No. 17-17403

In the United States Court of Appeals for the Ninth Circuit

INSTITUTE FOR FREE SPEECH, FKA Center for Competitive Politics,

Plaintiff–Appellant,

v.

XAVIER BECERRA, in his official capacity as Attorney General of the State of California,

Defendant–Appellee.

BRIEF OF THE PHILANTHROPY ROUNDTABLE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF AND REVERSAL

On Appeal from the United States District Court
for the Eastern District of California
No. 2:14-cv-00636-MCE-DB
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), *Amicus Curiae* The Philanthropy Roundtable hereby states that it is a nonprofit § 501(c)(3) organization. The Philanthropy Roundtable does not have any parent companies, and does not issue stock.

Dated: March 16, 2018

/s/ Allyson N. Ho
Allyson N. Ho
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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The Philanthropy Roundtable is a leading network of charitable donors. Its 650 members include individual philanthropists, family foundations, and other private grantmaking institutions. *Amicus*'s mission is to foster excellence in philanthropy, to protect philanthropic freedom, to assist donors in achieving their philanthropic intent, and to help donors advance liberty, opportunity, and personal responsibility in the United States and abroad.

Amicus seeks to advance the principles and preserve the rights of private giving, including the freedom of individuals and private organizations to determine how and where to direct charitable assets—while also seeking to reduce or eliminate government regulation that would diminish private giving or limit the diversity of charitable causes Americans support.

As an organization whose members include individual charitable donors and private grantmaking institutions, *amicus* has a substantial interest in the outcome of this case, which implicates not only donor privacy, but also donor freedom to choose which organizations and causes to support in building a robust civil society. *Amicus* respectfully submits that the California Attorney General's demand that donor

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[1] This brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *amicus curiae* or its counsel contributed money intended to fund preparation or submission of this brief.

lists—including the identities of anonymous donors—be turned over to the State by all Internal Revenue Code § 501(c)(3) organizations that solicit contributions in California implicates serious constitutional concerns. It unnecessarily abridges philanthropic freedom and threatens to chill charitable giving, thereby weakening the ability of individual donors, grantmaking institutions, and other nonprofit organizations to carry out their goals and missions.

While many donors are happy to see their contributions publicized, a sizable number will not give unless they can keep their donations confidential. Their reasons are many and varied. Some follow the teachings of the 12th-century Jewish theologian Maimonides, who believed that the second highest form of giving was "to give to the poor without knowing to whom one gives, and without the recipient knowing from whom he received." Others take their lead from the Gospel of Matthew, where Jesus taught that "when you give to the needy, sound no trumpet before you" and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." Still others wish to shield their families or businesses from unwanted and potentially dangerous publicity, or to avoid being bombarded with unwelcome solicitations. And some want the freedom to support controversial issues without fear of reprisal or ostracism. Given these important concerns, *amicus* respectfully requests that the Order dismissing this case be reversed—and agrees with Plaintiff that this Court's prior decision in *Center for*

Competitive Politics v. Harris, 784 F.3d 1307 (9th Cir. 2015), should be overturned if necessary to reach a different result in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Privately funded efforts to address social problems, enrich culture, and strengthen society are among the most significant American undertakings, and have been for hundreds of years. The United States is now among the most generous nations in the world when it comes to charitable giving, with gifts by individuals (including bequests) totaling over $312 billion in 2016. GIVING USA 2017: TOTAL CHARITABLE DONATIONS RISE TO NEW HIGH OF $390.05 BILLION (June 12, 2017).[2] Nonprofit and charitable organizations across the country benefited from those donations, including religious organizations, schools, hospitals, foundations, food pantries, and homeless shelters. *Id.* These organizations include approximately 135,000 charities registered in California. XAVIER BECERRA, ATTORNEY GENERAL, CALIFORNIA DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDE FOR CHARITIES 1.[3]

America's culture of charitable giving has flourished because its legal framework—including the national individual deduction for charitable donations and the national income-tax exemption for charitable organizations—recognizes the

[2] Available at https://givingusa.org/giving-usa-2017-total-charitable-donations-rise-to-new-high-of-390-05-billion.

