

Appeal Nos. 16-55727 & 16-55786

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

AMERICANS FOR PROSPERITY FOUNDATION,
Plaintiff–Appellee–Cross–Appellant,

v.

XAVIER BECERRA,
Defendant–Appellant–Cross–Appellee.

On Appeal from the United States District Court
for the Central District of California
No. 2:14-cv-09448 (Hon. Manuel L. Real)

**BRIEF OF THE PHILANTHROPY ROUNDTABLE AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFF–APPELLEE–CROSS–APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* The Philanthropy Roundtable states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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INTEREST OF *AMICUS CURIAE*¹

The Philanthropy Roundtable is a leading network of charitable donors comprised of 650 individual philanthropists, family foundations, and other private grant-making institutions. Its mission is to promote excellence in philanthropy, to protect philanthropic freedom, to uphold donor intent, and to aid donors in promoting liberty, opportunity, and personal responsibility. The Philanthropy Roundtable is accordingly devoted to preserving donors' right to determine how and where to direct their charitable assets.

The Philanthropy Roundtable has a significant interest in this case because the California Attorney General's practices threaten the longstanding tradition of anonymous giving. Throughout American history, donors have had the freedom to choose whether to give publicly or anonymously. The California Attorney General's demand that all Internal Revenue Code § 501(c)(3) organizations operating in California disclose many donors' names, addresses, and donations compromises that choice—especially given California's comprehensive failure to keep that information confidential.

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae* or its counsel made such a monetary contribution. All parties have consented to the filing of this *amicus* brief.

Outing anonymous donors compromises their privacy. Forcing charities to reveal anonymous donors' identities also encroaches upon donors' freedom to choose which organizations and causes to support. If left unchecked, California's scheme risks chilling anonymous giving and undermining the charitable aims of thousands of individuals. And by compelling disclosure of anonymous donors' personal information, the California Attorney General impedes core First Amendment rights of speech, association, and religious liberty. The Court should strike this regulation down as facially unconstitutional.

INTRODUCTION

Anonymous giving is deeply rooted in our nation's history and tradition. Anonymous charitable donations have played a critical role in causes throughout American history, from abolitionism and women's suffrage to the civil-rights and LGBT-rights movements. Many religious traditions—including Christianity, Judaism, Islam, and Hinduism—teach that anonymous charity is preferred, if not a religious obligation. An individual's ability to choose to give publicly or anonymously is central to billions of dollars in donations that simply would not occur if the government imposed a one-size-fits-all model of philanthropy.

Anonymous giving today is more important than ever. A substantial percentage of gifts—especially large donations—are made by anonymous benefactors. These donations support hospitals. They fund higher education,

through new scholarships, faculty, and buildings. And they support vigorous public debate and activism on all sides of contentious policy issues, such as abortion and same-sex marriage.

Under the guise of regulating charities, however, California's Attorney General has been unmasking anonymous donors and exposing them to the risk of public persecution. All tax-exempt charities operating in California must register with the State. Since 2010, however, the California Attorney General has demanded that all such charities submit unredacted versions of their IRS Form 990 Schedule B. *See* AFP Br. 9–11. That form lists the names, addresses, and the amount that substantial contributors give to a charity within a tax year. TX-237. Federal law considers that information so sensitive that it imposes strong penalties for unauthorized disclosure. *See* 26 U.S.C. §§ 6104(b), 7213, 7431.

Yet, as the district court rightly found, “the Attorney General has systematically failed to maintain the confidentiality of Schedule B forms.” *Americans for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016). California's employees have a pattern of recklessly and unlawfully publishing donor lists for all to see. As the district court found, California erroneously released *over 1,700* Schedule B forms on its website, including the Schedule B form of Planned Parenthood Affiliates of California. *Id.* Worse still, California wrongly made some *350,000* confidential documents publicly accessible

on the state's website. AFP Br. 21. And once California reveals these donors' identities, their privacy is lost forever. Charities that accede to the Attorney General's demands for their Schedule B forms thus risk exposing to harassment anonymous donors who zealously guard their privacy. But charities that try to protect their donors by refusing to submit Schedule Bs face the loss of tax-exempt status in California, the suspension of their registration in California, and penalties levied against individual employees and board members. AFP Br. 35.

