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

BRIEF OF INSTITUTE FOR FREE SPEECH AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF AMICUS CURIAE*

The Institute for Free Speech ("IFS") has a pending petition for certiorari challenging, purely on a facial basis, the same California disclosure regime at issue here. IFS thus has a direct and immediate interest in the resolution of these consolidated cases and respectfully requests that this Court resolve the cases by addressing petitioners' facial challenges. IFS was the first of several plaintiffs to file suit to enjoin California's disclosure requirement, and IFS's case was the first to reach the U.S. Court of Appeals for the Ninth Circuit. The court's decision in that case, *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), in turn controlled the outcome of the facial challenges brought by petitioners in these cases, Americans for Prosperity Foundation and Thomas More Law Center. The holding and reasoning of IFS's case are thus central to the Court's resolution of these cases.

Formerly known as the Center for Competitive Politics, IFS is a nonpartisan, nonprofit organization that works to defend the rights to free speech, press, assembly, and petition. Like other nonprofit groups, IFS depends on contributions from the public to fund its litigation, education, and advocacy efforts. For many years, IFS conducted fundraising activities in California. After the California attorney general began requiring nonprofit corporations to turn over a list of their major donors, however, IFS stopped raising money in that State rather than

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* Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties consent to the filing of this brief.

comply with a disclosure requirement it believed to be unconstitutional.

IFS filed suit claiming that the California disclosure regime violates the First Amendment right to free association on its face. The Ninth Circuit rejected that claim in *Center for Competitive Politics*, holding that forced disclosure of an association's donors or members does not "in and of itself constitute[] First Amendment injury." 784 F.3d at 1316. Absent evidence that disclosure would subject IFS's supporters to threats, harassment, or another "actual burden" on their First Amendment rights, the court found no inherent constitutional problem with the State's disclosure requirement. *Id.* at 1314, 1316.

The present dispute over California's regulation began with IFS's facial challenge, and it should have ended there too, without the need for petitioners to litigate a separate as-applied challenge. Had the Ninth Circuit correctly applied this Court's precedents in IFS's case, it would have struck down the California disclosure regime as facially unconstitutional. Particularly because its own petition for certiorari remains pending, IFS has a special interest in explaining why the Court should address the facial challenges presented in these cases.

SUMMARY OF ARGUMENT

Private associations enjoy a presumptive right under the First Amendment to withhold the identity of their supporters from the government, for any reason or for no reason at all. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). California has inverted that presumption by mandating that nonprofit corporations turn over a list of their major donors as a condition of raising

money in the State. This sweeping disclosure requirement, made without any compelling State need, violates the First Amendment on its face.

I. The Ninth Circuit rejected IFS's facial challenge based on the erroneous premise that the compelled disclosure of an association's donors does not constitute a First Amendment injury *at all*, at least without proof that the disclosure resulted in threats, harassment, or other concrete harms. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1314, 1316 (9th Cir. 2015). The Ninth Circuit's requirement that a plaintiff prove injury not only lacks any foundation in this Court's cases; it also decimates the associational right at issue. The right to associational privacy, by its very nature, includes the right not to tell the government why one wants to keep one's associations private.

Far from imposing no First Amendment harm at all, California's disclosure requirement burdens the exercise of First Amendment rights twice over. The State requires nonprofit groups to divulge the names and addresses of their principal donors as a condition of soliciting donations within its borders—itself a form of protected speech. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 788-89 (1988). The State cannot require nonprofits to waive one fundamental right (association) as a condition of exercising another (speech).

The Ninth Circuit's anomalous rule that a party resisting disclosure must show proof of an injury apart from the disclosure itself makes especially little sense in cases presenting a facial challenge. In First Amendment facial challenges, the question before a court is whether the law at issue is substantially overbroad in relation to the State's interests, such that it risks deterring protected speech. *See United States v. Stevens*, 559 U.S. 460, 473

(2010). A specific injury to a particular party forms no part of the analysis.

II. California's requirement that nonprofit groups disclose a list of their major donors should be struck down on its face. Facial challenges have a special role to play in the First Amendment context for reasons these cases make evident. The California attorney general has issued a wildly broad demand for donor information from nonprofit groups regardless of whether his office has any reason to suspect them of a crime or fraud. The State then holds this information indefinitely and places no limits on how the attorney general may use it. Its effort to collect and stockpile information about the expressive activity of ordinary people will exert a chilling effect on speech and associational rights.