[3] Available at https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/guide_for_charities.pdf.

importance of a robust civil society separate from government. Regrettably, however, the State of California's push to collect, in bulk, the names of charitable donors who choose to give anonymously—without any compelling reason—transgresses this crucial boundary and raises serious constitutional concerns. Nearly one-eighth of all charities in the United States are registered with the State Attorney General to solicit donations in California. KAMALA D. HARRIS, OFFICE OF THE ATTORNEY GENERAL, CALIFORNIA DEPARTMENT OF JUSTICE, GUIDE TO CHARITABLE GIVING FOR DONORS 1.[4] So the stakes for donor privacy and freedom in this case implicate donors and charities across the country.

The Supreme Court ruled unanimously in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." As a result, the State of Alabama could not compel the NAACP to reveal the names and addresses of its members because doing so would expose its supporters "to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" and thereby restrain "their right to freedom of association." *Id.* at 462. This case implicates the same concerns.

[4] Available at https://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/CharitiesSolicitation.pdf.

Many donors simply will not give unless they can keep their donations confidential. Many donors, for example, give anonymously out of deeply held religious convictions. Some do so to live a more private life. Others do so for the same reasons articulated by the Supreme Court in *NAACP v. Alabama*—to avoid "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility" associated with supporting unpopular or controversial causes. *Id.* Others may fear governmental—as well as private—retaliation and harassment. Still more do so to avoid unwanted solicitations by other organizations to which they would rather not contribute. Forced disclosure of donor names to state governments threatens serious consequences for individual donors' reliance on anonymity—and charitable organizations' reliance, in turn, on those donors. At the same time, California already has ample tools for carrying out its proper role in protecting the public from charitable fraud and deceptive solicitation practices, including *targeted* use of the Attorney General's *parens patriae* authority and subpoena power.

This Court should reject the Attorney General's policy of unfettered donor disclosure and its chilling effect on activity that is protected by the Constitution. This bulk disclosure policy—which has no statutory basis, serves no compelling state interest, and could be accomplished by less restrictive means—adversely affects the constitutional rights of all charitable donors and charities in California.

ARGUMENT

I. The State's Bulk Collection Of Charitable Donor Information Implicates Serious Constitutional Concerns.

The compelled disclosure of donor names and information in bulk to state governments undermines a significant component of charitable giving—donor anonymity. The State of California's unwarranted intrusion into individuals' charitable giving raises serious constitutional concerns under the First and Fourteenth Amendments by unnecessarily impinging on the freedoms of religion, speech, and association, as well as individual liberty and privacy. These grave constitutional concerns implicate serious practical consequences of decreased donations and chilling donor and charity speech.

Many donors who desire to remain private are motivated by deeply held religious beliefs protected by the First Amendment. For example, Muslim donors may prefer anonymity given the concept called *sadaqah*, which teaches it is the "best" form of giving. Qur'an, *Surat Al-Baqarah* 2:271 ("If ye disclose (acts of) charity, even so it is well, but if ye conceal them, and make them reach those (really) in need, that is best for you."); GIVING CHARITY IN SECRET & PUBLICLY, ZAKAT FOUNDATION OF AMERICA.[5] Jewish donors, likewise, may follow Maimonides' teaching that the second highest form of *tzedakah* ("charity" or "righteousness") is

[5] Available at https://www.zakat.org/en/giving-charity-secret-publicly.

to give anonymously to an unknown recipient and the third highest is to give anonymously to a known recipient. *See, e.g.*, JULIE SALAMON, RAMBAM'S LADDER: A MEDITATION ON GENEROSITY AND WHY IT IS NECESSARY TO GIVE 6-7, 109-26, 127-46 (2003); Susan Hertog, *Partners Against Misery* 26, PHILANTHROPY (Fall 2016) (Jewish philanthropist Jacob Schiff supported poor immigrants to America anonymously, "inspired by the teachings of Maimonides").[6] Christian donors may follow a similar concept consistent with Matthew's admonition that "when you give to the needy, do not announce it with trumpets" and "do not let your left hand know what your right hand is doing, so that your giving may be in secret." *Matthew* 6:2. And Hindu donors may choose to give an anonymous gift, or *gupt dān*, as an act of both self-renunciation and generosity. *See* ERICA BORNSTEIN, DISQUIETING GIFTS: HUMANITARIANISM IN NEW DELHI 26-27 (2012). For donors who live by these faiths, the mere disclosure of their donation may harm their free exercise of religion.