California's cavalier disregard for donor anonymity cannot be squared with the First Amendment, which protects the right to donate to charity, the right to freely associate with organizations of one's choosing, and the right to fulfill religious obligations free of governmental interference. Anonymous giving is central to all of those core First Amendment rights. For many donors, the right to donate to charity is meaningless without the corresponding ability to give anonymously, as Americans have done for centuries. Likewise, the right to choose which organizations to support and associate with is a nullity without the related freedom to keep one's associations private. And without the promise of anonymity, the right to freely live in accordance with religious precepts is no right at all for the many individuals faithful to religious traditions that embrace anonymous giving. This Court should stop California from imposing the strong arm of the law on those who wish to exercise their First Amendment rights.

ARGUMENT

I. ANONYMOUS GIVING IS A LONGSTANDING AND INDISPENSABLE FEATURE OF AMERICAN PHILANTHROPY

A. Anonymous Giving Is a Deeply Rooted Tradition

1. Private charity has played a seminal role in American life since the Puritans landed at Massachusetts Bay. John Winthrop insisted that the new inhabitants of Massachusetts “bear one another’s burdens.” Johanna Neuman, *The Distinctly American Tradition of Charity*, U.S. News, Oct. 18, 2010. In Philadelphia, Benjamin Franklin organized the first volunteer fire department and lending library. *Id.* From the Founding onwards, New England town governments coordinated their efforts with local charities. Olivier Zunz, *Philanthropy in America: A History* 105 (2011). In the late 19th century, Gilded Age fortunes ushered in a new era of philanthropy that transformed American higher education and aided freed slaves after the Civil War. *Id.* at 9–10. By the mid-20th century, a large proportion of Americans routinely gave what they could afford to a panoply of charities. *Id.* at 3. And today, Americans continue to give generously—resulting in \$373.25 billion in charitable gifts in 2015, including \$264.58 billion from individuals. Lilly Family School of Philanthropy, Indiana University—Purdue University at Indianapolis, *Giving USA 2016: The Annual Report on Philanthropy for the Year 2015* (2016).

Throughout American history, many individual donors have relied on anonymous giving, “one of the most ancient and esteemed philanthropic practices.” *Philanthropy in America: A Comprehensive Historical Encyclopedia*, Vol. 1, at 23 (Dwight F. Burlingame ed., 2004). In the early 19th century, abolitionism was so controversial that many donors feared giving to the cause while they were alive, and instead provided gifts in their wills. But some donors contributed to abolitionism during their lifetime, including a Western Michigan resident who gave the then-considerable sum of \$1,000 to the Western Anti-Slavery Society on the condition of anonymity. *See* Benjamin Quarles, *Sources of Abolitionist Income*, in *Abolitionism and American Reform* 208 (John R. McKivigan ed., 1999).

Nearly a century later, the women’s suffrage movement depended on anonymous donations. Olivia Sage, who gave the movement its New York headquarters and sustained it with her donations, did so on the strict condition that her gifts would not be publicly acknowledged. Ruth Crocker, *Mrs. Russell Sage: Women’s Activism and Philanthropy in Gilded Age and Progressive Era America* 214–15 (2006). Women’s rights activist Katherine McCormick likewise gave an anonymous gift of \$2 million that was instrumental to the development of the birth-control pill. *Empowering Women in Philanthropy, The Empowering Women Series, No. 3*, A Publication of the Feminist Majority Foundation (1991).

While many American industrialists in the late 19th and early 20th centuries publicized their philanthropy, others preferred anonymity. Jacob Henry Schiff, one of America's most prominent 19th-century bankers, made many of his charitable contributions anonymously. See Harry Golden & Martin Rywell, *Jews in American History: Their Contribution to the United States of America* 261 (1950). And when George Eastman, founder of Eastman-Kodak, gave over \$10 million to the Massachusetts Institute of Technology to build a new campus in 1912, he insisted on anonymity because of his desire to avoid personal publicity. William L. Chenery, *Philanthropy Under a Bushel: George Eastman, Kodak Manufacturer and Music Lover, Long Kept Big Gifts Secret*, N.Y. Times, Mar. 21, 1920.

