Outline of Amicus Brief

I. An industry perspective on the charitable sector and donor privacy

A. Charitable solicitation and the building of a donor file are critical to the survival of our nation's nonprofit organizations and the success of their charitable, educational, or religious programs.

B. Charitable solicitation is fully protected speech under the First Amendment.

C. Charitable speech is highly regulated under the many states' schemes of prior restraint with significant filing burdens and costs.

D. California's compelled disclosure of confidential donor information is a step too far, violating the First Amendment rights of all charity registrants and their major donors.

II. This Court's precedents require strict scrutiny to analyze California's compelled disclosure of its major donors as a precondition to engaging in protected speech.

A. The Ninth Circuit erred in applying the wrong level of scrutiny to protected speech and association.

B. Both the *NAACP* line of cases and the *Riley* line of cases in the charitable speech and association contexts require strict scrutiny in this case.

III. California's compelled disclosure requirement fails strict scrutiny and is overly broad in its application to all charities; therefore, it is facially unconstitutional.

A. The disclosure requirement is overly broad such that in all its applications the statute creates an unnecessary risk of chilling free speech.

B. The compelled disclosure of charities' confidential donor information fails strict scrutiny and is facially overbroad because it risks the suppression of ideas and association in all possible applications.

C. California's compelled disclosure of major donors conflicts with industry best practices and a longstanding regulatory framework that protects donor privacy.

1. Charities, organizations that rate charities, and fundraising professionals have established best practices and rules providing for donor privacy and its protection.
2. Federal tax laws protects donor information from disclosure to the public and to the states.
3. States have successfully registered charities to solicit charitable contributions for decades without the need for donor disclosure.

IV. Effects on Industry

A. California demonstrably failed to protect the confidential donor information in its custody.

B. The threat of misuse looms larger when one considers the states have no routine need for information on individual donors in order to enforce their charitable solicitation laws.

C. Since California adopted this practice, two other states have followed; and doubtless more will follow suit, even though there is no need for such information.

INTEREST OF THE *AMICI CURIAE*[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

ARGUMENT

I. An industry perspective on the charitable sector and donor privacy

Charities are fundamental to American civic life and are stronger in America than in most nations.[2]

The nonprofit sector is essential to our national fabric—without it, who would feed the needy, aid the poor, enrich our arts and cultural lives, and lead our nation's churches, mosques, and synagogues?[3] Grounded in the constitutional principles of freedom of association, freedom of speech, and freedom of religion, charities provide necessary services to those in need that our governments and for-profit entities cannot. *Id.* at 2.

In 2016, the nonprofit sector contributed an estimated $1.047.2 trillion to the United States economy, comprising 5.6 percent of our nation's gross domestic product (GDP). *See The Nonprofit Sector in Brief 2019*, URBAN INSTITUTE, NATIONAL CENTER FOR NONPROFIT STATISTICS (June 4, 2020).[4] Charities recognized as exempt under section 501(c)(3) of the Internal Revenue Code accounted for $2.04 trillion in revenue and $1.94 trillion in expenses in 2016, which is approximately three-quarters of the revenue and expenses for the nonprofit sector as a whole. *Id.* Charities also accounted for "just under two-thirds of the nonprofit sector's total assets ($3.79 trillion)." *Id.*

Charitable giving by individuals was an estimated $309.66 billion in 2019 and amounted to approximately 70% of total giving. *See Giving USA 2020: Charitable giving showed solid growth, climbing to $449.64 billion in 2019, one of the highest years for giving on record*, GIVING USA (June 16, 2020).[5] Charitable giving by individuals remains "by far the biggest source of giving." *Id.* (internal quotations omitted). Total giving for 2019 climbed to $449.64 billion, *id.*, up from $427.71 billion in 2018. *Giving USA 2019: Americans gave $427.71 billion to charity in 2018 amid complex year for charitable giving*, GIVING USA (June 18, 2019).[6] Increased individual giving is the primary reason for that growth. *Id.*

Preliminary measures suggest a significant increase in numbers of donors and dollars contributed for 2020. These funds support an enormous range of voluntary activities from providing health care, shelter, and food to providing public and private education at all levels. These funds may also support unpopular causes or controversial issues of social, political, and economic importance in an increasingly polarized society. With increased polarization, many donors will not give without anonymity. Donor privacy is essential for continued growth in individual giving and the fundraising success of these charities.

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[1] Counsel of record for all parties received timely advance notice of intent to file and consented to the filing of this brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

[2] *See CAF World Giving Index* 5 (Oct. 2019), *available at* https://www.cafonline.org/docs/default-source/about-us-publications/caf_wgi_10th_edition_report_2712a_web_101019.pdf.

[3] Sarah Hall Ingram, Commissioner, Tax Exempt & Government Entities, Internal Revenue Service, Remarks Before the Georgetown University Law Center Continuing Legal Education: Nonprofit Governance-The View from the IRS (June 23, 2009), https://www.irs.gov/pub/irs-tege/ingram__gtown__governance_062309.pdf.

[4] *Available at https://nccs.urban.org/publication/nonprofit-sector-brief-2019#the-nonprofit-sector-in-brief-2019*

[5] *Available at* https://givingusa.org/giving-usa-2020-charitable-giving-showed-solid-growth-climbing-to-449-64-billion-in-2019-one-of-the-highest-years-for-giving-on-record/

[6] *Available at* https://givingusa.org/giving-usa-2019-americans-gave-427-71-billion-to-charity-in-2018-amid-complex-year-for-charitable-giving/

A. Charitable solicitation and the building of a donor file are critical to the survival of our nation's nonprofit organizations and the success of their charitable, educational, or religious programs.

Many nonprofit organizations, including and especially those recognized as public charities exempt under § 501(c)(3), depend on charitable contributions from individuals to fund their educational, charitable, religious, or exempt purposes. Other sources of support often include gifts or grants from foundations and governmental entities as well as contributions from an organization's members. Gifts from individual donors represent the vast majority of charitable contributions made in the United States each year.