Donors may also prefer to give anonymously for the same important reasons articulated by the Supreme Court in *NAACP v. Alabama*—to avoid the threat of public censure, condemnation, and even physical harm to themselves and their families that can be associated with giving to unpopular or controversial causes. The Supreme Court ruled in that case that the Fourteenth Amendment protected the

[6] Available at http://www.philanthropyroundtable.org/file_uploads/PHIL_FALL16_24.pdf.

NAACP's right to keep its membership list confidential. Revealing that information, it warned, "[was] likely to affect adversely the ability of [the NAACP] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate." *NAACP v. Alabama*, 357 U.S. at 462-63.

And this threat to donors with unpopular positions is not merely theoretical—it has manifested itself throughout American history. When President Andrew Jackson was inflamed by abolitionists' successes, for example, he tried to expose abolitionist sympathizers to public ridicule, pressure, and threats. *See* Jennifer Rose Mercieca, *The Culture of Honor: How Slaveholders Responded to the Abolitionist Mail Crisis of 1835*, 10 RHETORIC & PUB. AFF. 51, 66 (2007). During the civil rights movement, many private actors and government officials fired, threatened, and otherwise intimidated supporters of civil rights. *See NAACP v. Alabama*, 357 U.S. at 462. And in the 1970s, government and private actors demonstrated hostility toward Socialist Workers Party members in the form of threats, hate mail, destruction of property, and termination from work. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99 (1982).

Nor are risks to donors who support unpopular causes a thing of the distant past. Anonymous contributions were the leading source of support for LGBTQ causes and groups between 1970 and 2010. SEAN PARNELL, PROTECTING DONOR PRIVACY: PHILANTHROPIC FREEDOM, ANONYMITY AND THE FIRST AMENDMENT, THE

PHILANTHROPY ROUNDTABLE 4-5.[7] No doubt, part of the motivation for anonymity was concern about the potential for violence and harassment against the LGBTQ community. ANTHONY BOWEN, FORTY YEARS OF LGBTQ PHILANTHROPY: 1970–2010, FUNDERS FOR LGBTQ ISSUES 17 (Jan. 2012).[8] On the other side of this issue, businesses whose owners' families have supported causes seen as hostile to LGBTQ rights have themselves been targeted for boycotts, vitriol, and disfavor from local government officials. PARNELL, PROTECTING DONOR PRIVACY, *supra*, at 4, 15. Revelation of private donations to right-leaning and left-leaning causes alike—such as think tanks skeptical of global warming or groups supporting abortion access—have led to harassment and threats of boycotts. *Id.* at 5; *see also id.* at 14-16 (listing examples). It is no wonder that donors across the political spectrum may prefer anonymity in their giving. *See* Bill Zeiser, *Dark Money*, NAT'L REV. (Sept. 24, 2014) (discussing anonymous donations through both DonorsTrust and The Tides Foundation).[9] Over half a century since *NAACP v. Alabama*, there is still ample reason for supporters of politically unpopular causes to exercise their First

[7] Available at http://www.philanthropyroundtable.org/file_uploads/Protecting_Donor_Privacy.pdf.

[8] Available at https://www.lgbtfunders.org/wp-content/uploads/2016/05/40years_lgbtqphilanthrophy.pdf.

[9] Available at https://www.nationalreview.com/2014/09/dark-money-bill-zeiser.

Amendment right to donate anonymously—without fear of consequences from private groups or the government.

Indeed, society would be worse off today without the ability of private donors to fund unpopular causes without fear of backlash—especially when acting where the government has refused to act. It was charitable giving by individuals that educated Native Americans at Dartmouth and Hamilton colleges; that set up thousands of schools for African-Americans during the Jim Crow era; and that eliminated hookworm in the United States when some state governments refused to acknowledge it existed. *See* Alexander Reid, *Renegotiating the Charitable Deduction*, 71 TAX ANALYSTS 21, 27 (2013). Other charity-driven initiatives, such as abolition, women's suffrage, and civil rights, fundamentally altered the ability of Americans to fully participate in their government—in the face of resistance from the government itself. *Id.* Protecting donor confidentiality helps ensure that controversial causes—precisely those that are working to sway public policy—can exist in a safe space where their donors are free from harassment.