Later in the 20th century, anonymous individual donors played a critical role in the civil rights movement. When civil-rights leader Julian Bond founded the Southern Elections Fund in 1969 to integrate elections in the South and support black candidates, the group's biggest source of funding came from an anonymous \$20,000 gift. Andrew B. Lewis, *The Shadows of Youth: The Remarkable Journey of the Civil Rights Generation* 265 (2009). And the NAACP fought all the way to the Supreme Court to keep its records and members secret when Alabama tried to compel disclosure in order to undermine desegregation. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452 (1958).

This tradition continues today. Many donors give to high-profile causes only on the condition of anonymity. Anonymous donors have been the largest grant-makers to LGBT causes between 1970 and 2010, donating over \$90 million. Anthony Bowen, *Forty Years of LGBTQ Philanthropy* 4 (2012). Indeed, a large proportion of donors to LGBT causes still donate anonymously. Alyssa Ochs, *Which Chicago Billionaire Is Giving Big for Transgender Studies?*, *Inside Philanthropy*, Jan. 20, 2016.

Many donors who support traditional marriage also give anonymously. *See* Stephanie Mencimer, *Gay Marriage Foes: 'Til Disclosure Do Us Part?*, *Mother Jones*, July 1, 2010. So do donors on both sides of the abortion debate. Between 2010 and 2013, anonymous donors gave Planned Parenthood over \$10 million through one donor-driven fund, which an anti-abortion website then published by using information from tax records. Aly Nielsen, *Planned Parenthood's Biggest Donors Gave \$374 Million in Four Years*, *News Busters*, July 31, 2015. Pro-life donors likewise seek anonymity—and go to court to protect their names from being released. *See, e.g.*, Chet Brokaw, *Agreement Settles Abortion Campaign Donation Case*, *Rapid City Journal*, Nov. 25, 2009.

2. Anonymous giving is also a tenet of several major religious traditions. Christians believe that Jesus, in the Sermon on the Mount, admonished his adherents that “when you give to the needy, do not let your left hand know what

your right hand is doing, so that your giving may be in secret.” Matt. 6:3–4. Over the past two millennia, Catholic and Protestant theologians have expanded on this teaching. St. Augustine emphasized that charity should be in service to God, not based on social relationships or benefits. Burlingame, *supra*, at 24. Likewise, St. Francis “believed that the true charitable bond was the private relationship between the donor and God and had nothing to do with public recognition or earthly rewards for giving.” *Id.* And Martin Luther preached that anonymous giving demonstrated that the donor’s intentions were pure, and not motivated by other people’s reactions to the act of giving. 21 Martin Luther, Works 130, 136 (1956).

Rabbinic Judaism likewise favors anonymous giving. The Talmud recounts the story of Rabbi Yanai observing a man publicly giving money to a poor man. He instructed the donor that “[i]t would have been better for you not to have given him anything rather than giving to him as you did, causing him embarrassment.” Chagiga 5a. The 12th-century Jewish theologian Maimonides also ranked anonymous giving highly. Maimonides ranked charity into eight levels. The second and third highest forms of charity—just beneath aiding someone in becoming self-supporting—both require the donor to remain anonymous. Mishneh Torah, 10.7–9. The fourth highest level also involves a reverse form of anonymity, where the giver does not know the recipient but the recipient knows the donor. *Id.* 10.10.

Islam similarly endorses anonymous giving. Charity “should be given in secret, if possible, to avoid spiritual pride and to save the recipient from embarrassment.” Th. Emil Homerin, *Altruism in Islam*, in *Altruism in World Religions* 77 (Jacob Neusner & Bruce Chilton eds., 2005). The Qur’an explicitly favors anonymous giving, stating that “[i]f 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.” *Surat Al-Baqarah* 2:271.

Finally, many Hindus consider anonymous religious donations “[o]ne of the most holy forms” of charity. Michael Barnett & Janice Gross Stein, *Sacred Aid: Faith and Humanitarianism* 144 (2012). Anonymous gifts (*gupta dān*) increase good karma further by denying the material reward that comes with recognition of the gift. Erica Bornstein, *The Impulse of Philanthropy*, 24 *Cultural Anthropology* 622, 626 (2009).

