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Nos. 19-251 & 19-255

In the Supreme Court of the United States

AMERICANS FOR PROSPERITY FOUNDATION,

Petitioner,

v.

MATTHEW RODRIQUEZ

Respondent.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SCHOLARS OF THE LAW OF NON-PROFIT ORGANIZATIONS IN SUPPORT OF RESPONDENT

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THOMAS MORE LAW CENTER,

Petitioner,

v.

MATTHEW RODRIQUEZ

Respondent.

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TABLE OF CONTENTS

Page

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. California Has A Compelling Interest In Information About Substantial Donors 5

A. California's Interest in Supervising Charities and Charitable Solicitation 5

B. Information About Substantial Donors Is an Integral Part of Charities Supervision 12

C. Schedule B Is Narrowly Tailored to Obtain Information Necessary to Charities Supervision 16

II. Subpoena Power Cannot Substitute for Schedule B Disclosure 21

A. Major-Donor Information is Often Necessary to Identify Which Organizations Should be Subject to Investigation 21

B. Annual Reporting Contributes to Deterrence 24

C. Requesting Donor Information After an Investigation Commences Is Less Effective and Adds Unnecessary Burdens on Charities 25

III. Petitioners' Views Would Threaten Central Elements of Both State and Federal Charity Reporting Regimes 28

Electronic copy available at: https://ssrn.com/abstract=3821246

TABLE OF CONTENTS
(Continued)

Page

CONCLUSION 31
APPENDIX OF AMICI CURIAE 1a

Electronic copy available at: https://ssrn.com/abstract=3821246

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

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427 U.S. 463 (1976) 30

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Electronic copy available at: https://ssrn.com/abstract=3821246

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Electronic copy available at: https://ssrn.com/abstract=3821246

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Electronic copy available at: https://ssrn.com/abstract=3821246

INTEREST OF AMICI CURIAE[1]

Amici are professors and scholars of the law of nonprofit organizations.[2] Collectively, they have served as officials in all aspects of the administration of nonprofit law, including as head of the Charities Bureau in a state Attorney General's office, Chief Counsel to a state Attorney General's office, and a member of the IRS Advisory Committee on Tax Exempt and Governmental Entities, and as administrators of federal tax law pertaining to charities at the Joint Committee on Taxation, U.S. Department of Treasury, the Internal Revenue Service ("IRS"), and U.S. Department of Justice. They have founded research projects on charities regulation and oversight at think tanks and law schools, and they assist state Attorney General offices in studying and adopting new approaches to the regulation of charity and charitable solicitation.

No party in this case represents all three of charity's key stakeholders: charities, states, and taxpayers who underwrite the charities' funding. Amici are participating in this litigation in order to aid the Court in understanding how these three interests depend on one another. They also attempt to provide a clearer understanding of state supervision of charities and how that supervision relates to federal tax law.

[1] Counsel for all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part, and that no person or entity other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Amici are listed, with brief biographies, in the Appendix to this brief.

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SUMMARY OF ARGUMENT

California has a compelling interest in sustaining its charitable sector, the nation's largest. Petitioners challenge the State's requirement that tax-exempt charities provide to the California Attorney General, on a confidential basis, a copy of the IRS Form 990 Schedule B form that charities file annually with the Internal Revenue Service. Their challenge, if upheld, would undercut crucial and irreplaceable elements of California's efforts to regulate its charitable sector and ensure public confidence in charities operating in the State. More than that, Petitioners' same arguments could apply equally to central aspects of the federal regulation of charities and other major components of state supervision. Thus, whatever the applicable level of constitutional scrutiny, California's collection of information about major charitable donors should survive review.

Since before the founding of this nation, Attorneys General have worked to build and preserve charity. A gift to charity is fundamentally a matter of trust: trust that money placed in the hands of another, over whom the donor has few direct means of control, will go to its promised good purposes. Attorney General supervision supplies a strong basis for that trust, by ensuring that assets donated for charitable purposes are in fact used for those purposes.

Attorney General supervision is necessary not only to prevent the fraud and deception that Petitioners emphasize. It is necessary also to protect the public's interest against the potentially contrary private interests of an organization's major donors, officers, and other "insiders" who may be in a position to make use of a charity's resources for their own purposes

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rather than for the charitable ends the state and the charity's other donors hope to foster.

Seen in this light, California's compelling interest in learning, on a confidential basis, the identities of an organization's major donors—and that is all that Schedule B reveals, not "membership lists"—is evident. No legal regime can protect effectively against opportunistic behavior by insiders without being able to identify who those insiders are.

By focusing narrowly on whether Schedule B was essential to particular investigations, Petitioners divert the Court's attention from larger and more important systemic uses for major-donor information. For one, uniform reporting of such information, in a machine-readable format and in advance of any potential investigation for wrongdoing, streamlines and reduces the cost of supervising California's 115,000 charities and eliminates the need to initiate some costly and potentially burdensome investigations. California has approximately one attorney available for oversight of each 5,000 to 10,000 charities. To even identify which transactions require more than minimal scrutiny, the state must first be able to see basic identifying and financial information and to match these items against each other for red flags. Schedule B makes this process efficient without imposing any additional administrative burden on charities.