In addition to exercising their freedom of religion, speech, and association, donors may also choose to give anonymously for other important personal reasons. For example, during times of economic recession, anonymous giving increases significantly as donors "who have suffered little, or even prospered, during the downturn" may not want to appear insensitive to the plight of others less fortunate.

Ben Gose, *Anonymous Giving Gains in Popularity as the Recession Deepens*, THE CHRONICLE OF PHILANTHROPY (Apr. 30, 2009).[10] During the recent severe economic downturn (2008-2010), for instance, the North Texas Food Bank—which distributes food to charities in 13 counties—received its first-ever $1 million gift in December 2009 from a woman who asked to remain anonymous. *Id.* "She said she would not have been able to look herself in the mirror over the holidays had she not made the gift," the food bank's chief executive was quoted as saying about the anonymous donor. *Id.*

Donors may also choose to give anonymously out of concern that the identity of the donor might overshadow the efforts of the charity. *See, e.g.*, Claire Cain Miller, *Laurene Powell Jobs and Anonymous Giving in Silicon Valley*, N.Y. TIMES, BITS (May 24, 2013) (quoting Ms. Powell Jobs, the widow of Apple founder Steve Jobs, as saying "[w]e're really careful about amplifying the great work of others in every way that we can, and we don't like attaching our names to things").[11]

Anonymity also allows donors to give to important causes even if they would otherwise decline out of a desire to lead a private life and avoid public displays of wealth. Chuck Feeney, for example, donated nearly his entire fortune of around

[10] Available at https://philanthropy.com/article/Anonymous-Giving-Gains-in/162627.

[11] Available at http://bits.blogs.nytimes.com/2013/05/24/laurene-powell-jobs-and-anonymous-giving-in-silicon-valley.

$4 billion anonymously. *See* CONOR O'CLERY, THE BILLIONAIRE WHO WASN'T 327-28 (2007). As Feeney has explained, "I had one idea that never changed in my mind—that you should use your wealth to help people. I try to live a normal life, the way I grew up . . . . I set out to work hard, not to get rich." *Id.* at 324. In fact, Feeney did not reveal his billion-dollar philanthropy until years later, and then only reluctantly, when the release of documents associated with a business transaction would likely have disclosed his donations. *Id.*

Pittsburgh banker and philanthropist Charles McCune also sought to avoid public recognition for his generous giving throughout his life—and the McCune Foundation carries on this preference by forbidding grantees to disclose the source of its donations. PARNELL, PROTECTING DONOR PRIVACY, *supra*, at 6-7 (citing MCCUNE FOUNDATION, POLICIES[12]). These types of privacy interests are at the heart of our constitutional protections.

Additionally, giving anonymously protects donors from unwanted solicitations by organizations to which they would rather not donate. A study by the Center on Philanthropy at Indiana University identified the desire to minimize solicitations from other organizations as the most frequently cited motivation for giving anonymously (followed by "deeply felt religious conviction," and next by "a

[12] Available at http://www.mccune.org/foundation:Website,mccune,policies.

sense of privacy, humility, [or] modesty"). ELEANOR T. CICERCHI & AMY WESKEMA, SURVEY ON ANONYMOUS GIVING, CENTER ON PHILANTHROPY, INDIANA UNIVERSITY—PURDUE UNIVERSITY AT INDIANAPOLIS 9-10 (1991). Major philanthropists have kept donations private to avoid the seemingly endless "deluge" of unwanted donation requests. Paul Sullivan, *Kroc's Giving, Like McDonald's Meals, Was Fast and Super-Sized*, N.Y. TIMES (Jan. 20, 2017) (noting Joan Kroc closed down her family foundation to limit solicitations); *see also* William Chenery, *Philanthropy Under A Bushel: George Eastman, Kodak Manufacturer and Music Lover, Long Kept Big Gifts Secret*, N.Y. TIMES (Mar. 21, 1920) (noting "perils" of non-anonymous giving).

