No. 15-152

In The Supreme Court of the United States

CENTER FOR COMPETITIVE POLITICS,

Petitioner,

v.

KAMALA D. HARRIS,
ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly held that petitioner is unlikely to prevail on a claim that its associational rights are violated by a state regulation requiring charitable organizations to provide state regulators with a copy of a federal donor disclosure form already filed with the Internal Revenue Service.

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INTRODUCTION

To protect the public from fraud and the misuse of charitable donations, California regulates tax-exempt charitable organizations. Under state law, these organizations must file information and reports with the state Registry of Charitable Trusts. At issue here is a regulation requiring that charities file with the Registry a complete copy of a form they have already filed with the federal Internal Revenue Service, listing the names and addresses of major donors. State policy protects this information from public disclosure, and it is used by the Attorney General to ensure that charities comply with the law. The court of appeals properly held that petitioner's First Amendment challenge to California's regulation is unlikely to succeed on the merits because the regulation is substantially related to compelling governmental interests, thus satisfying "exacting scrutiny." That decision is consistent with this Court's precedents concerning disclosure requirements and does not conflict with any decision of another court of appeals. Indeed, in the sole federal case involving a similar regulation, the district court recently reached the same result.

STATEMENT

1. In California, as in most other States, those entities that wish to enjoy the privilege and related benefits of operating and soliciting funds as a tax-exempt organization are supervised and regulated by

the State. Charitable organizations play a vital role in our society, but the potential for and existence of charitable fraud and illegality are considerable. *See, e.g.*, Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 Fla. Tax Rev. 1, 19-39 (2011) (detailing scandals and various types of illegal activities by charities). In light of declining oversight by the IRS, state regulators are an increasingly critical part of the effort to police and prevent charitable fraud. *See generally* U.S. Gov't Accountability Off., *Tax-Exempt Organizations: Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations* 1-2, 7, 19-20 (2014) (hereinafter GAO 2014 Report).[1]

In California, the Attorney General is responsible for supervising approximately 110,000 charitable trusts and public benefit corporations organized or conducting business in the State and for protecting charitable assets for their intended uses. *See* Pet. App. 4a; Cal. Gov't Code §§ 12581, 12598(a). To ensure that charitable status is not abused, the Attorney General has "broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities." Pet.

[1] As detailed by the GAO 2014 Report, IRS examinations of charities have steadily declined due to budget cuts and shrinking resources. In 2013, the IRS examined 0.71 percent of all charitable organization filings. *Id.* at 19-20.

App. 4a; Cal. Gov't Code § 12598(a).[2] In order to regulate charitable organizations and ascertain whether the purposes of a corporation or trust are being carried out, the Attorney General may require any agent, trustee, fiduciary, beneficiary, institution, association, corporation, or other person to appear and to produce records. Cal. Gov't Code § 12588. Any such order has the same force as a subpoena. *Id.* § 12589. The Attorney General has specific authority to require periodic written reports deemed necessary to her supervisory and enforcement duties. *Id.* § 12586.

Under the state Supervision of Trustees and Fundraisers for Charitable Purposes Act, the Attorney General maintains a register of charitable corporations and their trustees and trusts (the Registry), and may obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Gov't Code § 12584. Every charitable corporation and trustee subject to the Act must file an initial registration form with the Registry within 30 days after first receiving property, *id.* § 12585, and thereafter must also file periodic written reports, *id.* § 12586(a). The Attorney General is required to promulgate rules and regulations specifying the time for filing reports, their

[2] *See also* Cal. Bus. & Prof. Code §§ 17510-17510.95; Cal. Corp. Code §§ 5110, et seq.; *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161 (1987).

contents, and the manner of executing and filing. *Id.* § 12586(b).

