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.

KAMALA D. HARRIS, Attorney General, in her Official Capacity as Attorney General of California,

Defendant–Appellant–Cross-Appellee.

BRIEF OF THE PACIFIC RESEARCH INSTITUTE, CATO INSTITUTE, AND COMPETITIVE ENTERPRISE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF

On Appeal from the United States District Court
for the Central District of California
No. 2:14-cv-09448-R-FFM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Pacific Research Institute (PRI) hereby states that PRI is a nonprofit § 501(c)(3) organization. PRI is not a publicly held corporation and no corporation or publicly held entity owns more than 10 percent of its stock. *Amicus Curiae* Cato Institute (Cato) hereby states that Cato is a KS nonprofit corporation. It does not have any parent companies or subsidiaries, and does not issue stock. *Amicus Curiae* Competitive Enterprise Institute (CEI) hereby states that CEI is a nonprofit organization and has no parent companies, nor does any public corporation own any CEI stock.

Dated: January 27, 2017

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

The Pacific Research Institute is a nonpartisan, nonprofit § 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free-market policy solutions to the issues that impact the daily lives of all Americans. PRI demonstrates how free interaction among consumers, businesses, and voluntary associations is more effective than government action in providing the important results we all seek—good schools, quality healthcare, a clean environment, and economic growth. Founded in 1979 and based in San Francisco, PRI is supported by private contributions. Its activities include publications, public events, media commentary, invited legislative testimony, filing *amicus* briefs, and community outreach.

The Cato Institute was established in 1977 as a nonpartisan, nonprofit public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the limited constitutional government that is the foundation of liberty. To those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

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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 *amici curiae* or their counsel contributed money intended to fund preparation or submission of this brief.

The Competitive Enterprise Institute, is a § 501(c)(3) nonprofit, public interest organization dedicated to advancing free-market solutions to regulatory issues. Founded in 1984 and headquartered in Washington, D.C., CEI depends for its existence on contributions from private donors, many of whom choose to remain confidential. CEI's involvement in a number of controversial issues over the years, such as Affordable Care Act litigation, labor regulation, and global warming, has resulted in several attempts by outsiders, in some cases acting under color of law, to obtain the identities of CEI donors and to subject them to harassment campaigns.

As organizations supported by charitable donors, *amici* have 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. *Amici* respectfully submit that the California Attorney General's demand that donor 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, grant-making institutions, and other nonprofit organizations to carry out their goals and missions.

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 $298 billion in 2015—a record-breaking sum. LILLY FAMILY SCHOOL OF PHILANTHROPY, INDIANA UNIVERSITY—PURDUE UNIVERSITY AT INDIANAPOLIS, GIVING USA 2016: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2015 (2016). Over one million nonprofit organizations benefited from those donations, including religious organizations, schools, hospitals, foundations, food pantries, and homeless shelters. *Id.* This number includes approximately 118,000 registered charities in California alone. Opening Brief of Americans for Prosperity Foundation (AFPF Br.) at 8.

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—marks a critically important boundary between government and civil society. This boundary is enshrined in our Constitution. 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 at 1.[2] 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.

It cannot seriously be questioned that 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

[2] Available at http://oag.ca.gov/sites/all/files/agweb/pdfs/charities/publications/CharitiesSolicitation.pdf?.

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 retaliation and harassment, while 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 and charitable organizations. 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 all charities in California.

ARGUMENT

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

The compelled disclosure of donor names 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 freedom of religion, speech, and association, as well as individual liberty and privacy.

Donors may have any number of legitimate reasons for desiring to remain anonymous—including motivations that implicate deeply-held moral or religious beliefs protected by the First Amendment. For example, Jewish donors may request anonymity according to Maimonides' teaching that the second highest form of *tzedakah* ("charity" or "righteousness") is 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). Christian donors may request anonymity 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. Muslims have a similar concept, called *sadaqah*. 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."). 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).

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 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 as the Court recognized even before *NAACP v. Alabama*, under our Constitution the government cannot direct private associations to implement the government's preferred policies. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819) (rejecting attempt by the State of New Hampshire to seize control of Dartmouth College, a private university established by charitable contributions).