Whatever the motivation, anonymity is exceedingly important to many donors. Indeed, about 80 percent of high net-worth households responded to a survey that, in making a charitable gift, it is important to them that the organization not distribute their names to others and honor their requests for privacy and anonymity. *See* U.S. TRUST & INDIANA UNIVERSITY LILLY FAMILY SCHOOL OF PHILANTHROPY, 2016 U.S. TRUST STUDY OF HIGH NET WORTH PHILANTHROPY REPORT 40 (Oct. 2016).[13]

[13] Available at http://www.ustrust.com/publish/content/application/pdf/GWMOL/USTp_ARMCGDN7_oct_2017.pdf.

Of course, many donors choose to give publicly for similarly compelling reasons. *See, e.g.*, GIVING WELL: THE ETHICS OF PHILANTHROPY 202-17 (Patricia Illingworth et al. eds., 2011) (explaining that public giving helps create a culture of giving); *see also* Paul G. Schervish, *The Sound of One Hand Clapping: The Case For and Against Anonymous Giving*, 5 VOLUNTAS: INT'L J. OF VOLUNTARY & NONPROFIT ORGS. 1, 3 (1994) (noting that donors recognize reasons both for and against anonymous giving). But that is precisely the point—it is a choice for *donors* to make.

The freedom enjoyed by private individuals and associations in giving (whether publicly or privately) for public benefit has been a hallmark of American civil society since the Founding. Writing in 1831, Alexis de Tocqueville observed that "[t]here is nothing, in my opinion, that merits our attention more than the intellectual and moral associations of America." ALEXIS DE TOCQUEVILLE, 3 DEMOCRACY IN AMERICA 902 (1840). Rather than wait for government to act in the public interest, Americans have long created charitable associations to act in furtherance of those interests. "In democratic countries," Tocqueville wrote, "the science of association is the mother science; the progress of all the rest depends upon its progress." *Id.* However American donors wish to associate—anonymously for any of the reasons explained above or others, or publicly—the Constitution protects, and American civil society depends on, their right to do so. *See Gibson v. Fla. Legis.*

Investigation Comm., 372 U.S. 539, 544 (1963) (the "relationship between freedom to associate and privacy in one's associations" is "vital"); *id.* at 555 (maintaining privacy is a "strong associational interest").

Today, Americans exercise some of their most cherished constitutionally protected rights through making charitable donations—creating organizations that engage in freedom of speech, freedom of association, and freedom of religion. In this way, charitable giving is, as Tocqueville saw, fundamental not only to our civil society but also to our republican form of government. The individual freedoms of speech, association, religion, and privacy that the Constitution guarantees constrain government's unwarranted intrusion into charitable giving—including the bulk collection of donor identities at issue here—without a compelling interest and narrow tailoring. *See Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960) ("When there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.").

If the Attorney General's policy is permitted to stand, it will not only needlessly erode donor freedoms and privacy, and thereby put an important component of charitable giving at serious risk. It will also set a dangerous precedent for government intrusion into charitable organizations across the board. The principle of government noninterference with the charitable sector is evident in the federal income tax deduction for charitable donations. Charitable gifts are not

consumption because the donor receives nothing concrete in return for the gift; such gifts are, therefore, excluded from the economic definition of income. *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 365-66 (1972) (noting that the charitable-contribution deduction is necessary to ensure accurate measurement of a donor's income). The deduction does not exist to "subsidize" philanthropy—rather, the deduction shields private donations from government interference (through taxation) with individual choices about how best to further the public good. *See* John E. Tyler III, *So Much More Than Money: How Pursuit of Happiness and Blessings of Liberty Enable and Connect Entrepreneurship and Philanthropy*, 12 INT'L REV. OF ENTREPRENEURSHIP 51, 68-74 (2014); Reid, *Renegotiating the Charitable Deduction*, *supra*, at 27. In other words, our system of government (and taxation) is designed to keep charity isolated from the government for the good of the public. An intrusion in one area signals a lack of respect for that model and may open the door for intrusions in other areas.

So too with donor confidentiality, which, as the Supreme Court recognized in *NAACP v. Alabama*, similarly protects individuals from government overreach and interference with the exercise of their constitutional rights. The State's claim of entitlement to the bulk collection of donor identities implicates the same fundamental concerns articulated in *NAACP v. Alabama*, and this Court must keep government within its proper bounds, protect donor freedoms and privacy, and

prevent further unwarranted incursions into private charitable giving that will chill the exercise of First Amendment freedoms and upset long-settled donor expectations of privacy and confidentiality. The ability to donate anonymously—like the ability to vote anonymously—serves as an important check on government power.