2. Federal law provides that, to maintain tax-exempt status, most charitable organizations must file an annual Form 990 and accompanying schedules with the Internal Revenue Service. *See* I.R.C. § 6033. Schedule B of Form 990, at issue here, directs such organizations to report the name, address, and total contribution for any donor who gave $5,000 or more in cash or property during the previous year. Pet. App. 2a-3a. In general, charitable organizations must make their annual returns available to the public. *See* I.R.C. § 6104(d). They need not, however, publicly disclose the names and addresses of donors, *id.* § 6104(d)(3)(A), and the IRS likewise does not publicly disclose either Schedule B or donor information, *see id.* § 6103.

California law requires charitable organizations organized or doing business in the State to file with the state Registry a copy of their annual IRS Form 990, including Schedule B. *See* Pet. App. 4a-5a; Cal. Code Regs. tit. 11, § 301 (2014).[3] Failure to file a complete periodic report may result in suspension or revocation of a charity's registered status and late

[3] Although petitioner characterizes the Schedule B requirement as new, Pet. 3, state regulations have consistently required charitable organizations to submit a complete copy of the federal form and all schedules.

fees of $25 per month. *See* Cal. Gov't Code §§ 12586.1, 12598(e)(1).

Although certain charitable organization filings are open to public inspection, *see* Cal. Gov't Code § 12590, a registrant's Schedule B is not. In keeping with federal and state law regarding the treatment of donor and personal information, the Registry treats Schedule B as a confidential document. *See* Pet. App. 5a, 18a-19a; I.R.C. § 6103; Cal. Gov't Code § 6254(k); Cal. Civil Code §§ 1798 et seq. The Registry keeps these schedules in segregated files that are not publicly available, and uses them exclusively for the regulation of charitable organizations. *See* Pet. App. 5a. Registry staff who review and process periodic reports are instructed to remove all confidential documents, including the Schedule B, scan them separately, and upload them to a special database. *See* Dist. Ct. Dkt. 10-8. This non-public database is accessible only by a small number of government employees in the Attorney General's office directly involved in regulating charitable organizations, including the Registrar, attorneys, investigators, and support staff. *See* Pet. App. 5a.[4]

3. Petitioner is a charity organized in the Commonwealth of Virginia that solicits donations in

[4] In response to a California Public Records Act request, the Registry makes available only the "public file." The Attorney General does not produce confidential information or documents in response to such requests. *See* Cal. Gov't Code § 6254(k); Cal. Evid. Code § 1040.

California and has filed reports with the state Registry since 2008. Pet. App. 3a, 30a. In January 2014, petitioner filed its Annual Registration Renewal Fee Report with the Registry, including a copy of its Form 990 and a version of its Schedule B redacted to omit the names and addresses of its donors. *Id.* at 30a-31a. The Attorney General's Office subsequently sent a letter to petitioner instructing it to submit an unredacted copy of the Schedule B it filed with the IRS. *Id.* at 30a-31a, 59a-60a. In response, petitioner sued the Attorney General to enjoin enforcement of that demand. The complaint alleges that California's Schedule B disclosure requirement violates the Supremacy Clause and the First Amendment right to freedom of association. *See* Complaint, Dist. Ct. Dkt. 1.

Petitioner sought a preliminary injunction barring the Attorney General from enforcing compliance with the Schedule B requirement. *See* Pet. App. 29a-46a. In denying that motion, the district court held that petitioner was not likely to prevail on its First Amendment freedom of association claim for two reasons. First, petitioner had not articulated any objective, specific harm that would befall its members from complying with the Schedule B requirement, and thus had failed to make a prima facie showing of infringement of associational rights. *Id.* at 43a-44a. Second, even if petitioner had made such a showing, the requirement would be valid because it is substantially related to the Attorney General's compelling interest in performing her regulatory and oversight

function. *Id.* at 44a-45a. The district court also rejected petitioner's Supremacy Clause arguments. *Id.* at 33a-39a. The court further reasoned that because petitioner had failed to establish any likelihood of success on its constitutional claims, it could not establish that it was likely to suffer irreparable harm in the absence of preliminary relief, or that the balance of equities tipped in its favor. *Id.* at 45a-46a. Finally, the court held that "it is in the public interest that [the Attorney General] continues to serve [as] chief regulator of charitable organizations in the state in the manner sought." *Id.* at 46a.