Indeed, there are strong historical reasons for protecting donor privacy and freedom—both for the donors' sake as well as the public good. When President Andrew Jackson was inflamed by abolitionists' successes, for example, he tried to use postmasters 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 & PUBLIC AFFAIRS 51, 66 (2007). And the history of philanthropy in America is rich with examples of individuals and organizations acting where government has refused to act, or in ways the government simply does not like. 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 that the parasites were endemic among their residents. *See* Alexander Reid, *Renegotiating the Charitable Deduction*, 71 TAX ANALYSTS 21, 27 (2013). Protecting donor confidentiality helps ensure that controversial philanthropic 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 exceedingly 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 plights of others less fortunate. Ben Gose, *Anonymous Giving Gains in Popularity as the Recession Deepens*, THE CHRONICLE OF PHILANTHROPY (Apr. 30, 2009).[3] 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*, NY 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").[4]

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

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

Anonymity also may encourage giving by donors who might otherwise be uncomfortable making a public showing of wealth and who desire to lead a more private life. Chuck Feeney, for example, donated nearly his entire fortune of around $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.* These types of privacy interests are at the heart of our constitutional protections.

Also, 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 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).

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 for public benefit has been a hallmark of American civil society since the Founding. Writing in 1831, the philosopher 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.*

Today, through charitable contributions, Americans exercise some of their most cherished constitutionally-protected rights—creating organizations that engage in freedom of speech, freedom of association, and freedom of religion. In

this way, charitable giving is not just a "sweetener" of our quality of life, it 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 government

does not "subsidize" philanthropy through the charitable deduction—rather, the deduction shields private donations from government interference (through taxation) with individual choices about how best to further the public interest. *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.

Moreover, the State's proposed test threatens to make it virtually impossible to vindicate the First Amendment against disclosure requirements. In the State's view, First Amendment harm could only be shown by an anonymous would-be donor's public testimony that his or her giving would be chilled by Schedule B disclosure. *See generally* Attorney General Opening Br. at 30-37. But that type of showing is not the actual test: all that Americans for Prosperity Foundation ultimately must do is show "a reasonable probability that compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 480 (2015) (alteration in original) (quoting *McConnell v. FEC*, 540 U.S. 93, 198 (2003)). The district court determined, as a matter of fact, that would-be donors would be deterred from giving by threats to Foundation employees and by reasonable concerns about threats and harassment from public and government officials for the donors' support for the Foundation. In dismissing this evidence, the Attorney General essentially demands that a would-be donor testify in open court—despite his or her desire for anonymity—before a disclosure requirement could be struck down.

This is not the law. The district court correctly ruled that it is sufficient for a challenger to present evidence, as the Foundation did below, tending to support the

inference that there is a "reasonable probability" of threats or harassment. The Attorney General's proposed standard would make it practically impossible to challenge disclosure requirements even when there is an "actual burden on First Amendment rights," *John Doe No. 1 v. Reed*, 561 U.S. 186, 187 (2010), because would-be donors deterred by the prospect of disclosure will be the hardest to identify and to hale into court.

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

As explained by the Foundation (at 50-53), 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 authorizing such 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.

Amici recognize 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, and carries privacy protections that have no state law parallels either.

At the federal level, donor names are required to ensure compliance with discrete, technical provisions of the Internal Revenue Code. 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").[5]

What is more, at the federal level, Congress has enacted strong confidentiality rules to protect donor identities from public disclosure. *See, e.g.*, 26 U.S.C. § 6104(d)(3)(A) (providing for public inspection of tax returns from § 501(c) organizations but specifically prohibiting disclosure, stating that the IRS "shall not require the disclosure of the name or address of any contributor to the organization"). When a charitable organization discloses the names of its major donors to the IRS, that information (unlike other tax documents) is not available for public inspection. This confidentiality in charitable giving is grounded in the constitutional freedom of association, and it is one of the most important elements of philanthropic freedom. Because the information at issue is not generated by compliance with state regulatory requirements, it is unsurprising that the strong

[5] Available at https://www.ftb.ca.gov/Archive/Law/legis/06FedTax.pdf.

protections at the federal level prohibiting disclosure of donor information—*see, e.g.*, 26 U.S.C. § 6104(b)—have no analogue in state law.[6]

Furthermore, once donor names are in the hands of the State, they are much more vulnerable to public disclosure through the operation of the California Public Records Act (CPRA), Cal. Gov't Code § 6254(k). 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. Santa Monica–Malibu Unified Sch. Dist.*, 136 Cal. Rptr. 3d 395, 405 (Cal. Ct. App. 2012) (citing cases).