But the district court's Order would give the State carte blanche to collect *all* donor information—whether or not there is any governmental interest, let alone a compelling one, in its collection—unless and until anonymous would-be donors testify that they have been or would be harassed or their speech would be chilled by the disclosure. *See generally* ER 9-12. But such testimony or evidence may *itself* defeat the donor's interest in nondisclosure. Many donors may choose simply to cease giving to organizations who will be forced to turn over information to the State rather than risk the myriad negative consequences that may result from disclosure.

As explained by the Institute for Free Speech ("IFS"), this is precisely the type of real constitutional harm caused by unjustified forced disclosure of donor information. IFS Br. at 29-33. To the extent that this Court's opinion in *Center for Competitive Politics v. Harris* (*CCP*) forecloses consideration of the well-established First Amendment harm of forced disclosure itself, *amicus* agrees with IFS that the decision should be overturned. 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015). *See generally* IFS Br. at 29-43; IFS Pet. for Initial Hearing *En Banc* at 6-15.

II. The State Has No Compelling Interest In The Bulk Collection Of Donor Information, Particularly Given The Serious Risks Of Public Disclosure.

As explained by IFS (at 35-36, 43-44), the State has failed to show a legitimate reason—much less a compelling one—for the bulk collection of donor names. There is no statute specifically authorizing bulk collection by the State and certainly no legislative finding of a relation between the bulk disclosure requirement and a compelling state interest. Federal tax laws—which require limited disclosure of donor identities to the IRS and bar subsequent disclosure with very narrow exceptions that do not include bulk disclosures—have no state analogue that could justify the disclosure to which the State claims it is entitled. In the absence of a compelling state interest, no government agency should compel a charity to identify its donors where, as here, the risk of public disclosure—through California Public Records Act requests or otherwise—is grave.

Amicus recognizes the *federal* government's legitimate interest in allowing the IRS to identify substantial contributors to certain charities on a confidential basis and to require their disclosure to the IRS. These measures help to prevent donors from claiming fraudulent tax deductions, protect charities against self-dealing, and ensure that charitable grants support genuinely charitable organizations. But even in these limited instances where donor identities are disclosed to the IRS, the disclosure satisfies discrete federal tax law requirements which have no state-law analogue.

At the federal level, donor names are required to ensure compliance with discrete, technical provisions of the Internal Revenue Code. *See* IFS Br. at 8 n.2. Section 507, for example, provides for the termination of private foundation status based on the aggregate tax benefits received by statutorily defined "disqualified" persons, which include "substantial contributors." 26 U.S.C. §§ 507, 4946(a)(1)(A). Section 4941 prohibits self-dealing transactions between substantial contributors and private foundations. *See id.* § 4941. Other provisions prohibit private foundations from holding excess business holdings together with substantial contributors, *id.* § 4943; prohibit excess benefit transactions by public charities with substantial contributors, *id.* § 4958; and prohibit donor-advised funds from conferring prohibited private benefits on donors, *id.* § 4967.

State governments, however, lack the same interest in collecting donor identities because they do not have analogous tax rules to enforce. Indeed, the California Franchise Tax Board has expressly stated that California does not have analogous rules to the federal government and does not raise any state tax revenue by applying federal tax rules that require the bulk disclosure of donor identities. *See, e.g.*, CALIFORNIA FRANCHISE TAX BOARD, SUMMARY OF FEDERAL INCOME TAX CHANGES 436-37 (2006) (analyzing Pension Protection Act, which modified many of the federal rules applicable to exempt organizations, and determining that the

impact of those changes on California revenue is "not applicable").[14] That the Attorney General generally has "broad powers" over charitable trusts, Cal. Gov't Code § 12598(a), maintains a register of charities, *id.* § 12584, and can make regulations regarding the contents of reports setting forth the nature of a charitable organization's assets, *id.* § 12586(a)-(b), does not mean all such regulations are compelling based solely on the Attorney General's own assertion. *See* ER 3, 12. Indeed, none of these laws specifically contemplates or authorizes bulk donor collection. Rather, the State must point to a compelling interest like these federal laws to exercise its power in a manner that collects *all* donor information—just what the State has failed to do.