To raise funds and spread their message, nonprofit organizations engage in charitable solicitation activity through a wide variety of means, including, but not limited to, mail, email, website, social media, telephone, door-to-door, and distribution of leaflets or handbills. When charities engage in these charitable solicitation activities, it is generally referred to as "grassroots fundraising." The concept is to contact a large number of people with a request for small donations. It is designed not just to raise money but also to spread the organization's charitable message, create name recognition, and build a donor file. Each contact affords the charity the opportunity to deliver vital messages raising awareness about their cause and heightening name recognition.

A donor file is a nonprofit organization's most valuable asset. It is a list of the organization's supporters and/or members. The donor file is the lifeline of the organization, a trade secret, and confidential, non-public information. Nonprofit organizations spend years, if not decades, developing this asset. An organization's donor file includes its major donors, who are the largest contributors to the organization's cause. Major donors are critical to an organization's survival and success. Relationships with major donors require development and cultivation, and those relationships are built on trust and integrity.

Anonymous speech and association by organizations and their supporters has long been enshrined in our nation's history and values, even before their constitutional protection was guaranteed by the First Amendment. Generally, major donors do not want their name and association with a particular issue or cause in the hands of a political office of government or the public for three primary reasons, to-wit: (1) loss of privacy, (2) if leaked to the public, others would solicit and perhaps denigrate the organization (or the donor); and (3) the donor may not want their support of a particular cause or issue made known to the political office demanding it or to the public (for any number of reasons—family, religion, modesty, privacy, manifestation of public hostility, fear of reprisal or harassment).

Likewise, nonprofit organizations do not want to divulge their donor list, including and especially their major donors, because it conflicts with their duty to honor their donors' intent to remain anonymous, and they want to protect their most valuable asset and relationships. If such disclosure were compelled, there would be a "chilling effect" of the First Amendment rights of donors and organizations to speak and associate freely.

B. Charitable solicitation is fully protected speech under the First Amendment.

This Court has held on four separate occasions that the solicitation of charitable contributions is fully protected speech under the First and Fourteenth Amendments to the United States Constitution. *Ill. ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 611 (2003); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988); *Sec'y of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 961-62 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

As this Court explained in *Schaumburg*, charitable solicitation is fully protected speech because "charitable appeals for funds . . . involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Id.* Accordingly, this Court has accorded heightened First Amendment protection to charitable solicitation. *Id.*

In distinguishing commercial speech from fully protected charitable speech, the Supreme Court recognized that charitable speech "does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics of goods and services." *Id.* Any restriction imposed on charitable solicitations, therefore, "must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Id.*

The First and Fourteenth Amendments to the United States Constitution protect Petitioners' freedom of speech and association, including the organization's right to speak freely and its donors' right to associate anonymously, in California and in all jurisdictions. U.S. Const. amends. I, XIV. The First Amendment does not protect only speech that is favored by the majority, nor does it eschew unpopular or controversial causes. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Snyder v. Phelps*, 562 U.S. 443, 458 (2011) (quoting *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989)).

The right of nonprofits to engage in charitable solicitation in the many states without state charity regulators unduly burdening the exercise of their First Amendment freedoms is well settled in this Court and inextricably connected to that bedrock principle. *See Riley*, 487 U.S. at 789. Also well settled is the right of donors to associate anonymously with a charity's cause, whether that cause be popular among a few and unpopular with the majority (or vice versa). *NAACP v. Alabama ("NAACP")*, 357 U.S. 449, 463 (1958) (striking down the Attorney General's demand for the charity's member list as it sought to oust the charity from the state for political reasons). The sentiments and tolerance of the majority may vary by state and by term as state charity regulators hold temporary political offices (e.g., attorneys general, secretaries of state, or other executives).

Since NAACP v. Alabama, states know well that compelled disclosure of member or donor names stifles their ability to "pursue their collective effort to foster beliefs, which they admittedly have the right to advocate" and "may induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *NAACP v. Alabama*, 357 U.S. at 463 (1958). There are many reasons we choose to give anonymously: privacy, religious beliefs, modesty, fear of reprisal personally or professionally, or other manifestations of public hostility. This is even more critical today in the wake of increased cybersecurity concerns and botched enforcement scandals that target certain groups because of political affiliation or ideology.

C. Charitable speech is highly regulated under the many states' schemes of prior restraint with significant filing burdens and costs.

If a charity intends to engage in charitable fundraising activity in any state requiring registration prior to the solicitation of charitable contributions, it must register with that state's attorney general's office, or appropriate state charity regulatory official, before it begins soliciting. Presently, thirty-nine states and the District of Columbia broadly require nonprofits to register before soliciting any funds. Additional states require registration of nonprofit organizations if specific criteria is met. A nonprofit must also file renewal registrations and annual financial reports in the state in which it is formed and in any state in which it is registered to do business or solicit funds. Some states require additional interim and ending reports for each charitable solicitation campaign.

Thus, charities who solicit nationally may have to dozens of annual reports, campaign reports, and renewal filings each year, all of which are due at different times throughout the year and require significant filing fees[7] (some of which are based on annual revenue), thereby driving up the cost of compliance. Some states' annual report filings require a mere copy of the IRS Form 990[8]—a nonprofit's annual information return filed with the IRS—for the most recent fiscal year

[7] The estimated filing fees alone for a nonprofit registrant to engage in charitable solicitation nationally is $5,000 annually. The total estimated cost to register with the assistance of an outside registration service provider exceeds $12,000 per year.

[8] Most nonprofit organizations that qualify for tax exemption under § 501(c) must file the Form 990 information return

end. Other states require a more lengthy annual report application in addition to the Form 990 and a financial audit prepared by a certified public accountant. Except California, New York, and New Jersey, all states that require a copy of the Form 990 do not require the Schedule B to the Form 990.