Information reporting also plays a major role in deterrence, as ample evidence has shown in many tax contexts. It is more difficult for a major donor to induce a charity to, for example, hire its donor as a contractor at supra-competitive prices, if the charity knows that both the donation and the contract will be reported to the State (on Schedule B and elsewhere on the

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charity's federal tax return) and readily visible to the organization's own compliance personnel. Petitioners' focus on the number of individual investigations ignores this important function of the reporting requirements. Indeed, to the extent that deterrence is effective, one would expect to see *fewer* individual investigations based on Schedule B, because there are fewer actual instances of abuse.

Petitioners' suggestion that individual State requests for donor information should suffice is misguided. In addition to failing to serve this crucial deterrence purpose, such requests would often be more burdensome to donors than Schedule B itself. Investigations consume time and resources and may generate negative publicity that could impact other donations, often the life blood of these charities. All of these effects could in many instances be avoided if Schedule B information were available and exculpatory. In those situations where there is real wrongdoing, that wrongdoing could continue in the absence of Schedule B reporting, perhaps aided by spoliation of requested evidence, as investigative demands wend their way through courts.

Finally, if Petitioners' view of the major-donor reporting rule—taking it in isolation while ignoring its deterrent effects—were applied to many other components of charitable supervision by states and the IRS, they too might fall. Many charities must publicly report Schedule B information. Other publicly available data reported annually to California and the IRS similarly reveal personal information about a charity's closest supporters, such as board members, key employees, contractors, and certain grantees. Like major-donor information, this information may not, standing alone, be directly useful to supervisory

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authorities but instead becomes meaningful when used in combination with other reported information. If requiring the provision of Schedule B to the State Attorney General on a confidential basis were unconstitutional because, in very rare instances, its accidental disclosure might deter association with a charity, these other forms of reporting might also be deemed constitutionally suspect.

ARGUMENT

I. California Has A Compelling Interest In Information About Substantial Donors

Whatever the level of scrutiny applicable to California's request for major-donor information, that request survives constitutional challenge because California's interests would meet even the most demanding standard. California has compelling interests in preserving charitable assets held in trust for public use and in upholding public confidence in California charities, which are among the largest and most trusted in the country. The Attorney General's access to information about major organizational supporters is essential to the Attorney General's efforts to safeguard charitable assets and maintain the public's trust in the charitable sector.

A. California's Interest in Supervising Charities and Charitable Solicitation

A state Attorney General's power to supervise charitable organizations is deeply enshrined in the fabric of American law, with roots older than this country. Even before the English Statute of Charitable Uses in 1601, the Attorney General (of the Crown) had the power to bring suit to enforce a charitable trust. Marion Fremont-Smith, *Governing Nonprofit Organizations* 27, 32-34 (2004); Restatement of the

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Law, Charitable Nonprofit Organizations § 5.01(a), (c) (Am. L. Inst., 2021); Robert Carlson & Caitlin Calder, *Protection and Regulation of Nonprofits and Charitable Assets, in* State Attorneys General Powers and Responsibilities, Nat'l Ass'n of Att'ys Gen. 215-216 (Emily Myers ed., 2018). This common law power eventually provided the basis for the power of the Attorneys General of the various states. *Governing Nonprofit Organizations* at 305-14, 324.

States grant Attorneys General power to regulate charity to ensure that charitable assets are preserved irrevocably for public benefit. "The state attorney general . . . has the authority to protect charitable assets and interests within the jurisdiction of the state . . . ." Restatement of the Law, Charitable Nonprofit Organizations § 5.01; *see* Cal. Gov't Code § 12598(a).[3] "[A]ll the assets of a corporation organized solely for charitable purposes must be deemed to be impressed with a charitable trust by virtue of the express declaration of the corporation's purposes . . . [S]aid property [is] therefore 'irrevocably dedicated' to exempt purposes . . . ." *Pacific Home v. County of Los*

[3] The regulatory framework for charities oversight in the United States is complex, with state Attorneys General and federal officials including the IRS, Department of Treasury, Federal Trade Commission, and even the United States Postal Office constituting a regulatory ecosystem. Each of these offices or agencies has its own jurisdiction, some of which is concurrent with other offices, some of which stands alone. This "interlocking jurisdiction" affords states the primary role in overseeing governance, trusts, solicitation, charities registration compliance and corporate transactions, both through civil and criminal jurisdiction. *Protection and Regulation of Nonprofits and Charitable Assets,* 216-218; Cindy M. Lott & Marion Fremont-Smith, *State Regulatory and Legal Framework, in* Nonprofits and Government: Collaboration and Conflict 164 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2016).

Electronic copy available at: https://ssrn.com/abstract=3821246

Angeles, 41 Cal. 2d 844, 852 (1953). As described in a leading casebook on nonprofit organizations:

> The attorney general represents the public in enforcing the purposes of the trust or corporation. The common law duties of the attorney general reflected the expectations of society: that there should be a single evolving duty to carry out the charitable purposes of the trust, that it was necessary to keep trust property productive, and that trustees should be prohibited from diverting charitable funds for improper purposes or self-dealing.

James J. Fishman et al., *Nonprofit Organizations: Cases and Materials* 204 (5th ed. 2015).