Moreover, once donor names and information are in the hands of the State, they are more vulnerable to public disclosure through the operation of the California Public Records Act (CPRA), Cal. Gov't Code §§ 6253, 6254. *See Am. for Prosperity Found. v. Harris*, 809 F.3d 536, 542 (9th Cir. 2015). The CPRA is an exceedingly disclosure-oriented statute. *See, e.g.*, *CBS, Inc. v. Block*, 725 P.2d 470, 473 (Cal. 1986) ("Maximum disclosure of the conduct of governmental operations was to be promoted by the Act."). Although the CPRA has various exceptions, they must be narrowly construed—and they are permissive, not mandatory. *Marken v.*

[14] Available at https://www.ftb.ca.gov/Archive/Law/legis/Federal-Tax-Changes/2006.pdf.

Santa Monica–Malibu Unified Sch. Dist., 136 Cal. Rptr. 3d 395, 405 (Cal. Ct. App. 2012) (citing cases); Cal. Gov't Code § 6254 ("this chapter does not *require* disclosure of any of the following records" (emphasis added)).

The State may respond that a new regulation, 11 Cal. Code Reg. § 310(b) (2016), now guarantees it will not release information like Schedule Bs that cannot be released under federal law. But the State has admitted that this regulation merely codifies the State's existing "confidentiality policy"—the very policy in place when the State previously divulged confidential donor information to the public. *See* Def. Reply in Support of Motion to Dismiss at 4. The State argued to the district court that even though "a number of Schedules B were inadvertently housed on the public-facing website," *id.* at 3, this past disclosure was immaterial since its *policy*, then and now, is what matters—not its *practice* of disclosure. But if the State's policy has previously allowed at least "1,778 confidential Schedule Bs . . . [to be] publically posted on[line]," *Am. for Prosperity Found. v. Harris* (*AFPF*), 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016), and the Attorney General's office has done nothing to correct its "systematic[] fail[ure] to maintain the confidentiality of Schedule B forms," *id.*; IFS Br. at 20-22, 23-24 & n.10, it would certainly be reasonable to conclude that the potential for disclosure is still too great. This is especially true given the non-specific, aspirational nature of this regulation and its unclear relationship with

California disclosure statutes. *See* 11 Cal. Code Reg. § 310(b); Cal. Gov't Code § 6254.

In the absence of a compelling state interest—such as compliance with important state requirements parallel to those at the federal level—no state government agency should be able to force a charity to identify its donors.[15] And the lack of a compelling state interest is underscored where, as here, the Attorney General has already publicly disclosed thousands of charities' donors and has pointed to no specific policies in place to prevent the further release of information.

Given that confidentiality in charitable giving is grounded in the constitutional freedom of association and it is one of the most important elements of philanthropic freedom, this Court should do all it can to prevent the Attorney General from collecting and disclosing ("inadvertently" or otherwise) donor information in the future.[16] This risk of disclosure highlights why it is critical that courts ensure the

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[15] Another reason for this Court to reconsider its *CCP* decision is that Congress has enacted a comprehensive scheme for the collection and disclosure of taxpayer returns and taxpayer information from 26 U.S.C. § 501(c)(3) public charities—preempting the field. Congress has specifically required the disclosure of some taxpayer information but barred disclosure of donor information. At a minimum, the bulk disclosure of donor information for non-tax purposes conflicts with the requirements of 26 U.S.C. § 6104 and is thus subject to conflict preemption.