The State has not identified any compelling interest that would justify this serious intrusion on associational privacy, nor has it shown that its broad disclosure regime is narrowly tailored to that interest. On the contrary, the attorney general already has a tried and true investigative tool—the subpoena power—that he may deploy to collect donor information should a particular need arise. The First Amendment requires that he exercise that alternative rather than needlessly burden the associational rights of untold numbers of nonprofit organizations and their donors.

ARGUMENT

I. The Ninth Circuit Erroneously Rejected the First Amendment Facial Challenge

The Ninth Circuit misapplied this Court's precedents when it concluded that a plaintiff challenging a disclosure requirement on First Amendment grounds must prove an injury apart from the disclosure itself. This Court's cases

could not be clearer that compelled disclosure on its own gives rise to a First Amendment injury. "The Constitution protects against the compelled disclosure of political associations and beliefs"—full stop. *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 91 (1982).

The Ninth Circuit's requirement that a plaintiff must produce evidence of concrete injury misunderstands the nature of the associational right. That right presupposes that a private association need not explain its privacy interest to the government. Forcing an organization to give reasons why it or its members or donors want to remain anonymous undermines the very privacy rights that the group or its members seek to protect.

The Ninth Circuit's requirement that a plaintiff prove actual injury arising from disclosure makes little sense in the context of a facial challenge. When a party attacks a state statute or regulation on its face, it seeks "to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55-56 n.22 (1999). Rather than look for evidence of how the compelled disclosure affects any particular litigant, a court must examine whether the burden on speech, as a general matter, is justified in light of the State's interests.

A. Forced Disclosure of Private Associations Gives Rise to a First Amendment Injury

For more than half a century, this Court has recognized "the vital relationship" between the First Amendment right to associate and the privacy of one's associations. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Throughout our history, private associations have proven to be a powerful engine for speech be-

cause they enable their members to support a cause without attaching their own name to it. Particularly where that cause is unpopular, the anonymity that group membership provides is often what enables the speech to take place at all. *Talley v. California*, 362 U.S. 60, 64 (1960). "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Patterson*, 357 U.S. at 462; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (recognizing the special importance of the associational right "in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority").

For these reasons, the Court has "repeatedly found that compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) (emphasis added). The Court has not required litigants to come forward with evidence of specific injury, such as threats or reprisals, because it is self-evident that the forced disclosure of a group's members can chill expressive activity. As the Court explained in *Patterson*: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute a[n] effective restraint on freedom of association." 357 U.S. at 462; *see also Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539, 555-56 (1963) (recognizing the "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas"); *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016) ("Disclosure chills speech.").

Compelled disclosure injures both associations and their individual members. For the members, disclosure

brings the loss of their right to associate and speak anonymously, with a correlative chilling effect on their speech. Quite apart from that injury, however, disclosure burdens the independent right of organizations, as corporate persons, to speak free from undue intrusion by the State. *See, e.g.*, *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978). Just as disclosure requirements may chill individuals from *giving* money to nonprofit organizations, so too may they chill nonprofits from *soliciting* contributions from donors with whom they do not wish to be identified publicly. Accordingly, the organization has its own right to keep its associations private—either for a specific reason or for no reason at all. Of course, in many cases the injuries suffered by an organization and its members will be closely related. If a disclosure regime discourages supporters from opening their pocketbooks, then the organization will suffer adverse effects in the form of "diminished financial support and membership." *Patterson*, 357 U.S. at 459-60.

The Ninth Circuit not only failed to recognize that forced disclosure causes an inherent First Amendment injury; it then degraded the First Amendment right even further by requiring nonprofit groups to prove that their supporters would suffer an "actual burden" if their names and addresses were revealed. *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1314 (9th Cir. 2015).

This novel requirement is incompatible with the First Amendment because it amounts to compelled speech—it places the burden on private associations to confess the reasons why they or their members oppose disclosing membership rolls to the State. But forcing an organization to explain *why* it prefers to keep its associations anonymous would destroy the right to associate *privately*.

Speakers are not required to state their reasons for wanting privacy as a precondition for asserting their right to privacy. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[The] decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment.").

Imagine, for example, that the Census Bureau ordered all citizens in their twenties to produce a list of the people they had dated as part of a major survey on dating and marriage patterns. Or a state university asked fraternities and sororities to turn over a list of their alumni supporters so the university could improve its own fundraising efforts. Or the Postal Service demanded that all families disclose their holiday card list so that it could audit the accuracy of mail delivery. Under the Ninth Circuit's holding, none of these disclosure orders creates a First Amendment injury at all, such that the government could force the disclosure for any reason that meets rational basis review. Whatever the reason for an objection to compelled disclosure and regardless of any fear of harassment, the First Amendment harm resides in having to explain the need for privacy in the first place. The same holds true no matter whether the government requires individuals or organizations to identify their private associations.