To preserve the public's interest in charitable property and its uses, state laws grant Attorneys General power not only to investigate and gather information about charities in their jurisdiction, but also—unlike the authority of the IRS under federal law—to exercise broad regulatory and enforcement authority over charitable solicitations. *Protection and Regulation of Nonprofits and Charitable Assets,* at 229. An Attorney General may require an accounting of an organization's assets and may "investigate transactions and relationships of directors and trustees to determine whether property held or used by them has been allocated to charitable purposes." *Nonprofit Organizations* at 204-05. Moreover, Attorneys General may enjoin or impose restitutionary duties on an organization's officers and managers. *Id*. They may remove directors or trustees chosen by the organization and, in extreme cases, even wholly dissolve the entity and distribute its assets to

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other charitable uses. *Id*. All of these common-law and statutory powers and tools are wielded, however, by a small cohort of state charities regulators who, as of 2013, numbered fewer than 400 state attorney-general staffers overseeing more than one million nonprofits in the United States. Cindy M. Lott et al., *State Regulation and Enforcement in the Charitable Sector* 8 (2016); Elizabeth T. Boris & Cindy M. Lott, *Reflections on Challenged Regulators,* in Regulating Charities: The Inside Story 104 (Myles McGreggor-Lowndes and Bob Wyatt eds., 2017).

Most enforcement authority rests uniquely with Attorneys General. "In most states only the attorney general has the power and standing to intervene and investigate misappropriations of charitable funds, breaches of fiduciary duty and self-dealing by directors, and fraud in charitable solicitations." *Protection and Regulation of Nonprofits and Charitable Assets,* at 215. "Since there is usually no one willing to assume the burdens of a legal action, or who could properly represent the interests of the trust or the public, the Attorney General has been empowered to oversee charities as the representative of the public." *Holt v. College of Osteopathic Physicians & Surgeons*, 61 Cal. 2d 750, 754 (1964). If the Attorney General fails to enforce the law, no one else will.

Attorney General oversight works to ensure donor trust. Better Business Bureau Wise Giving Alliance Donor Trust Report 2020, 10 (2020) https://www.give.org/docs/default-source/donor-trust-library/2020-donor-trust-report.pdf. Many donors would not support charitable endeavors if they believed that the organization's insiders, including major donors, would profit from their contribution or otherwise divert charitable assets for the insiders' own private

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purposes. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 675 n.6 (1990) (Brennan, J., concurring) (citing Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835, 843-845 (1980)). States with stronger reporting requirements experience less self-dealing. Mihir A. Desai & Robert J. Yetman, *Constraining Managers without Owners: Governance of the Not-for-Profit Enterprise*, 4 J. Governmental & Nonprofit Accounting 53, 69 (2015). Donors give more to charities in states with greater protections against managerial self-dealing. Fisman & Hubbard, *Precautionary Savings and the Governance of Nonprofit Organizations*, 89 J. Pub. Econ. 2231, 2240-41 (2005). And fraud or improper dealing by one charity can negatively affect the reputation of many others. Mark S. LeClair, *Reported Instances of Nonprofit Corruption: Do Donors Respond to Scandals in the Charitable Sector?*, 22 Corp. Reputation Rev. 39 (2019); Joanne G. Carman, *What You Don't Know Can Hurt Your Community: Lessons from a Local United Way*, 21 Nonprofit Management and Leadership 433 (2011).

Accordingly, the States uniformly prohibit self-dealing transactions between a charity and certain of its insiders. *Governing Nonprofit Organizations*, at 217. A charity may not distribute profits to these insiders, such as by paying them excessive compensation or by entering into sweetheart deals for the charity's use of the insider's property. *Id*. Charitable assets of the organization may not be used for the private benefit of insiders, except to the extent that such use is merely incidental to some public-regarding charitable purpose. *In re Los Angeles County Pioneer Soc'y*, 40 Cal. 2d 852, 860 (1953). Thus, a charity may not be used as means of generating business for its major donors or other insiders. *See*

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Complaint at 8, 9, 13, People v. L.B. Research & Educ. Found., No. BC 421250 (L.A. Super. Ct., filed Sept. 8, 2009), https://oag.ca.gov/system/files/attachments/press_releases/n1799_lbresearch.pdf (alleging donations-for-business scheme); AFPF JA 415.

Attorney General oversight of charitable solicitation serves ends similar to those of donor and contractor oversight. As with investors in securities, a charity's financial supporters "would hesitate to venture their capital in a market . . . unchecked by law." *United States v. O'Hagan*, 521 U.S. 642, 658 (1997). Regulation to prevent fraudulent or misleading solicitation thus preserves funders' confidence and, with that, the stream of funding itself. *Id.* "Attorney general action is imperative to protect consumers, uphold the reputation of the charitable sector, and encourage the continued generosity of the public." *Protection and Regulation of Nonprofits and Charitable Assets* at 229; *see* Restatement of the Law, Charitable Nonprofit Organizations § 5.01 cmt. d.

California enjoys one of the nation's largest and most widely supported charitable sectors. As of June 2018, charities registered in California reported $295 billion in annual income and net assets of $851 billion. Cal. Dep't of Justice, *Attorney General's Guide for Charities* 1 (2020). At about that time, charities nationwide held about $3.8 trillion in assets, indicating that California registrants represent about 22.4% of the charitable assets in the entire nation. Urban Institute, National Center for Charitable Statistics, *The Nonprofit Sector in Brief 2019* (June 2020), https://nccs.urban.org/publication/nonprofit-sector-brief-2019#the-nonprofit-sector-in-brief-2019.