[16] This Court's intervention is especially necessary given the Attorney General's troubling assertion that, in its view, the *public* disclosure of Schedule Bs would be constitutional. Def. Motion to Dismiss First Amended Complaint at 15; Def. Reply in Support of Motion to Dismiss at 4 n.4.

government has advanced a truly compelling interest before it can collect donor names in bulk. Even the federal government—where safeguards are the strongest—is not immune from allegations of abuse and breaches of personal information from tax returns. *See, e.g.*, Lisa Rein & Jonnelle Marte, *Hackers stole personal information from 104,000 taxpayers, IRS says*, WASH. POST (May 26, 2015).[17] Especially in the context of California's historical "inability to keep confidential Schedule Bs" collected in bulk, *AFPF*, 182 F. Supp. 3d at 1056, the district court's dismissal of a need for *any* legitimate interest, let alone a compelling one, for this collection should be rejected. *See* ER 12 ("the balancing engaged in by *AFPF* [is] unnecessary"). Because the Attorney General's bulk collection fails that exacting standard, this Court should rule to prevent government overreach, protect donor privacy, and preclude the chilling of First Amendment rights.

III. California Has Ample Tools For Ensuring Charities Comply With State Law Without Any Need For The Bulk Collection Of Donor Information.

As explained above, California lacks the same interest as the federal government in collecting donor identities because it does not have analogous laws to enforce. Yet the State does have ample tools to protect the public from fraud and deceptive solicitation practices.

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[17] Available at https://www.washingtonpost.com/news/federal-eye/wp/2015/05/26/hackers-stole-personal-information-from-104000-taxpayers-irs-says/?utm_term=.08bde831e6d1.

The California Attorney General serves as "*parens patriae*" (*i.e.*, the protector for those unable to protect themselves) for charitable organizations in the State because charities have no shareholders. The Attorney General also holds subpoena power—available to address any individual instances of donor misbehavior. Cal. Gov't Code § 12588. These authorities are more than ample to assist the State in policing the charities within its borders. The bulk collection of donor names at the state level is simply not needed—especially given the success of federal and state regulators in ensuring compliance with already existing regulations that have made fraud and self-enrichment rare among charitable organizations. *See* Joanne Florino, *Policing Philanthropy?*, PHILANTHROPY MAGAZINE (Summer 2015).[18]

At the same time, the practical value of the request for the donor information is *de minimis* at best. The State does not allege that all, or even a significant number, of the over 100,000 charities in California are engaged in fraud or deceptive solicitation practices. To the contrary, as the U.S. District Court for the Central District of California recently found, there have been only 540 investigations in the past ten years. *AFPF*, 182 F. Supp. 3d at 1054. This represents less than one-half of one percent of the charities the Attorney General says must now disclose donors.

[18] Available at http://www.philanthropyroundtable.org/site/print/policing_philanthropy.

And of those investigations, only five involved Schedule B disclosures (none of which involved a Schedule B that was otherwise required to be disclosed). *Id.*

In the district court, the Attorney General could point to only one example where a non-public Schedule B was used in the course of an enforcement action. *See* IFS Br. at 23. There is simply no basis—let alone a compelling one—for the mass collection of Schedule Bs for fraud and deceptive practices investigations. Even in the small number of cases where a Schedule B might be relevant to a valid investigation, the subpoena power—with its procedural requirements that help guard donors' privacy interests—could be used rather than seriously burdening the First Amendment rights of hundreds of thousands of other donors.

In addition, national organizations such as the Association of Fundraising Professionals, Independent Sector, the Council on Foundations, and the National Council of Nonprofits promote codes of conduct and examples of best practices. State and regional associations of funders and nonprofits provide guidance. There are numerous ombudsman organizations such as GuideStar, GiveWell, CharityWatch, and Charity Navigator. And, of course, the press observes and reports heavily on nonprofit activity.

In sum, the right to choose how and where to make charitable gifts, even unpopular ones, is fundamental to Americans' exceptional philanthropic freedom. It also implicates fundamental constitutional rights. The State's rule constitutes

unwarranted government intrusion into the exercise of those rights, with potentially dire consequences for charities throughout California and the United States. This Court should uphold the proper balance between philanthropic freedom and legitimate government oversight by reversing the dismissal of this case.

CONCLUSION

For the foregoing reasons, the Court should reverse and, if necessary to reverse, grant the motion for initial hearing *en banc* to overturn its decision in *CCP*, 784 F.3d 1307 (9th Cir. 2015).

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Respectfully submitted,

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Signature of Attorney or Unrepresented Litigant: s/ Allyson N. Ho

Date: Mar 16, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of The Philanthropy Roundtable as *Amicus Curiae* in Support of Plaintiff and Reversal with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 16, 2018.

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Dated: March 16, 2018

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