3. Anonymous giving remains common today. From 2000 to 2010, anonymous individual donors gave a staggering \$7.36 billion—and that figure only counts publicly announced charitable donations. Indiana Univ. Center on Philanthropy, *Million Dollar List: Scaling Philanthropy, Methodology and Summary Statistics* 17 (Oct. 2011). Among major donors, anonymous giving is routine: Nearly one in ten individual donors who gave \$1 million or more did so anonymously. *Id.*

Just looking at recent anonymous donations to universities reveals the diversity of donors' interests. Anonymous donors have given \$50 million to Yale to revitalize a humanities building; \$20 million to rename the George Mason University Law School the Antonin Scalia Law School; \$20 million to construct a new football stadium in honor of Colorado State University's longtime coach; \$10 million to create a technology center and visualization laboratory at DePauw university; \$3.5 million to Drexel University to aid young adults with autism; and \$1.5 million to Emory University to create a chair in civil rights and social justice in Rep. John Lewis's honor.² And these are just illustrative examples.

In sum, anonymous donations have played—and continue to play—a major role in American civic and religious life. They aid in funding our social, religious, and educational institutions. Anonymous donations exist across ideologies, social causes, and religious traditions. And many of these donations would not happen at all if donors were forced to take unwanted credit for their charity.

² *Gift Deal to Rename George Mason U. Law School for Scalia*, The Chronicle of Philanthropy, Apr. 1, 2016; *Colorado State U. Gets \$20 Million for Football Stadium*, The Chronicle of Philanthropy, Mar. 28, 2016; Anais Strickland, *Gifts Roundup: \$400 Million to Stanford U. from Nike Co-Founder*, The Chronicle of Philanthropy, Feb. 29, 2016; *Yale Gets \$50 Million Gift to Enhance Humanities Building*, The Chronicle of Philanthropy, Jan. 20, 2016; *Anonymous Gift to Emory Endows Chair in Civil Rights, Social Justice*, Philanthropy News Digest, Apr. 26, 2015.

B. Donors Insist on Anonymity for Many Legitimate Reasons

While some donors are comfortable publicizing their donations, many others will not donate unless they can do so anonymously. As expert on philanthropy Dr. Paul Schervish noted, “donors do have a legitimate and reasonable desire to protect their anonymity and [to] protect against disclosure of their names outside of the organization,” which extends to having their names disclosed to California through Schedule B forms. ER513.

Today, donors insist on anonymous giving for many legitimate and laudable reasons. Many seek anonymity because large public gifts generate attention that can make donors a target and jeopardize their safety. ER 519 (Schervish). For instance, Gert Boyle of Columbia Sportswear quietly made an anonymous \$100 million donation to Oregon Health & Science University’s Knight Cancer Institute in 2014 after a home invasion and attempted kidnapping prompted her to lower her profile. “I’ve had my face out there a lot of times and I’ve had some nasty stuff happen,” she explained after a local newspaper outed her. Nick Budnick, *Gert’s Gift: Boyle Calls \$100 Million for Cancer Research ‘Right Thing to Do,’* Oregonian, Sept. 2, 2014.

For donors who wish to support controversial causes, concerns about safety and public backlash are particularly acute. As American politics becomes ever more polarized, donors “across the political spectrum” face risks of business

boycotts and harassment. ER519–22 (Schervish). Warren Buffett, for example, has anonymously donated hundreds of millions of dollars to reproductive-rights groups. Karen Wiese, *Warren Buffett's Family Secretly Funded a Birth Control Revolution*, Bloomberg Businessweek, Jul. 30, 2015. He stopped giving publicly to those groups through his company when public attention to those donations placed one of his companies' salespeople in physical danger. *Id.*