4. The court of appeals affirmed. Pet. App. 1a-26a.[5] Agreeing that there was no basis for preliminary relief, the court held that the Schedule B requirement is constitutional on its face.[6] The court rejected petitioner's contention that disclosure requirements are per se injurious to First Amendment rights. *Id.* at 9a-12a, 17a-18a. Based on its review of the relevant

[5] The appeal below was argued and submitted on December 8, 2014. On January 6, 2015, the court of appeals enjoined the Attorney General from taking any action against petitioner for failure to file an unredacted Schedule B pending resolution of the appeal. Ninth Cir. Dkt. 28 & 34. The court vacated that injunction on May 1, 2015, in conjunction with its decision affirming the district court. Ninth Cir. Dkt. 35, 36-1.

[6] The court of appeals construed petitioner's First Amendment claim as a facial challenge. Pet. App. 12a-14a (citing *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2013)). It noted that there is some question as to the standard for assessing facial challenges, but concluded that petitioner could not prevail even under the least demanding possible standard. *See* Pet. App. 14a-15a.

precedents from this Court, the court determined that, while disclosure requirements have the "potential" to infringe associational rights, many disclosure requirements are consistent with the First Amendment. *Id.* at 9a-10a (citing *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976)). Evidence of an "actual burden" on freedom of association is required to establish a First Amendment claim. *Id.* at 12a (citing *John Doe No. 1*, 561 U.S. at 196).

The court of appeals stated that even "the chilling *risk* inherent in compelled disclosure triggers exacting scrutiny." Pet. App. 12a (citing *Buckley*, 424 U.S. at 66). Applying that standard, however, the court determined that petitioner had produced no evidence that donors or potential donors would experience threats, harassment, or other conduct that would chill their exercise of First Amendment rights, and thus had not demonstrated any "actual burden" caused by the Schedule B requirement. *Id.* at 12a, 17a.

Against this absence of any actual burden, the court of appeals weighed the Attorney General's "compelling interest in enforcing the laws of California." *Id*. at 19a-20a. The court recognized that access to Schedule B filings, and the routine review of significant donor information, increases the Attorney General's "investigative efficiency" and allows her to "flag suspicious activity." *Id*. at 5a-6a, 20a. The court thus concluded that the Schedule B filing requirement on its face "bears a 'substantial relation'" to a "'sufficiently important' government interest." *Id.* at 20a-21a (quoting *Citizens United v. Fed. Election*

Comm'n, 558 U.S. 310, 366 (2010)). The court left open the possibility that petitioner could prevail on a future as-applied challenge, if it could establish "a reasonable probability that the compelled disclosure of [its] contributors' names [to state regulators] will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 21a (citing *McConnell v. FEC*, 540 U.S. 93, 199 (2003)).[7]

The court of appeals granted petitioner's unopposed motion to stay the mandate, but denied its request for an order enjoining the Attorney General from enforcing the Schedule B requirement pending the filing and disposition of the present petition. Ninth Cir. Dkt. 38. Justice Kennedy denied petitioner's application for an emergency injunction. To date, the Attorney General has taken no action to enforce the filing requirement against petitioner while the matter remains pending in this Court.

ARGUMENT

1. As a threshold matter, petitioner exaggerates the scope and effect of California's Schedule B reporting requirement. Charities soliciting funds as tax-exempt organizations in California are required to

[7] The court of appeals also determined that petitioner's preemption claim failed as a matter of law. *See* Pet. App. 21a-26a. Petitioner has not challenged this portion of the court's decision.

submit a complete copy of their federal IRS Form 990 Schedule B to the Registry, where it is protected from public disclosure. *See* Cal. Gov't Code §§ 12584, 12586(b), 12598(a); Cal. Code Regs. tit. 11, § 301. This reporting requirement is neither a "dragnet" nor an unprecedented collection of private information. Pet. 16, 27, 28. Instead, it is precisely the type of law enforcement tool that this Court has repeatedly approved as a permissible means of serving significant government interests in protecting the public from fraud and illegality. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).[8] Indeed, because the Registry protects the confidentiality of Schedule B information, the requirement is significantly less extensive than rules this Court has consistently upheld that require public disclosure of donors. *See John Doe No. 1*, 561 U.S. at 192-193; *Citizens United*, 558 U.S. at 366-371; *Buckley*, 424 U.S. at 69-72.