Private organizations have no "affirmative obligation" to explain why they object to disclosing a list of their donors to the State. *See Lamont v. Postmaster Gen.*, 381 U.S. 301, 307 (1965). The First Amendment preserves not only the right to speak and assemble, but also "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969). Ideas best flourish in an environ-

ment where they are not subject to oversight by government ministers. *See, e.g.*, *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Absent some compelling reason for intruding into their affairs, the government must leave private organizations "to pursue their lawful private interests privately." *Patterson*, 357 U.S. at 466; *see also NAACP v. Button*, 371 U.S. 415, 429 (1963) ("[T]he First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion.").

This Court's cases thus recognize a presumption—a default setting—that private associations are entitled to shield the identity of their supporters from the government. Although that right is not absolute, the "sanctuary" the First Amendment provides "from unjustified interference by the State" is "substantial." *Roberts*, 468 U.S. at 618. This Court has long required the *government* to provide a rigorous justification if it seeks to breach the privacy of an organization's member or donor rolls. At a minimum, the government must demonstrate that it has a sufficiently important interest in identifying a group's members, *see Gibson*, 372 U.S. at 555-56, and that it has no substantially less restrictive means of effectuating that interest, *see Shelton v. Tucker*, 364 U.S. 479, 488 (1960). "The right to privacy in one's political associations and beliefs will yield only to a subordinating interest of the State that is compelling." *Brown*, 459 U.S. at 91-92 (alterations omitted).

B. Disclosure Also Burdens the First Amendment Right To Solicit Charitable Donations

California's disclosure rule works a double First Amendment injury. It both intrudes into constitutionally protected associations and requires nonprofit groups to disclose those associations as a condition precedent to en-

gaging in constitutionally protected speech—the solicitation of charitable donations. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 789 (1988) ("[T]he solicitation of charitable contributions is protected speech.").

It is a pillar of our constitutional tradition that government may not impose preconditions—particularly unconstitutional ones—on the exercise of speech and assembly rights. Repeatedly over the past century, this Court has invalidated such conditions, even where they consisted of mere administrative hurdles, such as a requirement that a speaker obtain a license. *See Watchtower Bible & Tract Soc'y v. Vill. of Stratton*, 536 U.S. 150, 168 (2002) (striking down a license requirement for door-to-door canvassing); *Thomas v. Collins*, 323 U.S. 516, 540 (1945) ("[A] requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."). The restraint is altogether worse in this case because California is asking for far more than paperwork. The State commands that nonprofits give up their fundamental right to privacy as a condition of engaging in protected speech. The government cannot require citizens to barter one First Amendment right for another First Amendment right. *See Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."); *Aptheker v. Sec'y of State*, 378 U.S. 500, 507 (1964) (rejecting government's argument that plaintiffs could be required to forsake membership in the Communist Party as a condition of exercising constitutional right to international travel).

If California can demand that private associations disclose a list of their donors as a condition of raising money

in the State, its appetite for information will become virtually limitless. The State could require patrons to list the authors they plan to read before it will issue them a library card. It could require organizers of a peaceful protest to disclose the names, addresses, and cell phone numbers of expected participants. It could demand that newspapers turn over a list of their state government sources before it will issue press credentials for official events. It should be obvious that these impositions on the exercise of fundamental speech and press rights are unconstitutional. So too here.

C. The Ninth Circuit Misunderstood This Court's Cases To Require Proof That Disclosure Will Cause Secondary Injury

The Ninth Circuit believed that this Court's precedents dictated its errant rule requiring evidence of a concrete injury. Far from it. No case from this Court demands that a plaintiff plead and prove it will suffer threats or other reprisals before it can bring a First Amendment challenge to a state disclosure requirement.

1. The Ninth Circuit derived its proof requirement from an unduly narrow reading of *Patterson*. In *Patterson*, this Court overturned a contempt sanction entered against the NAACP for refusing to disclose its membership list to the Alabama attorney general—whose demand for this information was transparently designed to menace and intimidate the group's supporters. 357 U.S. at 466. Although the case involved a particularly flagrant abuse of state power, the principles it announced were general ones. Long after the Jim Crow era came to an end, the Court has continued to cite *Patterson* for the bedrock rule that private associations are "vigorously protected from interference by the State." *Roberts*, 468 U.S. at 622; *see also id.* at 632-33 (O'Connor, J., concurring)

(observing that *Patterson* "settled" the First Amendment right to privacy in associations).