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Its charitable sector is nearly three times as large, on a per-capita basis, as amicus Arizona.[4]

California has a compelling interest in preserving the integrity and vibrancy of its charitable sector, safeguarding assets already under charitable control, and encouraging further contributions. Other states may prefer a light-touch strategy in which regulatory burdens, and perhaps donor trust, are lower. *Compare, e.g*., Cal. Gov't Code § 12581 (requiring registration of "all charitable corporations . . . over which the state . . . has enforcement or supervisory powers"), *with* Ariz. Rev. Stat. Ann. § 13-3722 (requiring state registration only for charities soliciting funds for veterans organizations).[5] Each state has a compelling interest in developing its own vision of how best to support and regulate private charity, and different states have made different choices. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc*., 538 U.S. 600, 623 (2003).

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[4] California's population of 39.5 million, U.S. Census, Quick Facts California (July 1, 2019), https://www.census.gov/quickfacts/CA, is just 12% of the nation's 328.2 million, U.S. Census, Quick Facts United States (July 1, 2019), https://www.census.gov/quickfacts/fact/table/US/PST045219. In contrast, Arizona nonprofits held just $48 billion in assets, or 1.3% of the national total. Independent Sector, State Profile – Arizona (Mar. 18, 2020), https://independentsector.org/resource/state-profile-arizona/.
Arizona's population of 6.4 million is 2% of the national total. U.S. Census, Quick Facts Arizona (July 1, 2019), https://www.census.gov/quickfacts/AZ.

[5] A comprehensive summary of state enforcement policies is available at The Legal Compendium, Urban Inst. (Oct. 29, 2019), https://www.urban.org/policy-centers/center-nonprofits-and-philanthropy/projects/regulation-charitable-sector-project (click link to "Download the Legal Compendium" to download the spreadsheet).

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B. Information About Substantial Donors Is an Integral Part of Charities Supervision

Contrary to repeated suggestions from Petitioners, this is a case about confidential reporting of information to government officials, not about any broader disclosure to the public. Federal law already obliges charitable organizations to share detailed information about their finances, organizational structure, and activities with the public. 26 U.S.C. § 6104(d)(1). But, even when reported to government, information about most charities' donors is confidential, 26 U.S.C. § 6104(d)(3)(A), and a government official who willfully reveals such confidential information outside certain statutorily authorized circumstances has committed a federal crime, 26 U.S.C. §§ 6103, 7213. The reporting obligation challenged here should stand or fall based on whether confidentially reporting donor information to government regulators serves a sufficiently important governmental purpose.[6]

A legal regime intended to guard against opportunistic behavior by insiders cannot function unless regulators can identify the insiders. Major donors, no less than other insiders, may be able to divert resources from charitable goals to their own uses. Identifying and policing transactions with major donors thus serves an important role in preserving

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[6] Making such data available to potential supporters increases donor support by allowing donors to distinguish high-performing charities from their competitors. Putnam Barber et al., *Does Mandatory Disclosure Matter? The Case of Nonprofit Fundraising*, 50 Nonprofit & Voluntary Sector Q. __ (forthcoming 2021). Thus, certain public disclosures about charities that do occur may actually increase, not discourage, donations.

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public confidence in the charitable sector. George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 Harv. L. Rev. 1102, 1147-48 (2004) (noting that cross-monitoring of other donors is important to charitable contributors but difficult for them to accomplish on their own).

Indeed, federal law recognizes that large contributors to an organization are often in a position to exert control over the operations of the donee charity. Federal law, like that of California and other states, restricts certain transactions between insiders and the charity. 26 U.S.C. § 4958. For these purposes, federal law defines insiders to include "substantial contributors." 26 U.S.C. §§ 507(d)(2)(A), 4958(c)(3)(C); 26 C.F.R. § 53.4958-3(e)(2)(ii). A substantial contributor is "any person who contributed . . . an aggregate amount of more than $5,000 . . . if such amount is more than 2 percent of the total contributions . . . received" for the year. 26 U.S.C. § 507(d)(2)(A).

IRS reporting requirements are designed to ensure that the Service can enforce these limitations. Not coincidentally, the donors an organization must report on Schedule B of its tax return are exactly those who would qualify as substantial contributors. *See* Internal Revenue Service, Form 990 Schedule B Instructions for 2020.

Petitioners argue that donor information is unnecessary to uncover fraud. Foundation Br. 1, 8, 31. Even if that were true (and it is not), it would neglect the fact that Attorney General oversight guards not only against fraud but also against insider self-dealing more generally. A major donor can influence board

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decisions about vendors, grantees, expenditures, and sale or lease of charitable assets—all decisions that can result in a benefit flowing back to the donor or the donor's family. Organizations already report key employees, grantees, and major contractors. Internal Revenue Service, Form 990. Without major-donor information, there would be no indication in the organization's filings to show when grants or contracts are awarded to influential donors. Has the organization, for example, hired a key employee who happens to be its main supporter's underqualified child? Without donor information, a regulator cannot easily know.