2. The court of appeals adhered to this Court's longstanding precedent in holding that petitioner's First Amendment challenge is unlikely to succeed on the merits. This Court has repeatedly applied "exacting scrutiny" to disclosure requirements. *See*

[8] *See also* Sean McMahon, *Deregulate But Still Disclose?: Disclosure Requirements for Ballot Question Advocacy After Citizens United v. FEC and Doe v. Reed*, 113 Columbia L. Rev. 733, 746-759 (2013) (detailing the Court's "strong affirmation of the constitutionality and utility of disclosure requirements").

John Doe No. 1, 561 U.S. at 196; *Buckley*, 424 U.S. at 64. Under that standard, the government must show that there is a "substantial relation" between the disclosure requirement and a "sufficiently important governmental interest." *Citizens United*, 558 U.S. at 366-367. "The strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 744 (2008) (citing *Buckley*, 424 U.S. at 68).[9]

Relying on these precedents, the court of appeals applied exacting scrutiny and "[e]ngag[ed] in the same balancing that the *Buckley* Court undertook," weighing the purported harm to associational rights caused by the Schedule B requirement against the government's interest in and use of donor information. Pet. App. 17a-21a. It concluded that petitioner had submitted no evidence that compliance with

[9] There is no need for the Court to "clarify[ ] the proper standard" that applies to disclosure requirements, Pet. 31-32, or to dispel any confusion about the differences between "strict" and "exacting" scrutiny, *see* Pet. 33-36; Br. of Institute for Justice 13-20. The Court has already explained what each test is and when it applies. *Compare, e.g.*, *Citizens United*, 558 U.S. at 340 (laws that restrict expression of political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest"), *with id.* at 366-367 ("The Court has subjected [disclosure] requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.") (citations omitted).

the Schedule B requirement would cause it or its donors to suffer any negative consequence inflicted either by the public – which has no access to the information in the Registry's possession – or by government officials, and thus there was no showing of any actual burden on First Amendment freedoms. *Id.* at 17a-19a.

The court correctly concluded that the Attorney General's "compelling interest" in enforcing the law and protecting the public from fraud was more than sufficient to offset any possible burdens on associational rights that the Schedule B requirement might cause. Because Schedule B provides information not otherwise available to the State, identifying both the source and type of charitable donations made (*i.e.*, cash, securities, or in-kind), and that information assists the Attorney General in detecting and preventing illegality and abuse of tax-exempt status, the requirement to file a copy of Schedule B with state regulators is substantially related to these interests. *Id.* at 19a-21a. Accordingly, the requirement satisfies exacting scrutiny. *Id.* at 21a.

Petitioner suggests that the Schedule B requirement is not sufficiently tailored because the State's confidentiality policy is not codified by statute. *See* Pet. 6, 14. As the court of appeals determined, however, all the evidence in the record, as well as federal and state law regarding the treatment of donor and personal information, shows that the Attorney General is required to keep and always has kept Schedule B information confidential. *See* Pet. App. 18a-19a &

n.9; I.R.C. § 6103; Cal. Gov't Code § 6254(k); Cal. Civil Code §§ 1798 et seq.[10]

3. There is no support in this Court's jurisprudence for petitioner's contention that every compelled disclosure causes First Amendment injury. Pet. 12-18; Pet. App. 9a-10a. To the contrary, this Court considered and rejected that argument in *Buckley v. Valeo*.