D. California's compelled disclosure of confidential donor information is a step too far, violating the First Amendment rights of all charity registrants and their major donors.

While most state charity regulatory officials require nonprofit organizations to file Form 990 with their registration filings in order to solicit charitable contributions in the state, no state has required the names and addresses of an organization's contributors—whether on Schedule B or otherwise—as a condition of registration to engage in fully protected speech in the state until California started the practice allegedly in 2010.

To be clear, California's Supervision of Trustees and Fundraisers for Charitable Purposes Act ("the Act"), Cal. Gov. Code § 12580, does not expressly require nonprofit organizations to file Schedule B or any other list of major donors. Rather, it requires nonprofits fundraising in the state to register with the Attorney General and to file periodic reports in order to solicit charitable contributions in the state. Cal. Gov. Code §§ 12581, 12582.1, 12584-86. The Act leaves the content of those reports to the discretion of the Attorney General. Cal. Gov. Code §§ 12586-87. By regulation, the Attorney General requires nonprofits to file a copy of "Internal Revenue Service Form 990 . . . together with all attachments and schedules as applicable, in the same form as filed with the Internal Revenue Service." 11 Cal. Code Regs. 301.

As petitioners explained, for many years, the California Attorney General required charities to submit Form 990s without the Schedule B. The Attorney General's Office "abruptly changed course" in 2010. TMLC Cert Pet. 5. With no statutory authority or reasonable basis for doing so, the California Attorney General started demanding "the thousands of nonprofits fundraising in California submit their Form 990s along with all attachments, including Schedule B, as part of their annual reports." *Id.* It was not until 2020 that the Attorney General actually amended its regulation to require "attached schedules" of the Form 990 as filed with the IRS.[9] *See* 11 Cal. Code Regs. 301 (2019). The Act itself remains silent as to the compelled disclosure requirement, and the requirement directly conflicts with the First Amendment, *NAACP v. Alabama*, the Internal Revenue Code's nondisclosure rules, and best practices.[10]

II. This Court's precedents require strict scrutiny to analyze California's compelled disclosure of its major donors as a precondition to engaging in protected speech.

For the last 60 years, this Court has applied strict scrutiny to compelled disclosures that burden free speech and association outside the election context, including and especially mandates

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annually with the IRS. This includes not just charities, but most other organizations exempt under § 501(c). However, the IRS recently discontinued its requirement that certain advocacy organizations, such as social welfare and advocacy organizations, file Form 990 in order to protect donor privacy. Certain organizations, such as churches and small charities reporting less than $25,000 in annual revenue, also do not have to file a 990.

[9] The Ninth Circuit stated in its 2018 panel decision that the California Attorney General requires charities to file a "complete" copy of the IRS Form 990, "including attached schedules," and it cites to 11 Cal. Code Regs. 301. AFP App. 8a. However, the California Attorney General did not amend Reg. 301 to include the words "including attached schedules" until 2020, and the Act provides no statutory authority for the demand. In practice, the Attorney General started compelling Schedule B in 2010, after years of interpreting Reg. 301 to not require it.

[10] The Ninth Circuit also incorrectly stated in its 2018 decision that "[b]eginning 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." This is untrue. Prior to 2010, there was no "Schedule B obligation" for charities registering with that office. In practice, the Attorney General did not require Schedule B to the Form 990 prior to 2010, and neither the Act nor the regulation expressly required "Schedule B" or even "attached schedules." *See supra* n. 3.

that nonprofit organizations' turn over their confidential donor lists. *NAACP*, 357 U.S. at 465. *NAACP* and its progeny confirmed the First Amendment requires states to provide charities and their donors the proper "breathing space" that "First Amendment freedoms need . . . to survive," *NAACP v. Button ("Button")*, 371 U.S. 415, 433 (1963), and that government may regulate in this area only if it has a "compelling" interest and "only with narrow specificity." *Id.*

To quote an amicus submission at the certiorari stage, "[t]his is a case about charitable solicitations," Brief of Institute for Justice, ECF No. , at 4, and not campaign finance disclosures in the election context. California's challenged practice of requiring disclosure of a charity's major donors has nothing to do with electioneering. The 115,000 nonprofit organizations subject to this unconstitutional burden on speech and association do not engage in electioneering. In fact, the Internal Revenue Code prohibits charities and most other nonprofit organizations recognized as exempt under § 501(c) from engaging in electioneering.

A. The Ninth Circuit erred in applying the wrong level of scrutiny to protected speech and association.

The Ninth Circuit applied the wrong level of First Amendment scrutiny and relied on inapposite precedent to analyze California's compelled disclosure requirement. Applying the test for "exacting scrutiny" that this Court has limited to campaign finance disclosures in the election context, the Ninth Circuit abdicated *NAACP v. Alabama*, which sets forth the correct strict scrutiny standard applicable in this charitable speech case, and erroneously concluded that California's compelled disclosure requirement is constitutional as applied.

Further, the Ninth Circuit declined to hear petitioners' facial challenge because it felt it was bound by the same erroneous test and conclusion that it reached in an earlier case challenging the same disclosure requirement. AFP Cert Pet, App. 401 (citing *Center for Comparative Politics v. Harris ("CCP")*, 784 F.3d 1307, 1312-14 (9th Cir. 2015). Notwithstanding, the Ninth Circuit noted that if it "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.'"* *Id.* (emphasis added).

To the contrary, the Ninth Circuit ignored the substantial record before it and rewrote the facts to support its decision. *See* TMLC Cert. Pet., App. 109a (Ikuta, J., dissenting from the denial of rehearing *en banc*, joined by Callahan, Bea, Bennett, and R. Nelson, JJ.); Brief of Free Speech Coalition, et al., ECF No. , at 10 n.10. As the five dissenting judges in the *en banc* proceeding noted, the Ninth Circuit stated its review of these cases was for "clear error"; instead, it developed its own version of the facts contrary to the manifest weight of the evidence before it, eschewing the facial challenge.