Petitioners make much of the supposed fact that California points to relatively few reported instances in which substantial-contributor information was central to a fraud investigation, but Petitioners apparently fail to understand basic features of how deterrence works. Unfortunately, attempted fraud within and by ostensible charities is not rare. *E.g.*, Kris Hundley & Kendall Taggart, *America's 50 Worst Charities Rake in Nearly $1 Billion for Corporate Fundraisers*, *Tampa Bay Times* (Oct. 2, 2017); *see* Janet Greenlee et al., *An Investigation of Fraud in Nonprofit Organizations: Occurrences and Deterrents*, 36 Nonprofit & Voluntary Sector Q. 676, 677 (2007) (noting more than 2,000 fraudulent Internet sites soliciting donations for Katrina relief); Deborah S. Archambeault et al., *Fraud and Corruption in U.S. Nonprofit Entities: A Summary of Press Reports 2008-2011*, 44 Nonprofit & Voluntary Sector Q. 1194, 1215 (2015) ("[N]onprofit fraud continues to be a significant and costly issue."). Even if it were true that the number of litigated fraud cases involving donor information were small, that would be fully consistent with the importance of major-donor reporting,

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because, as discussed further below, that reporting itself helps prevent fraud. In essence, Petitioners argue that, since houses with large guard dogs are never robbed, guard dogs must be unnecessary. The scarcity of observed instances of fraud in states with more modest enforcement regimes also does not shed light on the efficacy of California's regime, because those states may, in the absence of major-donor disclosure, fail to detect many fraud cases.

Lastly, Petitioners seem to suggest that IRS requirements are not relevant to whether California needs major-donor information, because the Attorney General does not directly dispense tax benefits. Foundation Br. 45-46; Law Center Br. 54. States share with federal tax law, however, the common goal of protecting charitable resources from diversion to private purposes. Staff of Joint Comm. on Internal Revenue Taxation, 91st Cong., General Explanation of the Tax Reform Act of 1969 52-53 (Comm. Print Dec. 3, 1970). In any event, if a nonprofit breaches or loses its federal tax-exempt status, that may directly impact that nonprofit's status under state law as well. *E.g.*, Cal. Corp. Code § 5260. States have their own discrete interest in substantiating federal tax-exempt status as well as adherence to their own state laws. Thus, the Internal Revenue Code requires the Treasury Department to notify "the appropriate State officer," which includes the state Attorney General, when the IRS refuses to recognize the charitable status of an organization, revokes a charity's tax exemption, or imposes certain taxes on a charity. 26 U.S.C. § 6104(c)(1).

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C. Schedule B Is Narrowly Tailored to Obtain Information Necessary to Charities Supervision

In an apparent effort to liken this case to prior cases involving membership lists, Petitioners repeatedly and inaccurately describe Schedule B as a "sweeping" or "blanket" demand for donor information. Foundation Br. 2, 8, 19; Law Center Br. 25, 33, 35. To the contrary, Schedule B requires reporting only of those donors who are in a position to exert influence comparable to other insiders. More specifically, the Schedule B obliges nonprofits such as Petitioners to provide, on a confidential non-public basis, identifying information for donors that give the greater of $5,000 or 2 percent of the organization's support for the year. An organization with $1 billion in annual contributions would report only donors who had given $20 million dollars or more.

Thus, in practice, Schedule B's disjunctive test limits donor reporting to a select group of large donors. As applied to Petitioner Americans for Prosperity Foundation, the two-percent rule means that, for 2014, only donors who gave more than about $429,000 would have to be reported. For 2018, the threshold was approximately $340,000. Internal Revenue Service, Form 990: Return of Organization Exempt from Income Tax: Americans for Prosperity Foundation (2018), available at https://projects.propublica.org/nonprofits/display_990/521527294/02_2020_prefixes_47-52%2F521527294_201812_990_2020021417150111. For Petitioner Thomas More, the two-percent disclosure thresholds in those respective years were approximately $35,650 and $31,700. Internal Revenue Service, Form 990: Return of Organization Exempt from Income Tax: Thomas More

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Law Center (2018), available at https://projects.propublica.org/nonprofits/display_990/383448297/06_2019_prefixes_35-39%2F383448297_201812_990_2019061316407569.

Requiring donors of such substantial sums to be confidentially reported to government regulators is hardly a "dragnet" capturing small donors or all members. Of course, whether any particular contribution is "major" or "substantial" is a relative question, and the major-donor thresholds therefore depend on organization size: the less an organization raises, the lower the contribution thresholds for substantial contributors. Far from being a blanket demand for an organization's donors or members, the Schedule B is carefully tailored to capture only those donors who are particularly relevant to charitable oversight: those who, by virtue of their substantial support for the organization, are in a position to influence or take advantage of the organization's affairs.

Accordingly, California's requirement is a far cry from the sort of demand for membership lists that was at issue in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); and the other cases cited by Petitioners. Donors making contributions of thousands of dollars a year are not the "rank-and-file members" with which the Court was concerned in *NAACP*. 357 U.S. at 464. They are instead more closely akin to persons who "hold official positions" with the organization, the identities of which were not at issue in that case. *Id*.

Petitioners do briefly acknowledge that California's reporting requires information on only a narrow slice of donors; but, rather than admitting that this fact

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takes their case outside the ambit of *NAACP*, they try to spin it to their advantage by arguing that the reporting obligation is too limited to be useful. Foundation Br. 47. But the reason California requires reporting only of those major donors listed in Schedule B is precisely because it is the identity of *these* donors—those tending to have "substantial influence over the affairs of an organization," 26 C.F.R. § 53.4958-3(e)(2)(ii)—that is most relevant to charitable enforcement. As discussed above, California has a longstanding duty to protect charitable assets, and the identity of substantial contributors in particular is directly related to enforcing that duty.