In *Buckley*, the Court acknowledged that "compelled disclosure, in itself, *can* seriously infringe on privacy and association and belief guaranteed by the First Amendment." 424 U.S. at 64 (emphasis added). First Amendment harm is not, however, presumed. A party must establish an actual burden on its rights caused by the challenged disclosure. *See Davis*, 554 U.S. at 744. Specifically, it must demonstrate "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisal from either

[10] Nor do Internal Revenue Code sections 6103 and 6104 prohibit the Attorney General from requiring the submission of Schedule B information. *See* Pet. 5; Br. of American Target Advertising et al. 18-19. Sections 6103 and 6104 govern what *the IRS* can and cannot do with information it receives from filers. They do not dictate what information a State may require federal filers, including charitable organizations, to submit to state authorities as a matter of state law. *See* I.R.C. §§ 6103(b)(1)-(3), 6104(b)(6)(A); *Stokwitz v. United States*, 831 F.2d 893, 895-896 (9th Cir. 1987).

Government officials or private parties[.]" *Buckley*, 424 U.S. at 74.[11]

While the need to demonstrate actual harm was first articulated by this Court in *Buckley*, it was derived from the seminal associational rights cases, such as *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. Little Rock*, 361 U.S. 516 (1960). *See Buckley*, 424 U.S. at 64, 69-74. In both *NAACP* and *Bates*, there was "substantial uncontroverted evidence" that public disclosure of the names of NAACP members had resulted in bodily harm, threats, harassment, and economic reprisals that caused people to withdraw and discouraged new members from joining the organization. *Bates*, 361 U.S. at 524; *see NAACP*, 357 U.S. at 462. In both cases, it was only after the NAACP made this "uncontroverted showing" that the Court considered the nature of the government's

[11] One amicus brief asserts that "exacting scrutiny" is used only in "as-applied" challenges to disclosure, and thus that the court of appeals erred in applying it to petitioner's facial challenge. Br. of Cato Institute, et al. 6. But exacting scrutiny and a demonstration of actual First Amendment harm are considered in both facial and as-applied challenges. *Compare McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 103-104 (2003) (rejecting facial challenge to disclosure provisions of Bipartisan Campaign Reform Act of 2002 where the evidence did not establish the requisite "reasonable probability" of harm to any plaintiff group or its members), *with Citizens United*, 558 U.S. at 366-371 (rejecting as-applied challenge to same Act where party did not establish "a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed").

interest and its relation to the information sought. *See NAACP*, 357 U.S. at 463-466; *Bates*, 361 U.S. at 524-527.

In contrast, in *Buckley*, appellants did not make the "requisite factual showing." 424 U.S. at 69. As this Court stated, "where it exists, the type of chill and harassment identified in *NAACP* v. *Alabama* can be shown," but "no appellant in this case has tendered record evidence of the sort proffered in *NAACP* v. *Alabama*." *Id.* at 71-72. This Court concluded that "on this record, the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." *Id.* at 72. Accordingly, petitioner's contention that the court of appeals "misapplied" or "overruled" *NAACP* and *Bates* and their progeny is incorrect. Pet. 18, 30.

4. Petitioner's related contention that the court of appeals "shifted the burden of persuasion" and thus converted exacting scrutiny into rational basis review is also unfounded. Pet. 21-29. The court did not, as petitioner maintains, adopt a "'wholly without rationality' test," or excuse the Attorney General from demonstrating a "substantial relation" between the Schedule B requirement and a "sufficiently important governmental interest." Pet. 29, 30. Instead, the court carefully examined the Attorney General's evidence establishing a legitimate regulatory use for Schedule B donor information. *See* Pet. App. 5a-6a, 19a-21a. It properly applied exacting scrutiny, balancing the lack of burden on First Amendment rights caused by the Schedule B requirement against the Attorney

General's interests in obtaining the information for regulatory purposes, and examining the nexus between those interests and the requirement. *See supra* 8-9, 11-13. Pet. App. 17a-21a.[12]

Petitioner and its amici appear to contend that any government demand for information must be narrowly tailored to serve a compelling state interest – thus satisfying the strictest form of First Amendment scrutiny. *See* Pet. 21-26; Br. of Institute for Justice 3-7. That argument relies on inapposite cases, involving regulation of solicitation, prior restraints or content-based regulations of political speech, none of which is at issue here. *See* Pet. 15, 34; Br. of Institute for Justice 13-16.[13] Unlike in those cases, the reporting