Supporters of traditional marriage face similar considerations when deciding whether to donate publicly. Donors to California's Proposition 8 faced a withering retaliatory campaign for making non-charitable election donations that were subject to election disclosure laws. Because of their election contributions, some donors had their businesses boycotted. *See, e.g.,* Steve Lopez, *Prop. 8 Stance Upends Her Life*, L.A. Times, Dec. 14, 2008. Others, including the CEO of Mozilla, lost their jobs. Sarah McBride, *Mozilla CEO Resigns, Opposition to Gay Marriage Drew Fire*, Reuters, Apr. 3, 2014. Notably, some of that backlash occurred because an IRS employee improperly released Schedule B forms, the very forms California seeks (and has failed to protect) here. Mackenzie Weinger, *IRS Pays \$50K in Confidentiality Suit*, Politico, June 24, 2014. Although these examples involved election-related donations, donors to charities that support traditional marriage likewise have strong reasons to opt for anonymity.

For other donors, anonymity reflects “their religious obligation to not let their left hand know what their right hand is doing, which is very respected,” Dr. Schervish noted. ER517–18. Anonymous donations by Christians include \$20 million to the Roman Catholic Diocese of Orange to renovate Christ Cathedral and \$500,000 that was placed in a Salvation Army kettle. Chris Haire, *Anonymous Philanthropist Puts \$20 Million in Christ Cathedral’s Offering Plate*, Orange County Register, Dec. 3, 2014; Lonnie Shekhtman, *\$500,000 Donation to Salvation Army by Minnesota Couple*, Christian Science Monitor, Nov. 30, 2015. Some Jewish donors likewise believe “that God is more positively inclined to people who give charity secretly,” as one rabbi explained. Sarah Barmak, *The Value of Giving to Others—Anonymously*, Toronto Star, Nov. 22, 2013. Congregations thus have refused to recognize donors no matter how much they gave. Mark Oppenheimer, *In Big-Dollar Philanthropy, (Your Name Here) vs. Anonymity*, N.Y. Times, May 10, 2013. Likewise, Muslims give more anonymously, according to a recent study. Indeed, forced disclosure of Muslims’ contributions “may decrease contributions by either intrinsic motivations, the desire to obey the norm [of anonymous giving], or extrinsic motivations, the fear to be seen as faithless by others.” Fatima Lambarraa & Gerhard Riener, *On the Norms of Charitable Giving in Islam: A Field Experiment*, Düsseldorf Institute for Competition Economics Discussion Paper No. 59, at 25 (June 2012).

Donors also insist on anonymity to avoid unwanted attention and a wave of solicitations from other charities. ER518 (Schervish). An anonymous donor who gave \$15 million to Johns Hopkins refused to go public; school officials noted, “We asked him to let us use his name. He said no because he didn’t want to be inundated with requests.” Geraldine Fabrikant, *Lone Rangers of Charity Are Losing Their Masks*, N.Y. Times, Feb. 2, 1997. Others gave anonymously during the recession to avoid underscoring their wealth while others struggled. Ben Gose, *Anonymous Giving Gains in Popularity as the Recession Deepens*, The Chronicle of Philanthropy, Apr. 30, 2009.

Finally, donors choose to give anonymously for utilitarian reasons, believing that anonymous gifts encourage more giving and keep the focus on the charity. 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.* 4–7 (1994). Chuck Feeney, who founded an empire of duty-free shops, secretly gave away hundreds of millions before a business dispute forced him to go public. Jim Dwyer, *‘James Bond of Philanthropy’ Gives Away the Last of His Fortune*, N.Y. Times, Jan. 5, 2017. Feeney eschewed the limelight for personal reasons, but also saw anonymous giving as “a way to leverage more donations—some other individual might contribute to get the naming rights,” the head of Feeney’s philanthropic foundation explained. *Id.*; see also Steven Bertoni, *Chuck Feeney:*

The Billionaire Who Is Trying to Go Broke, Forbes Oct. 8, 2012. Similarly, Steve Jobs gave millions anonymously, a tradition his widow Laurene Powell Jobs continues. “We’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,” she said. Claire Cain Miller, *Laurene Powell Jobs and Anonymous Giving in Silicon Valley*, N.Y. Times, May 24, 2013. Likewise, two anonymous donors, Edith and Peter O’Donnell, donated \$135 million to the University of Texas. Their gifts were made on condition that the University obtain matching donations from others. By keeping the O’Donnells’ donations anonymous, the University was able to offer naming rights to the matching donors. See University of Texas, Credit Where It’s Due, <https://giving.utexas.edu/2013/07/02/credit-where-its-due/>.