According to the Ninth Circuit, however, *Patterson* was little more than an artifact of its time. *Patterson*, it said, dated to an era "when many NAACP members experienced violence or serious threats of violence," and the organization was able to present firm proof that "disclosure would harm its members." *Ctr. for Competitive Politics*, 784 F.3d at 1312 & n.3. Absent evidence that the California disclosure requirement opened a nonprofit group to a similar risk of harassment or intimidation, it declared *Patterson* "inapposite" to the present dispute. *Id.* at 1312 n.3.

The Ninth Circuit had no basis to confine this landmark precedent to its facts. *Patterson* itself did not suggest that membership lists are protected only to the extent a plaintiff can demonstrate severe and concrete harm arising from their disclosure to the State. Although the record in that case contained "uncontroverted" evidence of the threats and violence directed at members of the NAACP, this Court did not hold that such evidence is required in all cases. *See Patterson*, 357 U.S. at 462. To the contrary, *Patterson* recognized that the First Amendment is implicated when there is a mere *possibility* that state action will chill the exercise of speech and associational rights: "[S]tate action which *may* have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460-61 (emphasis added). Under this standard, the government is required to justify even the "*possible* deterrent effect" that its disclosure requirement may exert on the right to free association. *Id.* at 461 (emphasis added); *see also Talley*, 362 U.S. at 65 (recognizing that First Amendment scrutiny is triggered where "iden-

tification and fear of reprisal *might* deter perfectly peaceful discussions of public matters of importance" (emphasis added)). That language cannot be squared with the Ninth Circuit's requirement that an organization produce evidence of concrete injuries before it may assert its right to privacy.

The record in *Patterson* contained evidence of harassment and reprisals because of the posture in which it arose—on review of an order of civil contempt. 357 U.S. at 452-54. In subsequent cases, however, this Court made clear that a party whose fundamental rights are threatened need not wait until a penalty is imposed to invoke those rights. It may instead assert those rights preemptively in a declaratory judgment action. *See, e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."). In cases where a speaker files suit before a State has even enforced its laws, it may be impossible to introduce evidence of concrete harm that may result from compelled disclosure. It should thus come as no surprise that this Court has not required such proof before it enjoins state laws that deter the exercise of speech and associational rights.

In *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961), for example, this Court affirmed the entry of a preliminary injunction against a state disclosure law even though the district court had not made factual findings that the law would chill protected speech or associations. As in *Patterson*, the law at issue in *Gremillion* required the NAACP to tender a list of its members to state authorities. Although the case was at "a preliminary stage," and the State disputed that "disclosure of membership in

the NAACP results in reprisals," this Court upheld the injunction without waiting to see "what facts further hearings . . . may disclose." *Id.* at 296; *see also Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark.), *aff'd*, 393 U.S. 14 (1968) (quashing subpoena for list of political contributors, even though "there is no evidence of record . . . that any individuals have as yet been subjected to reprisals on account of the contributions in question"). In that case, as in others, the risk that speech and associational rights would be chilled provided a sufficient basis to invalidate the disclosure requirement.

2. In support of its ruling that a plaintiff must prove concrete harm arising from disclosure, the Ninth Circuit also relied on *Doe v. Reed*, 561 U.S. 186 (2010), in which this Court rejected a facial challenge to a state law that allowed for public disclosure of the signatories of referendum petitions. *See Ctr. for Competitive Politics*, 784 F.3d at 1314 (citing *Doe*, 561 U.S. at 196). But *Doe* does not support the position that compelled disclosure of an association's membership list to the State raises no First Amendment concerns in its own right. On the contrary, the Court made plain that "compelled disclosure of signatory information on referendum petitions *is subject to review under the First Amendment*." *Doe*, 561 U.S. at 194 (emphasis added).

The Ninth Circuit focused on *Doe*'s discussion of "exacting scrutiny," the standard of review that applies when a disclosure law is challenged under the First Amendment. *Doe* instructed that, for a state disclosure requirement to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." 561 U.S. at 196. Rather than take this passage as a whole, the Ninth Circuit focused myopically on the words "actual burden."