In the absence of a compelling state interest, no state government agency should be able to force a charity to identify its donors. And the lack of a compelling state interest is compounded where, as here, the Attorney General has

[6] Notwithstanding this Court's decision in *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015), *cert. denied*, 139 S. Ct. 480 (2015), we agree with AFPF 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. Congress has specifically required the disclosure of some taxpayer information but barred disclosure of donor information, thus preempting the field. 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. *See* AFPF Br. at 89-91. This Court should reconsider its prior decision.

already publicly disclosed thousands of charities' donors. Even if the Attorney General were to establish procedures to protect such confidential information, the risk of public disclosure—through CPRA requests or otherwise—is too great.

Especially in light of the privacy concerns at stake, it is critical that courts ensure government has advanced a truly compelling interest before it can collect donor names in bulk. This is underscored by recent events at the federal level—where safeguards are the strongest—concerning troubling allegations of biased government decision making and cyber breaches of personal information from over 100,000 individual tax returns. *See, e.g.*, Lisa Rein & Jonnelle Marte, *IRS: Hackers stole personal information from 104,000 taxpayers*, WASH. POST (May 26, 2015).[7] Because the State's rule 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 That Obviate Any Need For The Bulk Collection Of Donor Names.

As explained above, California lacks the same interest as the federal government in collecting donor identities because it does not have analogous laws

[7] Available at http://tablet.washingtonpost.com/rweb/biz/hackers-stole-personal-information-from-104000-taxpayers/2015/05/26/18b7adfde3d9767686b63e1f927b3acd_story.html.

to enforce. Yet the State does have ample tools to protect the public from fraud and deceptive solicitation practices.

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.

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. These authorities are more than ample to assist the State in policing the charities within its borders, as shown in the *amicus* brief filed by several States in support of AFPF. This helps explain why the State's proffered reasons for needing disclosure lack any connection with donor identity—each California Code provision cited by the Attorney General at pages 10 and 51 of the opening brief addresses director and officer transactions, not donor behavior. *See* Cal. Corp. Code §§ 5233, 5236, & 5227 (cited by the State as justifying investigations into "self-dealing," "improper loans," and "interested persons").

This is because—unlike donors—directors and officers are fiduciaries whose duties and obligations are prescribed by state regulation. *See* Cal. Corp. Code §§ 5230-5239. The State's subpoena power would be available to address any individual instances of donor misbehavior. 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).[8]

At the same time, the practical value of the Attorney General's request for the donor information is *de minimis* at best. The Attorney General does not allege that all, or even a significant number, of the 118,000 charities in California are engaged in fraud or deceptive solicitation practices. To the contrary, as the district court found, there have been only 540 investigations in the past ten years. This represents less than one-half of one percent of the charities the Attorney General says must now disclose donors. And of those investigations, only five involved Schedule B disclosures (none of which involved a Schedule B that was otherwise required to be disclosed).[9] There is simply no basis—let alone a compelling one—

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

[9] The Attorney General claimed five investigations but refused to provide substantiation for this claim. Even accepting the Attorney General's claim of five

for the mass collection of Schedule Bs for fraud and deceptive practices investigations. And 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 more than 100,000 innocent donors.

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.

CONCLUSION

For the foregoing reasons, the Court should affirm in the State's appeal, No. 16-55727, and reverse in AFPF's cross-appeal, No. 16-55786.

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investigations, and assuming that they all occurred in one year, that number accounts for less than 0.00833% of all filings—the Attorney General collects more than 60,000 annual filings. Attorney General Opening Br. at 8.

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Respectfully submitted,

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Signature of Attorney or Unrepresented Litigant [s/ Allyson N. Ho] Date [Jan 27, 2017]

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of the Pacific Research Institute, Cato Institute, and Competitive Enterprise Institute as *Amici Curiae* in Support of Plaintiff 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 January 27, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 27, 2017

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