[12] An amicus brief filed by several States posits that the court of appeals erred in holding that the requirement is sufficiently tailored to a compelling state interest because most States do not require charities to submit a copy of Schedule B. Br. of Arizona et al. 8-9. Different States have different regulatory schemes and oversight functions, and some do not register charities at all. *Compare* Del. Code Ann. tit. 6, §§ 2591-97 (2014), *with* Miss. Code Ann. §§ 79-11-501-529 (2014). States also have different resources available to review information. Moreover, States are entitled to take disparate approaches to problems of law and policy. The fact that States have varying requirements does not bear on whether it is constitutional for California to require charities that are organized under or do business within its jurisdiction to provide state regulators with a copy of their Schedule B.

[13] *See, e.g.*, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Riley*, 487 U.S. 781; *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980); *Talley v. California*, 362 U.S. 60 (1960).

requirement here does not "prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (internal quotation marks and citation omitted).[14] Because disclosure laws are a "less restrictive alternative to more comprehensive regulations of speech," strict scrutiny does not apply. *Id.* at 366, 369; *see also John Doe No. 1*, 561 U.S. at 196.

Petitioner's reliance on cases such as *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971), and *Elrod v. Burns*, 427 U.S. 347 (1963), to demonstrate that the Schedule B filing requirement fails exacting scrutiny is similarly misplaced. Unlike in *Baird* and *Elrod*, the Attorney General is not making a "broad and sweeping inquiry" into individual beliefs, nor is she soliciting information "solely for the purpose of withholding a right or benefit because of what [an individual] believes." *Baird*, 401 U.S. at 6-7. The law requires all tax-exempt charitable organizations that solicit donations in California to submit information, including a copy of Schedule B, to aid the Attorney General in

[14] Petitioners suggest that the Schedule B filing requirement functions as a prior restraint on speech. *See* Pet. 2, 7, 15; Br. of American Target et al. 13-18. That argument was not presented below, and in any event is meritless. Petitioner's complaint alleges only a violation of associational rights. Dist. Ct. Dkt. 1. Moreover, the Supervision of Trustees and Fundraisers for Charitable Purposes Act does not confer "unbridled discretion" on the Attorney General, or "raise[ ] the specter of content and viewpoint censorship" of expressive speech. *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 763-768, 770-772 (1988).

enforcing the law and protecting the public from fraud and misuse of charitable funds.[15]

5. There is no disagreement in the lower courts for this Court to resolve. The only other court that has addressed the specific question at issue here agrees that a regulation requiring charities to file a confidential copy of their federal Schedule B with state regulators does not infringe associational rights. *Citizens United v. Schneiderman*, No. 14-cv-3703, 2015 WL 4509717 (S.D.N.Y. July 27, 2015), *appeal pending*, No. 15-2718 (2d Cir.). New York has a regulation similar to California's Schedule B filing requirement. *See* N.Y. Comp. Codes R. & Regs. tit. 13, § 91.5. Like the court below, the Southern District of New York recently held that (1) New York's requirement is substantially related to the State's important interests in enforcing charitable solicitation laws and protecting the public; (2) the strength of the government's interests justified any minimal burden that the Schedule B requirement places on speech and associational rights; and (3) the regulation thus satisfies exacting scrutiny. *Citizens United*, 2015 WL 4509717 at *3-*7.

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[15] Petitioner's amici cite *Shelton v. Tucker*, 364 U.S. 479 (1960). Br. of Buckeye Institute et al. 7-8, 15, 17, 21, 23; Br. of Institute for Justice 7, 11. Unlike the "unlimited and indiscriminate sweep of the statute" in *Shelton*, the requirement to provide a copy of federal Schedule B to state regulators, without public disclosure and for purposes of preventing fraud or abuse, is circumscribed and has no obvious effect on First Amendment rights. 364 U.S. at 490.