See Ctr. for Competitive Politics, 784 F.3d at 1314. It understood the Court to mandate that a party resisting disclosure must show an "actual" injury separate and apart from the disclosure itself. *Id.* at 1314-16.

That reading of *Doe* is an unnatural one. *Doe* simply recognized that the "actual burden" imposed by a disclosure requirement varies from case to case—and that the State's burden to justify the disclosure varies as well. The "actual burden" on speech rights may vary for a host of reasons. Some state disclosure requirements are broad, whereas others are targeted and narrow. Some private associations closely guard the identity of their members, whereas other groups may display members' names or photos on a website. Whatever the circumstance, the State must always satisfy the Court that its interest in disclosure outweighs the burden on privacy rights. Accordingly, where the burden on those rights is substantial, the State must show its interests are substantial too. *See Doe*, 561 U.S. at 196 (holding that the State's interest "must reflect the seriousness of the actual burden on First Amendment rights"). *Doe* simply held the State to its burden of proof. It did not suggest that compelled disclosure raises no constitutional concerns at all absent evidence that the disclosure will lead to threats or other secondary harms.

Doe, in any event, is distinguishable from this case on its facts. The plaintiffs in *Doe* were attempting to block the public release of a referendum petition they had voluntarily "submitted to the government" in order to place an issue on the ballot. *Id.* at 190-91. Here, petitioners, IFS, and other nonprofit groups are resisting disclosure of their donors to the State in the first instance. Whatever interest the *Doe* plaintiffs had in preventing the further

disclosure of their signatures to the public, it did not implicate their fundamental right to shield their private donor information from the *State*.

Doe, moreover, arose in the "electoral context." 561 U.S. at 195-96. The State had argued that signatories to referendum petitions have no First Amendment right to privacy at all because their signature was a "legislative act" that had the effect of putting a law up for a popular vote. *Id.* at 195. Although the Court rejected that position, it emphasized that States enjoy "significant flexibility in implementing their own voting systems" and ensuring the integrity of the vote—an independent constitutional right. *Id.* at 195, 197; *see also id.* at 212-15 (Sotomayor, J., concurring). No similar interest obtains in this case.

D. Proof of Concrete Injury Is Not Required in the Context of Facial Challenges

The Ninth Circuit's requirement that a litigant resisting disclosure introduce evidence of an "actual" injury to its First Amendment rights, *Ctr. for Competitive Politics*, 784 F.3d at 1314, makes especially little sense in the context of facial challenges.

A facial challenge is available under the First Amendment where the State burdens far more speech than necessary to accomplish its objectives. *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988). Even if the law may be validly applied in some cases, it is still subject to a facial challenge if it "is so broad that it may inhibit the constitutionally protected speech of third parties." *Id.* The crux of an "overbreadth" claim is that the fit between the State's means and its ends is especially poor. For claims of this nature, there is no need for a court to consider evidence that the law caused specific injuries to any particular party. A facial challenge exists "not primarily

for the benefit of the litigant, but . . . to prevent the statute from chilling the First Amendment rights of other parties *not* before the court." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984) (emphasis added); *see also City of Chicago v. Morales*, 527 U.S. 41, 55-56 n.22 (1999) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question."); *Aptheker*, 378 U.S. at 516 (recognizing that, in evaluating a facial challenge, "this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar").

In *Doe v. Reed*, this Court rejected a facial challenge precisely because the argument the plaintiffs made for striking down a disclosure law "rest[ed] almost entirely on the specific harm they say would attend disclosure of the information" in one particular referendum petition or other similarly controversial ones. 561 U.S. at 200. If plaintiffs claim that a disclosure requirement burdens the exercise of their own speech or associational rights—say, by exposing them to threats or harassment for their unpopular views—they may bring an as-applied challenge. *Id.*; *see also id.* at 202-03 (Alito, J., concurring). But a facial challenge by its nature tests whether the compelled disclosure "*in general* violates the First Amendment." *Id.* at 200 (emphasis added).

In other cases presenting a facial challenge, this Court has neither considered nor discussed the type of evidence that the Ninth Circuit required in this case. *Watchtower Bible & Tract Soc'y*, 536 U.S. 150, concerned an ordinance that barred canvassers from entering private property for the purpose of promoting a cause without first obtaining a permit. Because the canvassers were required to identify themselves on the license, the Court treated the case

as implicating the right to anonymous speech. *Id.* at 160. But the Court did not ask whether any member of the religious society that brought the suit had suffered threats or harassment once their names were disclosed. Instead, it struck down the ordinance on its face because it was substantially overbroad—it regulated "*so much speech*" and was "not tailored to the Village's stated interests" in protecting the privacy of its residents. *Id.* at 165, 168 (emphasis added); *see also Talley*, 362 U.S. at 64-65 (holding a local ordinance "void on its face" because it barred distribution of anonymous handbills "under all circumstances").