Historical context also suggests the relatively modest scope of California's donor reporting. The origins of the Schedule B requirement are 80 years old. In 1941, the very first version of the informational return for charities (now known as the Form 990) required an itemized list of contributions exceeding $4,000. Cheryl Chasin et al., *Form 990*, Internal Revenue Service, 2002 Exempt Organizations Continuing Professional Education Materials 227, available at https://www.irs.gov/pub/irs-tege/eotopicg02.pdf. In 1947, in the next version of the form, filers were required to provide "a list of large contributors" with a lower reporting threshold of $3,000. *Id*. at 228

Reporting requirements expanded in 1969. Before that year, most of the tax-exempt sector did not have to file an annual return. Concerns about self-dealing and other abuses led to a general requirement that "every exempt organization must file an annual information return" (with exceptions for churches, certain religious orders, and very small organizations). General Explanation of the Tax Reform Act of 1969 at

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53. As explained by the Congressional Joint Committee on Taxation at the time: "The Congress concluded that experience of the past two decades indicated that more information is needed on a more current basis from more organizations and that this information should be made more readily available to the public, *including State officials*." General Explanation of the Tax Reform Act of 1969 at 52-53 (emphasis added).

In 1969, Congress expanded both the universe of mandatory filers and the information required on the form:

> [Required] to be shown on each information return [are] the names and addresses of all substantial contributors, directors, trustees, and other management officials and of highly compensated employees. Compensation and other payments to managers and highly compensated employees also must be shown. All this information is to be available to the public, except for the names and addresses of substantial contributors to exempt organizations other than private foundations. (The non-private foundations, are, however, required to disclose those names to the Internal Revenue Service.)

General Explanation of the Tax Reform Act of 1969 at 53.

The 1969 Act also requires disclosure of highly detailed information about charitable organizations, their beneficiaries, and those who work with them. Organizations must report the names, hours worked,

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and in many cases compensation of board members, officers, and other key employees. Form 990 *passim*. Grant recipients are identified by name and taxpayer i.d. number, the amount of grant received, and the purposes of the grant. Internal Revenue Service, Form 990 Schedule I Instructions (2020). All this reported information is freely available to the public. 26 U.S.C. § 6104(d)(3)(A). If association with a reporting charity bears some public opprobrium, it may fall on all these publicly named persons and entities as readily as on donors, and it is more likely to do so where, in contrast to the confidential reporting of donors at issue here, the information is public.

The public nature of so much charitable information also undermines Petitioners' claim that California's reporting requirement threatens their associational freedoms. The claim is specious. As Petitioner APF acknowledges, Foundation Br. 50-51, whether or not its donations from private foundations appear on its Schedule B, private foundations are themselves required by federal law to publicly disclose their grants. 26 U.S.C. § 6104(d)(1), (3)(A). Any harassment is far more likely the result of such public disclosure by the grantor private foundation.

The information reported to California on Schedule B is very modest when viewed in the context of charitable disclosures more generally. As a sovereign State, California could have developed its own information-reporting regime, its own definition of "substantial contributor," and its own form. Instead, California opted to rely on long-established forms and reporting rules already familiar to charities and their supporters, thereby minimizing any incremental burdens from dual reporting. The information

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requested is tailored narrowly to fit the enforcement regime for which it is needed.

II. Subpoena Power Cannot Substitute for Schedule B Disclosure

Petitioners argue that, even if major-donor information is relevant to charitable supervision, the Schedule B reporting requirement is overbroad because California has other means to obtain the same information. Foundation Br. 31-32, 34-36; Law Center Br. 38. Specifically, Petitioners suggest that California could request donor information with respect to select charities through subpoena or similar investigative powers. *Id*.

This argument fails to understand the unique role that mandatory annual reporting serves in charitable oversight. The obligation to report donor information each year, and in advance of any particular audit or other enforcement action, offers several key advantages over document requests initiated during the investigative process.

A. Major-Donor Information is Often Necessary to Identify Which Organizations Should be Subject to Investigation

Obtaining donor information by subpoena or other document request would be an ineffective substitute for Schedule B reporting, because donor information is often needed before the Attorney General can even open an investigation.

First, donor identity must frequently be established before the Attorney General may even assert jurisdiction. While the Attorney General has jurisdiction to supervise charitable solicitation of California residents, Cal. Bus. and Prof. Code

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§§ 17510-17510.95, this jurisdiction may be invoked only if an organization's donors are known and they are confirmed to include Californians.

Next, major-donor information provides one of the few efficient tools for identifying suspicious activity at an organization. The California Attorney General supervises more than 115,000 charities, *Attorney General's Guide for Charities* at 1, with a staff of approximately a dozen full-time attorneys, Garry W. Jenkins, *Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law*, 41 Ga. L. Rev. 1113, 1128 (2007); *see State Regulation and Enforcement in the Charitable Sector* at 8 (reporting little change in AG staffing in ten years following Jenkins survey). Any practical enforcement strategy must enable the Attorney General to readily identify transactions that require more than minimal scrutiny. Matching substantial contributors to other items on the tax return, such as employees, contractors, and grantees, can allow the regulator to focus on this narrower set of potential red-flag transactions. AFPF JA 413-414; AFPF C.A.E.R. 577-578, 716-718, 1062.

Donor information has been central to identifying and remedying many major instances of improper self-dealing at charitable organizations. Credit-counseling organizations provide a notable example. *See* Profiteering in a Nonprofit Industry: Abusive Practices in Credit Counseling, S. Rep. No. 109-55 (2005). These purportedly charitable entities were intended to provide education to desperate debtors and assist them in managing debt repayment plans. *Id.* at 4-5. In fact, many instead served the interests of creditors, to the detriment of the organizations' supposed beneficiaries. *Id.* Creditors who stood to benefit from "counseling" provided to beneficiaries

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proved to be major supporters of the most problematic credit-counseling agencies, providing a key clue to investigators. *See* California Department of Corporations, *Study of the Consumer Credit Counseling Industry in California and Recommendations to the Legislature Regarding the Establishment of Fees for Debt Management Plans and Debt Settlement Plans* 5 n.12 (March 1, 2003) (defining fair share payments and considering them to often be kickbacks).

