Nos. 19-251, 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION, *Petitioner*,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

THOMAS MORE LAW CENTER, *Petitioner*,

v.

XAVIER BECERRA, ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Writs of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae—the States of Arizona, Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, and West Virginia—file this brief in support of Petitioners Americans for Prosperity Foundation (the "Foundation") and the Thomas More Law Center (the "Center"). Amici States are among the vast majority of States that regulate non-profit organizations without preemptively mandating that they disclose the identities of their donors. In doing so, these forty-seven States and the District of Columbia protect the First Amendment rights of both donors and non-profit organizations, while preserving governmental resources to detect and investigate unscrupulous activity by regulated entities.

The *Amici* States file this brief in support of the First Amendment rights of their citizens, which the Ninth Circuit wrongly discounted based on purported law enforcement interests that were, at best, vastly overstated—which *Amici* States know well from their own experience enforcing their own respective laws without any need for the compelled, indiscriminate disclosure mandated by California.

SUMMARY OF ARGUMENT

This case involves the massive, indiscriminate collection of donor information from non-profit

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

organizations that could easily be inadvertently disclosed—which has already happened. Repeatedly. A crucial question presented is whether California has any legitimate law-enforcement need for that enormous, suspicion-less amassment of information.

As sister states with virtually indistinguishable law-enforcement and anti-fraud interests, *Amici* States have a unique and important vantage point with which to assess that California's asserted interest. And our collective experience is uniform and unequivocal: we don't need this sort of compelled collection of donor information for legitimate law enforcement purposes, and its stockpiling is unlikely to lead to any outcome other than mischief and chilling of speech. We therefore do not seek to collect it.

Our conclusion is borne out by California's own history: as the district court found, the compelled disclosure "demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years." Pet. App. 47a. But during that time, California's inability or unwillingness to secure that information has caused substantial harm. Moreover, the California law at issue remained dormant and unenforced for decades, underscoring the lack of value of its compelled disclosures.

The lack of genuine law enforcement need for this indiscriminate collection of donor information is not merely the present conclusion of the states and attorneys general joining this particular brief, however. Instead, it is the consensus position of virtually every legislature in the United States for at least the last century. Indeed, *forty-seven* states and the District of Columbia do not demand this

information. Only Hawaii and New York impose similar mandates. If the compelled disclosure at issue here served any legitimate law-enforcement interests, it is doubtful that California would be such a radical outlier.

To be sure, the information from these compelled disclosures can be enormously powerful: it can readily facilitate harassment, retaliation, and chilling of unpopular speech. Indeed, it has already done so.

But its power to chill speech is not remotely matched by any corresponding value preventing of fraud. Here, there is no record evidence of even marginal value for law-enforcement purposes. And that conclusion completely comports with the combined experiences of the States.

The Ninth Circuit gravely erred in concluding otherwise and radically exceeded its limited scope of review for factual findings. Its judgment should be reversed.

ARGUMENT

I. Mass Disclosures Of Donor Identities To The Government Is Not Substantially Related To Legitimate State Interests.

When compelled disclosure of membership or donor identities would result "in reprisals against and hostility to" such persons, the Constitution requires that (1) the state have a sufficiently compelling interest in requiring disclosure, (2) the government's method is substantially related to that interest, and (3) the means are narrowly tailored. *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961);

Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 546 (1963). California's general interest in regulating non-profit organizations and enforcing its laws regarding them falls far short of this standard. The compelled disclosures are unnecessary, perilous to donors, and corrosive to our First Amendment freedoms.

A. Forty-Seven States And The District Of Columbia Do Not Preemptively Compel Donor Disclosure

The States indisputably possess a law enforcement interest in preventing non-profits from defrauding their citizens. But the *vast* majority pursue that interest without compelling blanket, suspicion-less disclosures of donors. Only California, Hawaii, and New York require disclosure of unredacted Schedule Bs containing donor-identifying information. Pl.'s Br., at ADD-35 to ADD-43, *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018) (No. 16-55727) (50-State Survey on Schedule B Submission Requirements in Connection with Charitable Registration Filings); *see also* Hawaii Charity Financial Report Guide (Jul. 2019), https://ag.hawaii.gov/tax/files/2018/06/Hawaii-Charity-Annual-Transmittal-Guide-7.10.19.pdf; N.Y. Form CHAR500 (2018), https://www.charitiesnys.com/pdfs/CHAR500_2018.pdf.

Moreover, 11 of the majority States do not require *any* registration for non-profits to raise funds in their jurisdictions. In 2013, Arizona joined Delaware, Idaho, Indiana, Iowa, Montana, Nebraska, South Dakota, Texas, Vermont, and Wyoming in adopting a general non-registration standard.