Shelton v. Tucker, 364 U.S. 479, struck a similar theme. At issue in that case was an Arkansas law that required all public school teachers, as a condition of employment, to submit an affidavit listing every group to which they contributed or belonged in the previous five years. Although the plaintiff was a member of the NAACP, the Court did not invalidate the law on the ground that the disclosure would subject the plaintiff to retaliation. Instead, it held the law facially overbroad because the scope of the State's intrusive and deeply personal inquiry was out of proportion to its interest in evaluating the competence of its teachers. "The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers." *Id.* at 490.

This case is similar to *Watchtower* and *Shelton*. As further explained in Section II, *infra*, the California regulation violates the First Amendment on its face because its sweeping demand for donor information bears no substantial relationship to its interest in preventing fraud. The Ninth Circuit rejected IFS's facial challenge to the

law because IFS did "not claim and produce[d] no evidence to suggest that [its] significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the . . . disclosure requirement." *Ctr. for Competitive Politics*, 784 F.3d at 1316. For the reasons above, proof of such harm should have played no part in the analysis.

II. The California Disclosure Requirement Should Be Struck Down as Overbroad on Its Face

A. Facial Challenges Are Particularly Appropriate in the First Amendment Context

This Court has long recognized a heightened role for facial challenges in the First Amendment context. *See United States v. Salerno*, 481 U.S. 739, 745 (1987) (distinguishing First Amendment facial challenges from other facial challenges); *see also United States v. Stevens*, 559 U.S. 460, 472 (2010). Unlike facial challenges in other contexts, which require the plaintiff to show either that a statute is unconstitutional in every application or "lacks any plainly legitimate sweep," First Amendment facial challenges require merely that the plaintiff prove substantial overbreadth. *Stevens*, 559 U.S. at 472-73; *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); pp. 17-18, *supra*. Under that standard, "a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 559 U.S. at 473.

This distinction effectuates the principles underlying the First Amendment. Most other constitutional protections preserve only an individual's right to be free from certain intrusions, like excessive force, but the First Amendment preserves an individual's right to act affirmatively—to speak, publish, assemble, petition, or practice one's religion. Facial challenges are therefore especially

appropriate in the First Amendment context because overly broad laws "deter[] people from engaging in constitutionally protected speech"—*i.e.*, from engaging in affirmative acts that the Constitution specifically protects. *United States v. Williams*, 553 U.S. 285, 292 (2008).

Not only are facial challenges suitable in First Amendment cases, but case-by-case adjudication can be particularly *inappropriate*. Compare the First Amendment to the Fourth. The crux of a Fourth Amendment violation is reasonableness. Because the reasonableness of a search depends on context, Fourth Amendment claims are typically decided case by case. But with a First Amendment claim that a statute is substantially overbroad, the circumstances of any one particular case rarely matter. "Gradually cutting away the unconstitutional aspects of a statute by invalidating its improper applications case by case does not respond sufficiently to the peculiarly vulnerable character of activities protected by the First Amendment." Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 262 n.97 (1994) (alterations omitted) (quoting Laurence H. Tribe, *American Constitutional Law* § 1227, at 1023 (2d ed. 1988)).

Citizens should not have to bear the cost of repeat litigation over the same constitutionally defective state regulation. Where state disclosure laws are concerned, as-applied challenges burden the exercise of First Amendment rights by requiring private associations to spend precious resources hiring counsel and marshalling evidence that they or their donors will face threats or other harms resulting from disclosure. "The First Amendment does not permit laws that force speakers to retain a[n] attorney . . . before discussing the most salient political issues of our day." *Citizens United v. FEC*, 558 U.S. 310,

324 (2010). Litigation costs are substantial, and many organizations cannot afford them. Americans for Prosperity Foundation's as-applied claim required the testimony of five different fact witnesses and two experts. *Ams. for Prosperity Found. v. Harris*, No. 2:14-cv-09448-R (C.D. Cal.), Dkt. Nos. 164, 165, 166, 170, 171. Such litigation by its nature forces organizations to engage in compelled speech by asking them to justify their interests in associational privacy. Where the disclosure requirement is substantially overbroad in light of the State's interests, it should be stricken on its face.