So-called "down-payment-assistance" organizations offer another important example. Sellers of homes would contribute dollars to the down-payment-assistance "charity." Those dollars would then be granted to a low-income buyer, enabling the buyer to make a 3% down payment to buy a home. States and the IRS cracked down on these organizations after they determined that they were more a scam to sell homes and issue mortgages than an actual charitable effort to put people in homes. *See* Rev. Rul. 2006-27, 2006-1 C.B. 915; Internal Revenue Service, *Down Payment Assistance Programs: Questions and Answers* (August 29, 2011). Again, the fact that large donors to the organization directly benefited from their own contributions was a central piece of evidence that these organizations were not serving the public's interest. *See* Rev. Rul. 2006-27.

These examples about credit-counseling agencies and down-payment-assistance organizations illustrate but two of many ways in which Schedule B aids in ferreting out improper activities. It does so as well in numerous other situations, such as inflated gifts-in-kind and loans disguised as donations. Resp. Br. 7-8.

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B. Annual Reporting Contributes to Deterrence

In addition to assisting the Attorney General directly, the substantial-contributor reporting requirement puts organizations on notice that the Attorney General has the information necessary to monitor possible self-dealing and excess benefit transactions between the organization and its principal donors. Awareness of such monitoring itself deters organizations from engaging in such transactions.

This role for reporting of information about major donors is consistent with modern tax systems' approach to information reporting generally. A tax system could require taxpayers to report only identifying information and their self-assessment of their tax liabilities, with further details required only from those taxpayers chosen for audit. But routine submission of more comprehensive financial information has key enforcement advantages. Tax systems require broader information reporting on annual returns because, when a taxpayer affirms that the detailed information submitted is accurate, that has both deterrence and liability implications. Henrik J. Kleven et al., *Why Can Modern Governments Tax So Much? An Agency Model of Firms as Fiscal Intermediaries*, 83 Economica 219 (2016); *see* Jay A. Soled, *Homage to Information Returns*, 27 Va. Tax Rev. 371, 371-73 (2007) ("Most studies indicate that such returns are pivotal in causing taxpayers to be forthright in their reporting practices. These same studies indicate that in the absence of such returns, taxpayer compliance plummets."); Margot L. Crandall-Hollick & Conor F. Boyle, Cong. Rsch. Serv., R44993, *Child and Dependent Care Tax Benefits: How*

Electronic copy available at: https://ssrn.com/abstract=3821246

They Work and Who Receives Them 13 (Feb. 1, 2021) (noting that requiring tax-return reporting of dependents' social security number led to sharp decline in number of dependents falsely claimed on returns).

C. Requesting Donor Information After an Investigation Commences Is Less Effective and Adds Unnecessary Burdens on Charities

Petitioners' suggestion that the Attorney General should instead rely upon California's subpoena power as a less intrusive alternative to confidential mandatory reporting of the identity of substantial contributors misapprehends the way in which charity investigations are conducted. That suggestion, if followed, would potentially expose filing organizations to greater harm while undermining the Attorney General's ability to supervise charities effectively.

Information reporting is an important tool for preliminary stage investigations because, contrary to Petitioners' apparent assumption, California is not empowered to issue subpoenas to filers on a whim. The State must be able to demonstrate a factual basis showing that the information sought is "reasonably relevant" to a matter within the Attorney General's authority or its subpoena may be quashed. *People v. West Coast Shows, Inc.*, 10 Cal. App. 3d 462, 470 (1970). Major-donor information, along with other evidence, allows the state to develop a basis for issuance of a subpoena. For example, identification of major donors in Schedule B, combined with information about transactions in which the organization engaged with those same entities or persons, would be critical evidence that could serve in support of a subpoena. AFPF JA 402.

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Being forced to use subpoena power to obtain major-donor information may also undermine the success of well-founded investigations. Schedule B information enables the State to assemble evidence of solicitation fraud, illegal self-dealing, or other violations of law without alerting a filer to the pendency of the investigation. *See SEC v. Jerry T. O'Brien, Inc*., 467 U.S. 735, 750-51 (1984) (explaining policy rationales for keeping third-party information requests confidential). For example, the State can contact third-party sources in order to understand the nature of transactions between the charity and major donors. Demanding major-donor information from filers in the preliminary stages of an inquiry would invariably delay the course of an investigation and might prompt the destruction of documents or other evidence by the investigation's target. *Id*. In cases of fraud, for example, even brief delays can provide the organization with opportunities to dispose of evidence, manufacture further fraudulent evidence, or otherwise cover up misdeeds. AFPF C.A.E.R. 590, 998-990. Organizations may continue to misdirect assets or exploit donors while the State awaits compliance with its subpoena. AFPF C.A.E.R. 590, 998-990, 1029.

