD WRIGHT DR.
P.O. BOX 393
ANN ARBOR MI 48106

CT FILE
NUMBER:
118144

RE: WARNING OF ASSESSMENT OF PENALTIES AND LATE FEES, AND SUSPENSION OR REVOCATION OF REGISTERED STATUS

The Registry of Charitable Trusts has not received annual report(s) for the captioned organization, as follows:

1. The IRS Form 990, 990-EZ or 990-PF submitted for the fiscal years ending 12/31/10, 12/31/11, 12/31/12, & 12/31/13 do not contain the copy of Schedule B, Schedule of Contributors, as required. The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document

filed by the organization with the Internal Revenue Service. The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Failure to timely file required reports violates Government Code section 12586.

Unless the above-described report(s) are filed with the Registry of Charitable Trusts within thirty (30) days of the date of this letter, the following will occur:

1. The California Franchise Tax Board will be notified to disallow the tax exemption of the above-named entity. The Franchise Tax Board may revoke the organization's tax exempt status at which point the organization will be treated as a taxable corporation (See Revenue and Taxation Code section 23703) and may be subject to the minimum tax penalty.
2. Late fees will be imposed by the Registry of Charitable Trusts for each month or partial month for which the report(s) are delinquent. Directors, trustees, officers and return preparers responsible for failure to timely file these reports are also personally liable for payment of all late fees.

   PLEASE NOTE: Charitable assets cannot be used to pay these avoidable costs. Accordingly, directors, trustees, officers and return preparers responsible for failure to timely file the above-described report(s) are personally liable for

payment of all penalties, interest and other costs incurred to restore exempt status.

3. In accordance with the provisions of Government Code section 12598, subdivision (e), the Attorney General will suspend the registration of the above-named entity.

   If you believe the above described report(s) were timely filed, they were not received by the Registry and another copy must be filed within thirty (30) days of the date of this letter. In addition, if the address of the above-named entity differs from that shown above, the current address must be provided to the Registry prior to or at the time the past-due reports are filed.

In order to avoid the above-described actions, please send all delinquent reports to the address set forth above, within thirty (30) days of the date of this letter.

Thank you for your attention to this correspondence.

Sincerely,

Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

Detailed instructions and forms for filing can be found on our website at http://ag.ca.gov/charities.

DICKINSON WRIGHT PLLC

350 S. MAIN STREET, SUITE 300
ANN ARBOR, MI 48104-2131
TELEPHONE: (734) 623-7075
FACSIMILE: (734) 623-1623
https://www.dickinsonwright.com

PAUL R. FRANSWAY
PFransway@dickinsonwright.com
(734) 623-1713

April 7, 2015

VIA E-MAIL (delinquency@doj.ca.gov) AND
OVERNIGHT DELIVERY

Kamala D. Harris
Attorney General
State of California
1300 I Street
P.O. Box 903447
Sacramento, CA 94203-4470

Re: Thomas More Law Center
CT File Number: 118144

Dear Ms. Harris:

As we have advised your office on a number of occasions, we represent the Thomas More Law Center with regard to the issue of your requirement to file

unredacted Schedule B as part of the filings of Annual Reports to the Registry of Charitable Trusts.

We have been provided with a copy of the Warning of Assessment of Penalties and Late Fees, and Suspension or Revocation of Registered Status based upon the assertion that failure to include Schedule B is a violation of Cal. Government Code section 12586 (enclosed). We are also aware of the pendency of two matters that arose from an identical demand made by your office where the courts involved have issued a preliminary injunction ordering your office not to take the adverse actions threatened for failure to file Schedule B, those being *Center for Competitive Politics v. Kamala Harris*, No. 2:14-cv-006360-MCE-DAD (E.D. Cal. 2014) (Court of Appeals Docket #14-15978) and *Americans for Prosperity Foundation v. Kamala Harris*, No. 2:14-cv-09448-R-FFM (C.D. Cal. 2014).

The cases cited above raise effectively identical legal and factual issues, especially since the asserted defects in filings and the proposed enforcement actions are identical. My client is prepared to comply with the law, but the unsettled nature of the law, the significant Constitutional questions involved and the irreparable harm that would occur if my client is required to provide Schedule B in advance of clarification of the law will force them to commence litigation to seek a preliminary injunction unless some understanding can be reached with your office. While the Law Center is prepared to litigate those issues if necessary, judicial economy and the proper use of resources of both the State of California and our client would appear to be best served by your office

and our client reaching an agreement under which your office would agree to defer any action on your proposed enforcement action until there is a resolution in the two matters cited where injunctions have been issued. Inasmuch as your threatened enforcement action required a response within 30 days, I ask that you contact me immediately so that we can reach some resolution on this issue that would obviate the need for yet another lawsuit raising identical issues.

Thank you for your attention to this matter.

PRF:ms
Enclosure
cc: Thomas More Law Center