B. California's Disclosure Requirement Is Overbroad on Its Face

California's disclosure requirement is facially unconstitutional because it imposes an "unlimited and indiscriminate" burden on the right to associate far out of proportion to the State's legitimate need. *See Shelton*, 364 U.S. at 490. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Button*, 371 U.S. at 433. "Broad and sweeping state inquiries into" a person or group's associations "discourage citizens from exercising rights protected by the Constitution." *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971). Under the exacting scrutiny standard, even important government interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton*, 364 U.S. at 488. Far from satisfying that standard, California's disclosure mandate to nonprofits is virtually limitless.

California has issued a blanket demand that nonprofit or charitable groups seeking to raise money in the State must divulge a list of their major donors to the attorney

general. Although the ostensible purpose of the regulation is to assist the attorney general in detecting fraud, it applies whether or not the State has any reason to suspect that a particular group is engaged in fraudulent or criminal activity. It does not permit organizations to redact or withhold the names of donors who reside outside of California—and outside the reach of the State's law enforcement powers. What is more, the regulation contains no temporal limits. California retains the donor records indefinitely, and the attorney general may inspect them at any time and for any purpose whatsoever.

The risk that this information dragnet will chill protected speech and associations is as obvious as it is substantial. Soliciting and making charitable donations are both forms of speech subject to the highest First Amendment protection, *see Riley*, 487 U.S. at 789, and both activities convey a significant amount of information about the beliefs and priorities of the speaker, *see Buckley*, 424 U.S. at 66. A record of a person's nonprofit giving may reflect, among other things, what religion she practices, what schools she attended, and what her views are on the divisive issues of the day, from abortion rights and gun rights to racial justice and law enforcement reform.

Donors have many reasons they would not want to divulge this sort of deeply personal information to the State, whether out of embarrassment, fear of surveillance or official reprisals, or "merely . . . a desire to preserve as much of one's privacy as possible." *McIntyre*, 514 U.S. at 341-42. If donors can no longer support their causes from a position of relative anonymity, some of them will cease giving money rather than expose their affiliations to the State. IFS is in just such a position: It has stopped soliciting donations in California, the Nation's most populous

State, rather than submit to its intrusive disclosure regime.

California's demand that nonprofit groups turn over a list of their major donors will surely have the most swift and dramatic effect on organizations that advance controversial or unpopular positions. Given California's history of leaking this information, *see* p. 25, *infra*, supporters of these groups will understandably fear that disclosure will subject them to social ostracism or online vitriol. *See McIntyre*, 514 U.S. at 341-42. But even groups that do not ordinarily court controversy may lose supporters who have subjective and idiosyncratic privacy concerns or simply object to disclosing information to the State. One can expect that the disclosure requirement will deter contributions from, among many others:

- Donors whose "religious scruples" bar them from taking credit for charitable donations. *See Watchtower*, 536 U.S. at 167.
- Civil libertarians who object on principle to government intrusions into private lives. *See id.*
- Supporters of nonprofits working for human rights in repressive countries.
- Patients who worry that a donation to a hospital, foundation, or research institution may reveal a medical condition they prefer to keep private—depression, mental illness, addiction, infertility, or a sexually transmitted infection.
- Sexual assault survivors who wish to donate to a victims' organization but who do not want to disclose their own experience as survivors.
- Prosecutors, journalists, teachers, or others whose jobs require impartiality in a professional setting,

but who wish to advance their views in their personal capacity.

- Career civil service employees whose private views clash with those of the incumbent administration or prominent state legislators.
- Members of minority racial, religious, or ethnic groups who fear they may be profiled by the State once their affiliation with a charitable or nonprofit group is disclosed.
- Supporters of ideological causes disfavored by employers or consumers who fear job or business losses over their donations.
- Anyone who believes their donations will subject them to recrimination from family, friends, or coworkers or make them the target of harsh online criticism.