To be sure, many other donors are happy to publicize their donations, and some individuals who originally gave anonymously later allowed their names to be made public, such as the O’Donnells. But donors have long had the freedom to choose whether to acknowledge their gifts, and that choice has been central to America’s longstanding tradition of philanthropy. Recent studies also confirm that anonymous donors tend to give in greater amounts and encourage others to give by credibly signaling that the charitable cause is high-quality and worthy of donations. See Mike W. Peacey & Michael Sanders, *Masked Heroes: Endogenous Anonymity*

in Charitable Giving, Centre for Market and Public Organisation Working Paper No. 13/303, at 1–4, 27–28 (May 2013).

II. CALIFORNIA’S FORCED COLLECTION AND RECKLESS DISCLOSURE OF SENSITIVE DONOR INFORMATION RAISES SERIOUS CONSTITUTIONAL CONCERNS

A. California Is Infringing Free Speech and Assembly

The First Amendment protects not only the right to donate to charity, but also the right to do so anonymously. The core First Amendment rights of speech and free assembly encompass the right to donate to charities of one’s choosing. “Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise.” *Luis v. United States*, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring in judgment). And the Supreme Court has long recognized that the First Amendment protects charitable solicitations as incidents of the freedoms of speech and assembly. When charities ask donors for money, that solicitation “involve[s] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.” *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980).

The right to donate to charity is the flip side of charities’ right to solicit. The freedom of speech “necessarily protects the right to receive it.” *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). That is because the First Amendment right to

solicit charitable donations would be a nullity if the government could suppress donors' right to give money to charity with impunity. The right to donate is likewise a core incident of the freedom of assembly. "The right to join together 'for the advancement of beliefs and ideas' is diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective.'" *Buckley v. Valeo*, 424 U.S. 1, 65–66 (1976) (per curiam) (citation omitted). Because donating to a cause is no different from joining it, the Supreme Court has treated donors and members "interchangeably." *Id.* at 66.

Like many other First Amendment rights, an individual's right to donate to charity would be meaningless without the right to choose to donate anonymously. Without the right to publish anonymously, the First Amendment would fail to guard "unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995). Similarly, without the right to donate anonymously, the First Amendment would offer little real protection for the rights to donate to charity and to belong to associations of one's choosing. When the revelation of an organization's donors "expose[s] [them] to economic reprisal, loss of employment, threat of political coercion, and other manifestations of public hostility," anonymity is undoubtedly central to free association. *NAACP*, 357 U.S. at 453,

462. Anonymity is so entwined with core First Amendment rights that the Supreme Court has refused to countenance laws that mandate “disclosure of membership lists for groups seeking anonymity” even when they merely “made group membership less attractive.” *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006).

Moreover, like the “honorable tradition of advocacy and of dissent” supporting anonymous speech, *McIntyre*, 514 U.S. at 357, anonymous charitable donations have a long historical pedigree. Anonymous giving has sustained controversial charitable causes throughout American history, including anti-slavery societies and women’s suffrage. *Supra* pp. 6–7. Christians, Jews, Muslims, and Hindus have embraced anonymous giving as an article of faith for millennia. *Supra* pp. 9–11. And anonymous giving remains ubiquitous today, funding a host of secular and religious initiatives and spurring other donors to give more. *Supra* pp. 11–13, 18.

California’s disclosure scheme unquestionably suppresses individual donors’ ability to speak and associate freely by shielding themselves with anonymity. By collecting sensitive donor information from every charity that solicits contributions in California—i.e., the names and addresses of substantial contributors, along with their donation amounts—California’s Attorney General amasses a wealth of information that could subject donors across the country to harassment. Rather

than safeguarding this information, California has carelessly published over a thousand Schedule B forms on the Internet, including donors to Planned Parenthood—risking the very harassment that anonymous donors rightly fear. *Supra* pp. 8–9, 13–15. Donors who prize anonymity will be chilled from engaging in protected speech and conduct just as surely as if California prohibited anonymous donations directly. *See Am. Comm. Ass’n v. Douds*, 339 U.S. 382, 402 (1950) (there is no difference between direct and indirect infringements on freedom of association for First Amendment purposes).