B. Both the *NAACP* line of cases and the *Riley* line of cases in the charitable speech and association contexts require strict scrutiny in this case.

As the Institute for Justice explained well in its amicus brief at the certiorari stage, "[w]hen reviewing laws that burden charitable solicitation or require charities to disclose to the government facts about their private associations, this Court has consistently applied the very highest level of judicial scrutiny, upholding those burdens only if they are *narrowly tailored* to serve a *compelling government* interest." IJ Br. at 18-19; *see Riley*, 487 U.S. at 788-89; *NAACP*, 357 U.S. 449, 463.

Importantly, the Institute for Justice also clarified the varying parlance in some of these charitable speech cases over the years:

> the Court has called this standard "exacting scrutiny," but the elements of this standard are synonymous with what this Court has elsewhere called "strict scrutiny." Compare *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664 (2015) ("We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest."), with *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231

> (2015) ("[C]ontent based restrictions on speech . . . can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (internal quotation marks omitted)). . . In charitable-solicitation cases, this Court has used "exacting scrutiny" synonymously with strict scrutiny.

IJ Br. at 19, 21.

Lower courts across the country have long followed this Court's precedent, subjecting prophylactic rules that unduly burden charitable solicitation to strict First Amendment scrutiny. *Id.*; *see Nat'l Fed'n of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 212 (5th Cir. 2011) (applying strict scrutiny to Texas law regulating charitable solicitation); *Planet Aid v. City of St. Johns*, 782 F.3d 318, 328-29 (6th Cir. 2015) (applying strict scrutiny to ordinance regulating charitable solicitation); *Nat'l Fed'n of the Blind v. Norton*, 981 F. Supp. 1371, 1373 (D. Colo. 1997) (applying strict scrutiny to Colorado Charitable Solicitations Act). If there was any doubt as to the controlling standard of First Amendment scrutiny in charitable solicitation cases, this Court resolved that in *Reed* and clarified that strict scrutiny is the rule in charitable speech cases.[11]

III. California's compelled disclosure requirement fails strict scrutiny and is overly broad in its application to all charities; therefore, it is facially unconstitutional.

Overbroad regulations are facially unconstitutional because they are not narrowly tailored to further the state's asserted interest. *Munson*, 467 U.S. at 968-69. "Where, as here, a statute imposes a direct restriction on protected First Amendment activity and where the statute's defect is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." *Id.* Such statutes are facially unconstitutional because "every application" creates "an impermissible risk of suppression of ideas." *Forsyth*, 505 U.S. at 129-30; *Members of City Counsel v. Taxpayers for Vincent*, 466 U.S. 789, 797 (1984). Such is the case here.

A. The disclosure requirement is overly broad such that in all its applications the statute creates an unnecessary risk of chilling free speech.

The California Attorney General's prophylactic rule requiring disclosure of confidential donor information on Schedule B by nonprofit registrants in California is not limited in its application to Americans for Prosperity and Thomas More Law Center. The petitioners in this case are two charitable organizations that were forced to spend more than five years and significant resources to challenge California's violation of their right to free speech and their donors' right to privacy in association. But the California disclosure requirement applies to all 115,000[12] (or more) charities registered to solicit charitable contributions in California as of 2019, including most amici.

Worse, the Ninth Circuit has erroneously and unconstitutionally barred petitioners and all future charity litigants from bringing a facial attack, thereby forcing all charities in the nonprofit industry to bring an "as-applied" challenge to free themselves of this compelled disclosure requirement. Because the disclosure requirement unduly burdens "these indispensable liberties" of speech and association, *NAACP*, 357 U.S. at 461, and creates an unnecessary risk of chilling free speech and association in all its applications to charities not before the Court, including amici, this Court should reverse the Ninth Circuit's decision on the facial challenge and facially invalidate

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[11] Under *Reed*, laws that target charitable solicitation are content-based because they regulate based on subject matter and/or topic of charitable speech. *See Planet Aid*, 782 F.3d at 328-29 (pre-*Reed* but reaches the same conclusion required under a *Reed* analysis). Content-based regulations of speech are subject to strict scrutiny. *See id.*, *Riley*, 487 U.S. at 795. *Reed* thus affirmed longstanding prior precedent applying strict scrutiny to laws that unduly burden charitable speech and explained how and why we got there.

[12] *Attorney General's Guide for Charities*, CAL. DEP'T OF JUSTICE, CHARITABLE TRUSTS SECTION 1 (Jan. 2019), *available at* https://www.oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf.

the compelled disclosure requirement.

B. The compelled disclosure of charities' confidential donor information fails strict scrutiny and is facially overbroad because it risks the suppression of ideas and association in all possible applications.

California's requirement that charities disclose their major donors on Schedule B in order to register to solicit charitable contributions in the state fails strict scrutiny because it is not narrowly tailored to further a compelling state interest. The state asserts its interest lies in protecting the public from charitable fraud. However, the compelled disclosure of confidential donor information from all 115,000 charities registering to engage in protected speech in California, as well as major donors outside the State of California, does not substantially relate to the prevention of fraud in California. It does nothing to prevent fraud. Equally problematic, the requirement operates on the assumption that every registering charity is guilty of fraud until proven innocent. Such prophylactic rules burdening charitable speech have consistently been stricken by this Court as facially overbroad.