It is no answer to say that the chilling effect of California's disclosure requirement will be limited because the attorney general does not intend to release the donor lists to the public. No matter the attorney general's present intent, he or his successor could decide to reveal this confidential information at a later date. What is more, the district court made factual findings in *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049 (C.D. Cal. 2016), that leaks were commonplace and the State's security protocols for maintaining the confidentiality of donor lists were "indefensible." *Id.* at 1057. The petitioner in that case identified nearly 1,800 donor lists that California had inadvertently released online, including a copy of Planned Parenthood's Schedule B that "included all the names and addresses of hundreds of donors." *Id.*

But the California regulation would not be saved even if the State could guarantee that the donor lists would never become public. Donors have at least as much to fear from disclosure of their names to the State as they do from disclosure to the public at large. It is the State that has the power to arrest, audit, interrogate, and incarcerate. The California disclosure requirement supercharges the State's investigative and law enforcement powers by providing access on demand to documents—the Schedule Bs—for which it would ordinarily need a warrant or subpoena. Once the State has collected that information, there are no limits on the purposes for which it can be used. It can be compiled into a searchable database, shared with other law enforcement agencies, and combined with other sources of information to build a comprehensive portrait of the activities and associations of ordinary people. Lest our country become a surveillance state, this Court has already recognized the need for constitutional limits on searches that provide "an intimate window into a person's life, revealing . . . his familial, political, professional, religious, and [other] associations." *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (Fourth Amendment).

The vague law enforcement interests asserted by the attorney general do not remotely justify California's sweeping intrusion into private associations. In its briefing to the Ninth Circuit in IFS's case, California scarcely bothered to describe its supposed interest in the donor lists, arguing that "in the absence of any showing of harm, the law does not require the Attorney General to explain the necessity of the required disclosure." Harris Br. 29, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir.), Dkt. No. 17. It was not until oral argument that the State attempted to justify its disclosure rule, suggesting that the donor lists might help it identify instances where

charities inflated the value of in-kind donations. It never explained, however, why it could not simply require the names of donors who made in-kind rather than cash contributions. This kind of speculative interest falls far short of carrying the State's burden of justifying its imposition on speech and associational rights.

Even assuming that the State had legitimate law enforcement interests, its disclosure requirement violates the First Amendment because it sweeps far more broadly than necessary to effectuate those interests. There is no conceivable need for the State to conduct a fishing expedition into the files of every nonprofit group to exercise effective oversight of the small number of them that might engage in financial fraud. Indeed, an investigator for the attorney general's office testified in the *Americans for Prosperity* case that the office used the Schedule B donor lists in only five of the 540 investigations conducted in the previous ten years—and even then the Schedule B information would have been available through other means. *See Ams. for Prosperity Found.*, 182 F. Supp. 3d at 1054. At best, the California regulation is potentially helpful once every two years. "That the statute in some of its applications actually prevents the misdirection of funds from the organization's purported charitable goal is little more than fortuitous." *Joseph H. Munson*, 467 U.S. at 966-67. "It is equally likely that the statute will restrict First Amendment activity." *Id.*

What is more, the State has an alternative means of carrying out its investigative mandate that burdens far less speech. As the Ninth Circuit recognized, "the Attorney General has the power to require disclosure of significant donor information as a part of her general subpoena power." *Ctr. for Competitive Politics*, 784 F.3d at 1317. And that traditional investigative tool accords greater

protection to speech rights because the target of the subpoena can ask a court to narrow its scope or quash it altogether. California's standing disclosure order provides no such built-in mechanism for judicial review.

Where a less speech-restrictive means of gathering the information exists, the First Amendment requires that the State exercise that option rather than burdening speech and associational rights. *See, e.g.*, *McIntyre*, 514 U.S. at 349-51 (invalidating Ohio's requirement that the names and addresses of individuals distributing campaign literature be disclosed because the State had more tailored means to prevent fraud); *Riley*, 487 U.S. at 795 (observing that state antifraud law provided less restrictive alternative to burdening speech rights); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637-38 (1980) ("The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation."). It makes no difference that the attorney general would gain certain administrative efficiencies from collecting Schedule B lists up front instead of issuing subpoenas when a particular need arises. This Court has "emphatically" stated that "the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S. at 795; *accord McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

California here attempts to force nonprofit groups to turn over a list of their major donors as a condition of soliciting money within the State. It seeks the disclosure of information that is presumptively protected by the First Amendment as a prerequisite to engaging in other constitutionally protected activity. And it does so on only the thinnest showing of need. The First Amendment prohibits the State from broadly interfering with speech and as-

sociational rights when it may pursue its goals in less restrictive ways. The California disclosure requirement violates the Constitution on its face.

CONCLUSION

The Court should reverse the decisions below and should reverse the decision in *Institute for Free Speech v. Becerra*, No. 17-17403 (9th Cir. Oct. 11, 2019), *petition for cert. pending*, No. 19-793 (filed Dec. 18, 2019).

Respectfully submitted,

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