Other federal appellate courts also have applied exacting scrutiny and upheld *public* disclosure requirements that are far more extensive than the filing with government regulators challenged here. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 470 & n.1 (7th Cir. 2012) ("[I]n the aftermath of *Citizens United* a number of suits have been filed challenging federal and state disclosure regulations as facially unconstitutional. Of the federal courts of appeals that have decided these cases, every one has upheld the disclosure regulations against the facial attacks."); *see also Del. Strong Families v. Attorney Gen. of Del.*, 793 F.3d 304, 312 (3d Cir. 2015) (upholding Delaware Elections Disclosure Act's requirements that organizations engaged in express advocacy disclose individual contributors of $100 or more); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 41 (1st Cir. 2011) (rejecting facial challenge to Maine laws requiring the maintenance and disclosure of financial information); *SpeechNow.org v. FEC*, 599 F.3d 686, 696-698 (D.C. Cir. 2010) (upholding federal disclosure requirements as applied to unincorporated nonprofit association that was required by the FEC to register as a political committee); *Frank v. City of Akron*, 290 F.3d 813, 819 (6th Cir. 2002) (holding that requirement that persons making financial contributions or loans to local political campaigns list their home addresses did not unduly burden contributors' right to association).

The lower courts also agree that, under "exacting scrutiny," a plaintiff must demonstrate that the

challenged disclosure requirement places an actual burden on associational rights. In that regard, petitioner claims that *American Civil Liberties Union v. Clapper*, 785 F.3d 787 (2d Cir. 2015) "create[s] a circuit split." Pet. 19 n.5. *Clapper*, however, addressed only the injury-in-fact required to establish standing. *See* 785 F.3d at 800-803. It did not resolve the plaintiff's First Amendment claim, ruling instead that the National Security Agency's bulk collection of metadata exceeded the authority granted to it by Congress. *See id.* at 825. In any event, the Second Circuit now has before it the precise issue presented in this case. *See Citizens United v. Schneiderman*, No. 15-2718 (2d Cir.). That court is best positioned to decide in the first instance what implication, if any, its decision in *Clapper* has for the question presented here.

Petitioner's assertion that the court of appeals' opinion below is in "significant conflict" with *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999), is also mistaken. Pet. 19. In *Lady J.*, the Eleventh Circuit considered a challenge to an ordinance that required corporate applicants for adult business licenses to disclose the names of "principal stockholders." 176 F.3d at 1366. The court held that the regulation did not survive exacting scrutiny because, although the government's interest in preventing the "harmful secondary effects" caused by adult businesses was substantial, there was no "relevant correlation" between that interest and the names of principal stockholders, who do not run or generally influence those businesses. *Id.* Although the

Eleventh Circuit did not discuss the evidence, if any, of the actual burden on plaintiffs' First Amendment rights, it also did not presuppose any actual burden, and applied the same analysis as did the court of appeals here.

Indeed, the "circuits have uniformly adopted the same [exacting scrutiny] standard." *Justice v. Hosemann*, 771 F.3d 285, 296 (5th Cir. 2014); *see also Worley v. Florida Sec'y of State*, 717 F.3d 1238, 1244 (11th Cir. 2013) (collecting cases from the First, Fourth, Seventh, Eighth, Ninth and Tenth Circuits), *cert. denied sub nom. Worley v. Detzner*, 134 S. Ct. 529 (2013). Petitioner claims that the court of appeals here deviated from that uniform approach because it did not require the government to meet its burden of demonstrating that the Schedule B requirement was substantially tailored to a sufficient government interest. *See* Pet. 22-24 & n.6. As set forth above, this assertion fails for want of any factual or legal support. *See supra* 11-13, 15-16. Pet. App. 17a-21a. The court of appeals' decision is thus consistent with the cases relied upon by petitioner.[16]

[16] *See, e.g.*, *Del. Strong Families*, 793 F.3d at 312; *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132-134 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 949 (2015); *Hosemann*, 771 F.3d at 296-301; *Citizens United v. Gessler*, 773 F.3d 200, 209-216 (10th Cir. 2014); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270, 282-285 (4th Cir. 2013); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876-877 (8th Cir. 2012) (en banc).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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