Further, the state admitted, and the district court found, that charities' confidential donor information is not necessary to register the 115,000 charitable organizations applying to engage in a fully protected speech activity, and that the requirement is merely one of convenience. The amicus brief of 14 other states confirms that such private, confidential data is not needed to carry out a state's registration process. In fact, the district court found that "the attorney general was hard pressed to find a single witness who could corroborate the necessity of Schedule B forms in conjunction with their office's investigations." To that end, the district court found that out of 540 investigations of charitable fraud over ten years, the Attorney General's Office had used Schedule B information in only five cases, and even then admitted it could have obtained the same data in other more narrowly tailored ways, such as through its subpoena power.

Attorneys overseeing such investigations further testified that successful investigations can be completed without Schedule B and that the same information can be obtained through less restrictive means. 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." Finding, therefore, that it is "indeed possible for the attorney general to monitor charitable organizations without Schedule B," the attorney general is limited in pursuing its interests "by means which do not 'broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" The disclosure requirement thus fails the narrowly tailored prong.

In addition, the district court in *Americans for Prosperity* spent significant time noting the numerous inadvertent disclosures of confidential donor information by the attorney general in contravention of the privacy protections afforded by the First Amendment and IRC § 6104 as well as assurances from that office that steps were in place to prevent disclosure. "Taken in the context of a proven and substantial history of inadvertent disclosures," the court in *Thomas More Law Center* found "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 justified in a fear of disclosure given such a context."

As *NAACP* made clear, the disclosure of donor names to a political office of attorney general, which increases the risk of abuse of enforcement power, could be just as devastating as that office's leak of the confidential information to the media or to the public. Given the voluminous record before the Ninth Circuit and the lower court's holdings in *Americans for Prosperity* and *Thomas More Law Center*, the Ninth Circuit erred in applying the wrong legal standard and disregarding all facts before it to rewrite the case in a way that supports its decision. The Ninth Circuit failed to recognize that this disclosure requirement does not (and cannot) pass strict scrutiny; it is overly broad in its chilling of First Amendment freedoms and is, therefore, facially unconstitutional.

Charities should not be forced to file an as-applied challenge and prove the likelihood of threats, harassment, and reprisals in order to free themselves of California's unconstitutional burden on their First Amendment rights to speak freely and associate anonymously. The First Amendment does not require those harms to actually occur or "be a foregone conclusion" in order

to invalidate a facially unconstitutional law such as this. That superfluous requirement of thousands of individual legal challenges[13] defies the very purpose and protection of the right to speak freely and associate anonymously and directly contradicts this Court's precedent in the *Riley* line of charitable solicitation cases.

C. California's compelled disclosure of major donors conflicts with industry best practices and a longstanding regulatory framework that protects donor privacy.

Protecting the privacy of donors is paramount to any nonprofit organization; it ensures donors feel secure in entrusting such organizations with their identities and their private contributions and support for particular causes or issues. The possibility of repeat donations gives charities a strong incentive to stringently protect donor information, including and especially from overreaching demands of political offices that regulate charitable solicitation.

1. Charities, organizations that rate charities, and fundraising professionals have established best practices and rules providing for donor privacy and its protection.

Industry best practices[14] encourage charities to implement and maintain privacy policies and a Donor Bill of Rights that sets the standards for the organization's fundraising activities and ensures that donor intent is honored.

For example, Boardsource, an industry leader in best practices and board governance training, explains that a Donor Bill of Rights "outlines the donor's right to receive proper recognition, gain access to the organization's financial statements, obtain information on how funds are being distributed, *and stay anonymous if desired*."[15] Boardsource confirms that some donors simply prefer to give anonymously, and lists the benefits to anonymous giving. *Id.* In its *Handbook of Nonprofit Governance*, Boardsource advises "[w]hen a donor wishes to remain anonymous, the organization must respect the donor's wishes . . . ."[16]

The Association of Fundraising Professionals publishes a Donor Bill of Rights and Code of Ethics to guide nonprofits in fundraising activities.[17] The Donor Bill of Rights states donors have the right "to be assured that information about their donations is handled with respect and with confidentiality to the extent provided by law."[18]

Independent Sector, another respected leader in industry best practices, says the following on the subject of donor privacy:

> Donor privacy is a critically important principle for nonprofit organizations. It enables potentially controversial or less popular causes to receive financial support from individuals without posing a public risk to donors. Currently, 501(c)(3) charitable organizations and 501(c)(4) social welfare organizations are permitted to protect the privacy of their donors and prevent them from being made public.

Donor Disclosure, INDEPENDENT SECTOR, *available at* https://independentsector.org/policy/

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[13] Such a requirement that each charity bring an individual as-applied challenge redirects charitable assets that otherwise could have been used to further the organization's exempt purposes to instead defend the constitutional freedoms denied each organization not before the Court.

[14] Organizations publishing best practices for the nonprofit sector include, but are not limited to, Boardsource, National Council of Nonprofits, Nonprofit Leadership Alliance, Independent Sector, Maryland Nonprofits.

[15] *Financial and Fundraising Issues-FAQs*, BOARDSOURCE (emphasis added), *available at* https://boardsource.org/resources/financial-fundraising-issues-faqs/.

[16] BOARDSOURCE, *The Handbook of Nonprofit Governance* 174 (2010), *available at* http://gife.issuelab.org/resources/19261/19261.pdf.

[17] *See Ethics*, ASSOCIATION OF FUNDRAISING PROFESSIONALS, *available at* https://afpglobal.org/ethicsmain?ItemNumber=3359

[18] *Id.* at VI, *available at* https://afpglobal.org/donor-bill-rights.

policy-issues/donor-disclosure/.

The California Attorney General's Office also publishes its own *Attorney General's Guide for Charities*,[19] which sets forth best practices for nonprofits that operate or fundraise in California. The Guide states the following: "Find out what practices the fundraising professional implements to protect donor privacy, and who is responsible for performing security data breach notification as required by law."