The loss of anonymity is also the key difference between California’s collection of Schedule B forms and the federal government’s. Unlike California, the federal government has strong legal protections against unauthorized disclosure of confidential tax information. *See* 26 U.S.C. §§ 6104(b), 7213, 7431. Federal employees pay more careful attention to preserving confidentiality, unlike California employees who consider preventing unauthorized disclosure of Schedule B forms to be “very tedious, very boring work.” *Americans for Prosperity Found.*, 182 F. Supp. 3d at 1057. And as a result, the federal government, unlike California, does not carelessly publish Schedule B forms on the Internet for all to see.

B. California Is Interfering with Protected Religious Expression

California’s disclosure regime also independently threatens the rights of religiously motivated donors. “[T]he ‘exercise of religion’ often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation.” *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990). A religiously motivated act of anonymous giving is itself an exercise of religion—and has been recognized as such since biblical times.

California’s disclosure regime interferes with the freedom to exercise religion in two different ways. First, the law interferes with the ability to do anonymous charity. For Christians, Jews, Muslims, and Hindus, anonymous giving has special religious significance. *See supra* pp. 9–11. But California’s regime heavily restricts anonymity. Anyone who makes a substantial donation will have their names, addresses, and amounts of their donations disclosed to California employees—who in many cases have then broadcasted hitherto anonymous donors’ names to the world.

Second, California’s disclosure regime chills individuals from acting on their religious beliefs by contributing to causes. Donors support any number of controversial causes—for instance, those involving abortion, adoption, family

planning, and marriage—because of their sincerely held religious beliefs. Yet, by acting on those religious views publicly, these donors risk vicious retaliatory campaigns, including boycotts of their businesses. *See, e.g., Lopez, supra* (discussing boycotts resulting from Proposition 8 campaign donations). Many donors will forgo such donations rather than subject themselves to that kind of harassment.

California’s disclosure regime is subject to strict scrutiny, and cannot survive that high bar. Where a law implicates “the Free Exercise Clause in conjunction with other constitutional protections,” the First Amendment will often “bar[] application of a neutral, generally applicable law to religiously motivated action.” *Smith*, 494 U.S. at 881; *accord Am. Family Ass’n, Inc. v. City & Cty. of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002) (applying this standard whenever there is “a colorable claim that a companion right has been violated”). And because forced disclosure of donations also implicates the freedom of speech and association, *supra* pp. 19–22, California’s disclosure regime is thus unconstitutional “unless the strict scrutiny test is satisfied (*i.e.*, the law is narrowly

tailored to advance a compelling government interest).” *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004).³

For all of the reasons AFP has argued, *see* AFP Br. 50–64, California has no compelling interest in demanding charities’ Schedule B forms. Nor is California’s disclosure regime narrowly tailored to serve California’s putative interest in fraud prevention. Holding charities accountable for malfeasance is a worthy objective—but collecting (and failing to safeguard) Schedule B forms is unnecessary to achieve that end. This Court should not allow California to needlessly stifle anonymous donors’ right to freely exercise their religion.

³ Philanthropy Roundtable takes no position on whether the First Amendment prohibits States from applying election-related disclosure laws to political action committees or 501(c)(4) organizations. This Court has held that special governmental interests apply to election-related disclosure, including ensuring the “integrity of the electoral process” and providing voters with information. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 538 (9th Cir. 2015). These interests do not apply to ordinary charitable donations.

CONCLUSION

This Court should hold that the First Amendment bars the California Attorney General from collecting all 501(c)(3) charities' Schedule B forms. This Court should therefore affirm the judgment below in part and reverse and remand in part.

Respectfully submitted,

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Dated: January 27, 2017

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Signature of Attorney or
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s/ Sarah M. Harris

Date

Jan 27, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, the foregoing Brief of *Amicus Curiae* The Philanthropy Roundtable was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on all counsel of record by operation of the CM/ECF system on the same date.

/s/ Sarah M. Harris