Amici States, while forgoing blanket compelled donor disclosures, exercise oversight of non-profits that solicit donations within their jurisdictions and successfully investigate, prosecute, and deter fraudulent activities. There is no evidence in the record that donor fraud is any higher in any of the 47 majority states and D.C.

For example, all 50 States participated in Arizona's action against four sham cancer charities. Collectively, the purported non-profits raised more than $187 million from across the country. The California Attorney General in this litigation pointed to this case as one where Schedule B forms had been part of the investigation. Importantly, the form in question was obtained by a *targeted subpoena* rather than pursuant to a compelled wholesale disclosure policy like California's. Ninth Circuit ER1756; Pet. App. 47a. Hence, in Respondent's own proffered example, there was a narrower way to achieve the State's interest than the compelled disclosure policy.

The Ninth Circuit panel, in holding that California's policy was adequately tailored, implicitly concluded that 48 similarly situated jurisdictions either lack California's law enforcement interests or inadequately regulate non-profit organizations.

On the contrary, Amici States share California's law enforcement concerns and diligently regulate non-profits. But what they do not share is California's apparent disdain for the legitimate privacy interests of donors and the chilling effects of that California's mandatory, discriminate disclosures probably has caused and will cause going forward. Their avoidance of dragnets-by-default reflects reasoned judgment and trust in traditional tools like

compliance audits and subpoenas based on particularized suspicion of wrongdoing. These tools are effective and equally available to California.

B. Amassed Personal Information Heightens The Potential For Public Disclosure

California's indiscriminate compelled disclosures concentrate a substantial amount of sensitive information in a single location. This creates a more attractive target for hackers, leakers and other bad actors by creating an incredibly enticing target, given the volume of information that can be purloined by a single breach. It additionally increases the number of innocent persons harmed by any sort of breach, including accidental breaches.

California itself laid bare this risk by inadvertently posting more than a thousand unredacted Schedule Bs online, thereby publicizing the names and addresses of thousands of donors. Pet. App. 51a-52a. And California's insecure online registry made more than 350,000 confidential documents—including Schedule Bs—accessible to anyone modifying a web address. Pet. App. 92a. "The pervasive, recurring pattern of uncontained Schedule B disclosures ... is irreconcilable with [Respondent]'s assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry." Pet. App. 52a.

The panel nonetheless disregarded the district court's careful factual findings and instead bizarrely concluded that despite California's failure to "maintain[] Schedule B information as securely as it should have," Pet. App. 35a, there was no ongoing "significant risk of public disclosure." Pet. App. 37a. In doing so, the Ninth Circuit effectively replaced California's burden on appeal of showing clear error

in the district court's well-supported factual findings with merely offering a completely unenforceable promise to "do better" in the future. And it did so even though breaches continued up until a week before trial—at which point California had ample knowledge of the insecurities of its system but still had no apparent will to plug those holes. The record is also undisputed that no California employee has been disciplined—*ever*—for the prior security lapses.

If any finding in this case is clearly erroneous, it is the Ninth Circuit's appellate factual finding that California's bare promise to address its manifest security failings is likely to make a material difference.

C. California's Policy Imperils Privacy Across The Country

California extracts Schedule Bs from over 60,000 charitable organizations every year. Pet. App. 51a. Any individual contributing to one of these organizations is at risk of another privacy breach from California.

California's notoriously leaky systems thus threaten the legitimate privacy interests of citizens of *all* of the Amici States. And if this information is again disclosed, the reprisals and chilling effects will not be limited to California's borders.

D. The Consequences Of Disclosure Can Be Severe

The amount of harm from a breach varies with the affected individual(s). When they contribute to a cause that hotly divides public opinion, the First Amendment implications are most poignant. This Court's seminal decision in *NAACP v. Alabama*

recognized that "privacy in group association" is "indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." 357 U.S. at 462-63. This Court recognized that permitting Alabama to compel disclosure of NAACP members during the Jim Crow era carried grave risks. And the district court rightly found that grave threats were also present here. Pet. App. 51-53a 78a.

Recent changes to federal law combat the severe risks to individuals whose identifying information is improperly protected. The Consolidated Appropriations Act in 2016 requires termination of IRS employees for ""performing, delaying, or failing to perform (or threatening to perform, delay, or fail to perform) any official action (including any audit) with respect to a taxpayer for ... a political purpose." Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 407 (2015). But these protections are of little benefit if the same information leaks from California's insecure systems—particularly if California continues its unbroken pattern of refusing to take *any* disciplinary actions for breaches.

CONCLUSION

California's compelled disclosure requirement is unnecessary to serve any legitimate law enforcement purpose, as 47 other states and the District of Columbia have all recognized. The Ninth Circuit's contrary conclusion should be reversed.

Respectfully submitted,

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