Ironically, the California Attorney General's best practices require nonprofits to know whose responsibility it is to provide notification of security data breaches, yet the Attorney General failed to provide notification to any of the 1,800 charities whose confidential donor information was leaked by that office when it inadvertently published Schedule Bs on its website. AFP Cert. Pet. 9. Nor did the Attorney General provide notification to any of the charities whose confidential Schedule Bs were made searchable on its website due to a security data breach. *Id.* An additional irony, the State of California just passed its own strong privacy law with which these failures to notify would not comply.

Industry best practices also require charities to invest in adequate cybersecurity measures. Nowadays, charities are well-versed in the need to "assess the risks of a data security breach, and protect…data from unauthorized disclosure." *Cybersecurity for Nonprofits*, NATIONAL COUNCIL OF NONPROFITS.[20] Best practices require nonprofit organizations implement data management and security standards and data protection standards[21] respecting donor privacy to ensure the confidentiality of donor information and to protect against cybersecurity threats.

In addition to best practices, charities are "graded" by various rating organizations and watchdog groups based on a myriad of criteria, including how donor information is handled and secured. These rating organizations and watchdog groups directly influence how potential donors spend their money by informing the public about which charities are more "worthy" to donate to based on their rankings under industry best practices. Accordingly, every charity stands to lose part or all of its donor base (and potential future donors) if it garners a negative review or rating for failure to implement privacy protections and industry best practices regarding donor privacy and cybersecurity measures.

For example, Charity Navigator's methodology for ranking a nonprofit organization under industry best practices takes into account a charity's privacy policy, and the desire of donors to have their information kept confidential. *How Do We Rate Charities' Accountability and Transparency?*, CHARITY NAVIGATOR.[22] Potential harms from disclosure of donor information "can be minimized if the charity assures the privacy of its donor lists." *Id*.

Similarly, CharityWatch reports on a charity's privacy policy as an informational benchmark for potential donors. *See Our Charity Rating Process*, CHARITYWATCH.[23] It grades a charity based on the strength of its privacy policy and provides donors with a clear picture of how well a charity protects its confidential donor information. *See id*. Watchdog organizations like Charity Navigator and CharityWatch require charities to protect donor privacy.

To succeed in the marketplace of ideas, charities must safeguard the confidential information of their supporters, including and especially their major donors.

2. Federal tax laws protects donor information from disclosure to the public and to the states.

The Internal Revenue Code requires that Form 990 filers make their returns available to the public upon request, with one important exception: Schedule B. *See* 26 U.S.C. §

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[19] *See Attorney General's Guide for Charities*, *supra* n.13.

[20] *Available at* https://www.councilofnonprofits.org/tools-resources/cybersecurity-nonprofits.

[21] *Data Privacy Risks And Cyber Liability: The digital age is filled with 404 Errors and plenty of theft*, THE NONPROFIT TIMES NEWS (June 30, 2015), *available at* https://www.thenonprofittimes.com/npt_articles/data-privacy-risks-and-cyber-liability-the-digital-age-is-filled-with-404-errors-and-plenty-of-theft/.

[22] *Available at* https://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1093 (last visited Feb. 10, 2021)

[23] *Available at* https://www.charitywatch.org/our-charity-rating-process (last visited Feb. 10, 2021).

6104(d)(3)(A)(exempting charities from having to disclose "the name or address of any contributor"); 26 CFR 301.6104(d)-1 ("the term annual information return *does not include the name and address of any contributor to the organization*") (emphasis added); (the requirement to make an annual information return available to the public "applies to an exact copy of the original Form 990 and all schedules and attachments filed with the Internal Revenue Service *except that the required disclosure does not include the names and addresses of contributors to the organization*") (emphasis added). Charities thus "must publicly disclose most of their tax return, *see* 26 U.S.C. § 6104(d)(1), but they are 'not required to publicly disclose their donors.'" AFP Cert. Pet. 6 (quoting *McCutcheon v. FEC*, 572 U.S. 185, 224 (2014) (plurality opinion); 26 U.S.C. § 6104(d)(3)(A). As Petitioners explained, "a charity's Form 990 is public, but its Schedule B is not." *Id.*

Moreover, under 26 U.S.C. §§ 6104(b) and 6104(c)(3), Congress forbids the IRS from disclosing the "name or address of any contributor" listed on Schedule B to anyone, including state regulators. TMLC Cert Pet. 6-7; AFP Cert Pet 6. Violations of this nondisclosure rule result in civil and criminal penalties for the individual IRS employee or contractor who leaked the information, ranging from one year's imprisonment, $1,000 in fines, and dismissal, to up to five years imprisonment, $5,000 in fines, and dismissal. *Id.*

As petitioners explained, the legislative history surrounding the relevant federal statutory protections precluding disclosure of donor information by nonprofit organizations or the IRS to the public or the states is grounded in the constitutional interest of protecting donor privacy. "Congress explicitly provided for donor privacy 'because some donors prefer to give anonymously' and because 'requir[ing] public disclosure in these cases might prevent the gifts.'" S. Rep. No. 91-552, at 53 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2081.

3. States have successfully registered charities to solicit charitable contributions for decades without the need for donor disclosure.

Unlike the IRS, which already polices charities for potential self-dealing, excess benefit transactions including those with substantial contributors[24], related party transactions, improper loans, expenditures, and accounting for all things including non-cash charitable contributions, the states do not have analogous tax rules to enforce—certainly not in the context of charitable solicitation and interstate commerce. States do not need Schedule B information, and California admits it has no routine use for it. Indeed, for more than thirty years, all states that regulate charitable solicitation proved they were able to successfully do so without "demanding unfettered access to the private details of charities' associations with their donors." IJ Br. at 2

Indeed, some states, such as Indiana, expressly protect donor information from disclosure to state government by statute. Section 23-17-11-2 of the Indiana Code states "[n]otwithstanding the requirements of this article, a corporation may refuse to provide names or identifying information relating to contributors." Not only is confidential donor information not needed for state charitable solicitation registration, organizations can, and best practices dictate they should, refuse to provide confidential donor information to state political offices, such as the attorney general absent compulsory process.