Use of Schedule B also diminishes unwarranted burdens on charities. Screening with major-donor information is likely to prevent at least some investigations, as the State may conclude from Schedule B information that substantial contributors do not appear to be involved in transactions or activities that are being examined. If the Attorney General has available only the option of initiating an investigation in the case of suspected violations involving substantial donors, organizations with Schedule B's that would have assuaged concerns up front will be subject to the disruption that a

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government investigation entails. State investigations, once opened, can take years to resolve. *Attorney General's Guide for Charities* at 85. Resolving potential disputes at the pre-investigation stage thus has the potential to greatly reduce the time and resources an organization must devote to responding to an investigation.

The burdens on charities that must respond to subpoenas go beyond the cost of compliance with or challenge to the subpoena; they include unnecessary reputational harm to a charity should the issuance of the subpoena become a public matter. *Cf. Pollard v. Roberts*, 283 F. Supp. 248, 257 (E.D. Ark.), *aff'd,* 393 U.S. 14 (1968) (per curiam) (holding that state subpoena for political party contributors burdened recipients and was unconnected to any important state interest). While investigation subpoenas are not intended to be public, the secrecy of such a formal demand on an organization with numerous employees and other constituents cannot be presumed. For that reason, Attorneys General resolve investigations informally whenever possible, in an effort to avoid the reputational damage that is associated with a public government investigation. *Attorney General's Guide for Charities* at 85.

Finally, subpoenas can impose unnecessary burdens on third parties. If the Attorney General wishes to identify donors without alerting the organization under investigation or suspects that organization may not provide accurate information, the Attorney General may request documents from payment processors, outside fundraisers, or others with relevant information. None of these requests, or the time and expense necessary to fulfill them, would

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be needed if the information provided in the Schedule B obviated the need for the requests.

III. Petitioners' Views Would Threaten Central Elements of Both State and Federal Charity Reporting Regimes

Contrary to the suggestion of Petitioners, Foundation Br. 45-47; Law Center Br. 53-55, and the United States, U.S. Amicus Br. 24, if the Court were to hold that California's request for Schedule B is unconstitutional, that holding could threaten many other important elements of nonprofit oversight, including federal law. The purposes that Schedule B serves in California mirror those served by many other reporting provisions, under both California and federal law.

First, for many charities the Schedule B is *not* reported confidentially to a government agency but is a fully *public* document. Donors of $5,000 or more to private foundations must be publicly disclosed.[7] 26 U.S.C. § 6104(d)(1), (3)(A). Petitioner Americans for Prosperity Foundation never mentions this fact, and Thomas More mentions it only in passing. Law Center Br. 7. Congress required public reporting of private-foundation donors as a way of ensuring accountability and preventing self-dealing at charities whose activities would otherwise be difficult for the public to observe. General Explanation of the Tax Reform Act of 1969 at 52-53.

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[7] For tax law purposes, all section 501(c)(3) organizations are either public charities or private foundations. A private foundation is defined (with certain exceptions) as one that draws its support from a relatively small number of donors. 26 U.S.C. § 509(a). Petitioner Americans for Prosperity Foundation is not a "private foundation" under this definition, despite its name.

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Petitioners' claims thus represent a direct challenge to the federal regime for supervising private foundations. Any supposed chilling effect on donors that results from California's *confidential* reporting obligation seemingly would apply with even greater force to federal *public disclosure* of Schedule B for private foundations. A charity's status as either a public charity (confidential reporting of major donors to the government) or a private foundation (public disclosure of major donors) can turn on knife's-edge facts, such as whether the fraction of revenue derived from sources other than substantial contributors exceeds one-third of its revenues over the applicable testing period, 26 U.S.C. § 509(a)(2)(A). It cannot be the law that such a charity's constitutional rights will change from year to year as its revenue from these sources ranges between thirty-two and thirty-four percent.

Next, many other items currently reported and publicly disclosed by charities could potentially reveal information about private individuals, and so could affect those individuals' willingness to support or associate with a given charity. As argued above, the Form 990 lists key employees, board members, contractors, and certain grantees. All of these parties are essential to a charity's ongoing mission. If public disclosure in fact discouraged these individuals and entities from associating with the charity, that effect would threaten the charity's operations more directly than a small decrease in donor enthusiasm. And, like major-donor information, each of these reporting items could in theory be obtained via subpoena or investigative demand rather than being reported annually on a tax return.

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Further, and again similar to major-donor information, information about key personnel and transactions contributes importantly to the ability of the Attorney General and the IRS to ensure that charities comply with applicable law. Typically, no one piece of information identifies prospective self-dealing. AFPF JA 413. Instead, each piece contributes incrementally to a picture that regulators can use to identify potentially suspect transactions. *See Andresen v. Maryland*, 427 U.S. 463, 480 n.10 (1976) ("Like a jigsaw puzzle, the whole 'picture' of petitioner's false-pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little."). For example, if a major donor also appears as a contractor to the organization, and that donor's close relatives serve as the organization's board members, the contracting relationship will likely receive closer scrutiny than if the Attorney General could observe any of those facts only in isolation.

Thus, there is no ready way to distinguish reporting of major-donor information from other routine forms of information reporting. Data about an organization's activities, key supporters, and other insiders form a web of information that supervisory agencies use to draw inferences about which organizations merit closer scrutiny. *See* AFPF JA 311. If the Court accepts Petitioners' arguments with respect to one strand of that web, it could endanger the other strands and result in the collapse or substantial weakening of effective regulation of charities.

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CONCLUSION

The judgment of the court of appeals should be affirmed.

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APPENDIX

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APPENDIX OF AMICI CURIAE

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Electronic copy available at: https://ssrn.com/abstract=3821246

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