IV. Effects on Industry

If donor privacy is violated, this would cause irreparable harm to nonprofit fundraising and to the nation's charitable sector.

A. California demonstrably failed to protect the confidential donor information in its custody.

Since California adopted the practice of requiring an un-redacted Schedule B for its charitable registration, two other states have followed suit: New York and New Jersey.

[24] *See* I.R.C. 4958.

"California's outsized importance—not to mention New York is one of the other two States," makes it likely that other states will soon join in requiring disclosure of Schedule B. Brief for The United States 23, ECF No. California's outsized importance stems from its status as the most populous state in the union, and the fact that it receives over 60,000 registration renewals annually from charitable organizations. *See id*.

California's importance here makes its track record on the confidentiality of donor information—whether on Schedule B or otherwise—downright alarming. The district court in *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016), identified numerous failures by the California Attorney General's office to protect confidential donor information. The Attorney General's "inability to keep confidential Schedule Bs private is of serious concern," as it "systematically failed to maintain the confidentiality" of such forms. *Id*. at 1056-57. The Attorney General's failures here amounted to far more than isolated incidents. Rather, "the amount of careless mistakes made by the Attorney General's Registry is shocking." *Id*. at 1057.

In particular, at one point the Attorney General's office allowed 1,800 Schedule Bs to be available for public access on its official website. *See id*. This included the names and addresses of thousands of donors, all of which were meant to be kept private. Even the Attorney General's investigation of the matter admitted "posting that kind of information publically could be very damaging" to many of the organizations at issue. *Id*.

The court also was unmoved by the Attorney General's remedial steps in the wake of this breach. "Once a confidential Schedule B has been publically disseminated via the internet, there is no way to meaningfully restore confidentiality." *Id*. There is no way to claw it back. The Attorney General's assurances of updated confidentiality practices were "irreconcilable" with the "pervasive, recurring pattern of uncontained Schedule B disclosures." *Id*. In light of the Attorney General's history of "completely violating" the confidentiality of Schedule Bs, its "assurances that a regulatory codification of the same exact policy will prevent future inadvertent disclosures rings hollow." *Thomas More Law Ctr. v. Harris*, No. CV 15-3048-R, 2016 U.S. Dist. LEXIS 158851, at *16 (C.D. Cal. Nov. 16, 2016).

Further, the Attorney General maintained that its registry "is underfunded, understaffed, and underequipped when it comes to the policy surrounding Schedule Bs." *Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1057. "Underfunded, understaffed, and underequipped" are hardly three adjectives synonymous with effective protection of confidential information. It is doubtful that donors would be comforted by knowing that their confidential information is being processed and held under such paltry conditions." *Id.*

It should be noted that these breaches of confidentiality by the Attorney General's office did not happen in a vacuum. They come in an era where cyber hacks of governmental organizations and corporations alike are increasingly common. Massive data breaches involving Equifax, Yahoo!, Capital One, Target and Sony have made headlines, and put the confidential data of millions at risk.[25] The hacking of sensitive information has even played a role in swinging our presidential election, in the case of the WikiLeaks scandal.[26] Given the current climate, where it is becoming harder and harder to protect confidential information, the requirement of disclosure of

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[25] *See Equifax Data Breach Settlement*, FEDERAL TRADE COMMISSION, https://www.ftc.gov/enforcement/cases-proceedings/refunds/equifax-data-breach-settlement (last visited Feb. 12, 2021); Brett Molina, *Capital One data breach: A look at the biggest confirmed breaches ever*, USA TODAY (Jul. 30, 2019, 5:43 PM), https://www.usatoday.com/story/money/2019/07/30/capital-one-data-breach-among-biggest-ever/1865821001/; Andrea Peterson, *The Sony Pictures hack, explained*, THE WASHINGTON POST (Dec. 18, 2014, 3:15 PM), https://www.washingtonpost.com/news/the-switch/wp/2014/12/18/the-sony-pictures-hack-explained/.

[26] *See* Ellen Nakashima & Shane Harris, *How the Russians hacked the DNC and passed its emails to WikiLeaks*, THE WASHINGTON POST (Jul. 13, 2018, 6:26 PM), https://www.washingtonpost.com/world/national-security/how-the-russians-hacked-the-dnc-and-passed-its-emails-to-wikileaks/2018/07/13/af19a828-86c3-11e8-8553-a3ce89036c78_story.html; Mark Hosenball, *WikiLeaks faces U.S. probes into its 2016 election role and CIA leaks: sources*, REUTERS (Dec. 7, 2017, 11:35 AM), https://www.reuters.com/article/us-usa-trump-russia-wikileaks/wikileaks-faces-u-s-probes-into-its-2016-election-role-and-cia-leaks-sources-idUSKBN1E12J2.

Schedule B presents a massive risk of loss of privacy. This makes unpopular charities and those who advocate with respect to controversial issues especially vulnerable in our increasingly polarized community.

This massive risk, when coupled with the Attorney General's systemic failures to actually protect confidential information, is particularly egregious when considering that the Attorney General's office rarely even uses Schedule Bs to conduct its responsibilities pertaining to charitable organizations. The Attorney General "does not use the Schedule B in its day-to-day business," and "seldom use[s] Schedule B when auditing or investigating charities." *Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1053-54.

The supervising investigative auditor for the Attorney General's office testified that during a ten year period of investigations, the office used Schedule Bs in just approximately .009% of such investigations. *See id*. at 1054. That is less than one percent. Even in the five instances where a Schedule B was used, (a) it was unclear whether they were even un-redacted Schedule Bs, and (b) the relevant information in such Schedule Bs "could have been obtained from other sources." *Id*.

B. The threat of misuse looms larger when one considers the states have no routine need for information on individual donors in order to enforce their charitable solicitation laws.

The record is clear that the Attorney General has no genuine need for Schedule Bs. The office routinely conducts successful investigations into charitable organizations without the need for a Schedule B. The record "lacks 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*. at 1055.

This is further strengthened by the fact that the state listed Petitioner "as an active charity in compliance with the law" for ten years, accepting its annual registration for each of those years without Schedule B. *Id*. at 1053. Petitioner never included a Schedule B with such filings, yet the Attorney General nonetheless found Petitioner in complete compliance with the state's requirements for over a decade. Therefore, the Attorney General cannot reasonably claim it has a genuine need for Schedule Bs, given how seldom it uses the form in reality.

In addition, fourteen states with laws regarding charitable solicitation have agreed there is no routine need for information on individual donors in order to enforce such laws. *See* Brief for the State of Arizona et al., at __, ECF No. These states note that 47 states are able to effectively police charities in their jurisdiction without requiring confidential donor information, and that the "lack of donor disclosure requirements has not prevented them from exercising oversight of non-profits that solicit donations within their jurisdictions and investigating, prosecuting, and deterring fraudulent activities." *Id*. at 6-7. Furthermore, if the need to acquire an organization's Schedule B emerges, then the states are free to seek a targeted subpoena pursuant to their investigative powers.

For example, the states highlight an occasion where all 50 states "joined in a civil enforcement action in Arizona against four sham cancer charities and the individuals who ran them." *Id*. at 7. California's Attorney General used this action as an example of one of the few times that a Schedule B was used in an investigation. However, the Schedule B was obtained via a targeted subpoena, and not pursuant to any annual disclosure filing. *See id*. This further shows how little the Attorney General actually needs to enforce its Schedule B requirement.[27]

Because the Attorney General has such little actual use for Schedule Bs, a reasonable person might ask, "If they do not need the information to enforce solicitation laws, then why do they want it?"

[27] In addition, requiring the Attorney General to seek a subpoena to acquire a Schedule B would better protect the rights of the charitable organizations, giving them a fair opportunity to resist such subpoena within the confines of the judicial system.

C. Since California adopted this practice, two other states have followed; and doubtless more will follow suit, even though there is no need for such information.

If not reversed, more states will undoubtedly follow California's lead. Charities should not be forced to file a lawsuit and prove the likelihood of threats, harassment, and economic reprisal in order to free themselves of California's (or any state's) facially unconstitutional burden on their First Amendment rights to speak and associate anonymously, even if on behalf of politically disfavored causes. That defies the very purpose and protection of these indispensable freedoms.

Adding more states into the mix that would collect Schedule B increases the already substantial chance that the confidential donor information of myriad charities will be inappropriately made available to the public. Given California's track record, it would be unreasonable to expect donor information to remain confidential if other states follow its lead. More states gathering such data dramatically increases the risk of a loss of privacy.

With data breaches of even national security and high-level corporate data becoming increasingly common, how can we expect regulators' storage of industry's confidential data on their websites (and off) to remain secure? For these reasons and others, many individual donors are not comfortable with their personal information being provided by charities to state officials in political offices. Regardless of whether they live in the state, they do not trust state officials to keep the information secure or to refrain from misusing it.

If Ninth Circuit decision is not reversed, the record makes clear that major donor names likely will be exposed. That will result in possible reluctance to give and/or pirating by other groups. Some organizations are already staying out of California, New York, and New Jersey for fear of harassment, reprisal, and reluctance to litigate the issue.

Forcing disclosure of major donors destroys donor anonymity, creates opportunity for the states to abuse confidential, nonpublic information and opens the floodgates to more overreaching by state charity regulatory officials who will, if not challenged, continue to exceed the bounds of what the law permits them to demand from registrants. If California wins, the adverse effects on nonprofit fundraising would be devastating.

With the political winds shifting from term to term, fears of threats, harassment, reprisals and even political targeting by government[28] for advocacy on issues of social, economic and political importance shift as well, and such risks are especially worrisome for unpopular causes and controversial issues. This Court should not force charities to wait until serious physical threats and actual harassment materialize before an organization can pay the high cost to litigate on a case-by-case basis to free itself from a facially unconstitutional disclosure requirement, which chills the freedoms of speech and association of all charities and their supporters.

Compelled disclosure of a charitable organization's major donors by state attorneys general is destructive not only to civil liberties but to the nonprofit fundraising industry. With the costs of registration and compliance already staggering, the risk of privacy loss is too great a price to pay for First Amendment rights. As Philanthropy Roundtable explained, "[d]onor anonymity is too important a First Amendment right to be sold at so cheap a price." Br. Philanthropy Roundtable at 18, ECF No.

CONCLUSION

For the reasons stated above, this Court should reverse the Ninth Circuit's decision on both the facial challenge and the as applied challenge and find the donor disclosure requirement unconstitutional on its face and as applied.

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[28] *See, e.g.*, Kelly Phillips Erb, *Timeline of IRS Tax Exempt Organization Scandal*, FORBES (May 7, 2014) (involving political targeting of conservative "Tea Party" charitable organizations by IRS), *available at* https://www.forbes.com/sites/kellyphillipserb/2015/03/02/updated-timeline-of-irs-tax-exempt-organization-scandal/?sh=22d3f6c66a6b; *NAACP*, 357 U.S. at 452 (involving Alabama Attorney General's demands for member list and voluminous documents from charity in effort to run the NAACP out of the State of Alabama during the Civil Rights Era).

Respectfully submitted.

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Karen Donnelly
Errol Copilevitz
COPILEVITZ, LAM & RANEY, P.C.
310 W. 20th Street,
Suite 300
Kansas City, MO 64108
(816) 472-9000
FAX: (816) 472-5000
kdonnelly@clrkc.com
ec@clrkc.com

Counsel for Amici Curiae