NO. 19-255

IN THE

Supreme Court of the United States

THOMAS MORE LAW CENTER,

Petitioner,

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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INTRODUCTION

Rather than addressing Thomas More Law Center's constitutional arguments, the California Attorney General simply rehashes the Ninth Circuit's opinion. And that rehash confirms precisely what the Law Center said in its petition: that the Ninth Circuit rewrote the law to hold that all charities—even those whose donors, clients, and employees face death threats, boycotts, harassment, and vitriol—must disclose their donor information to state officials who routinely make such confidential information publicly available. No exceptions.

The Ninth Circuit achieved that outcome by erasing *NAACP* v. *Alabama*'s strict-scrutiny test for government donor-disclosure mandates and substituting the intermediate-scrutiny exception that *Buckley* v. *Valeo* carved out for election-related disclosures. Then the Ninth Circuit wrongly placed the burden of proof on the Law Center.

But lowering the legal standard and shifting the burden of proof were not enough, given the district court's factual findings. So the Ninth Circuit also wiped out all fact findings favorable to the Law Center: (1) decades of Attorneys General successfully regulating charities without Schedule Bs; (2) state officials making scores of donors' names and addresses publicly available; (3) the state's glaring lack of cybersecurity; (4) unchallenged expert testimony that charitable donations will nosedive; and (5) officials' failure to take voluntary corrective action and refusal to mandate punishment for even willful and malicious leaks. The Attorney General's codification of a toothless, pre-existing policy did not fix these problems.

No less than *NAACP* v. *Alabama*'s survival is at stake. Unless this Court grants review to give freedom of association meaning and resolve a circuit conflict that the Attorney General validates, lower courts will continue to facially uphold the most sweeping disclosure mandates that bureaucrats can imagine. Charities will continue to find as-applied exemptions impossible to achieve, and support for groups advocating contentious ideas will dry up.

This Court should intervene now while there are still dissenting voices left to save. Certiorari is warranted.

I. The Attorney General is wrong to say that *NAACP* v. *Alabama*'s and *Buckley* v. *Valeo*'s standards of review for donor-disclosure laws are somehow the same.

Defending the Ninth Circuit's holding forces the Attorney General to advance the untenable notion that strict scrutiny under *NAACP* v. *Alabama* and intermediate scrutiny under *Buckley* are indistinguishable. Br. in Opp'n ("Opp.") 12–16. Not so. Not even one of the non-electoral cases the Attorney General cites either mentions the term "exacting scrutiny" or applies anything resembling the feeble *Buckley* donor-disclosure standard of review. And *Buckley* itself distinguishes *NAACP* v. *Alabama* repeatedly based on (1) the electoral context and unique need to safeguard "the free functioning of our national institutions," 424 U.S. at 66, (2) the lack of any reason to think political donors would generally face "harassment," *id.* at 69–70, and (3) an available exception for donors to minor political parties, *id.* at 71–72, 74.

Whatever *Buckley*'s merits—which this Court and individual Justices have questioned[1]—one thing is clear: its standard applies only to elections. This Court has long held that *Buckley*'s rule governs the "compelled disclosure of *campaign-related* payments." *Buckley* v. *Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 202 (1999) (emphasis added). It is a limited exception for "disclosure requirements *in the electoral context*." *John Doe No. 1* v. *Reed*, 561 U.S. 186, 196 (2010) (emphasis added). Outside that field, *NAACP* v. *Alabama* and its progeny control.

The Attorney General is wrong to say that *Buckley*'s "'exacting scrutiny' standard applies to *all* government requirements regarding the reporting or disclosure of associational information," Opp.12, because this Court has explicitly confined that test to campaigns or elections. The argument ignores this Court's plain language and cherry-picks a few words from *NAACP* v. *Alabama* and its progeny that—when read in isolation—sound lax. *E.g.*, Opp.12–13. (disclosure has no "substantial bearing" on or "relevant correlation" to the State's interests).

But even a cursory review of this Court's decisions shows that *NAACP* v. *Alabama* and its progeny apply the same kind of strict scrutiny this Court generally uses to evaluate free association claims. Pet.21–23. In fact, the Attorney General quotes *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963), as requiring the "State [to show a]

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[1] *E.g.*, *McCutcheon* v. *FEC*, 572 U.S. 185, 200–203 (2014); *id.* at 228–232 (Thomas, J., concurring in the judgment); *Randall* v. *Sorrell*, 548 U.S. 230, 265–73 (2006) (Thomas, J., concurring in the judgment).

"compelling state interest." Opp.13; *see also* Pet.22–24, a standard far higher than the "important governmental interest" the Ninth Circuit used here, Opp.6.

The Attorney General never addresses this glaring disparity between strict and intermediate scrutiny. Opp.11–13. And the difference in the review standard is dispositive; the Attorney General does not even try to claim that his disclosure mandate serves a compelling interest. Mere "important" government interests are insufficient to show that the disclosure mandate serves a "compelling" and "subordinating" interest. *NAACP* v. *Alabama*, 357 U.S. at 463; *Bates* v. *City of Little Rock*, 361 U.S. 516, 525 (1960).

Nor can the Attorney General evade the narrow tailoring that *NAACP* v. *Alabama* and its progeny require. Opp.13–14. Words like "narrow[]," "highly selective," and "narrowly drawn" mean exactly what they say. Opp.13 (cleaned up). No linguistic contortionism can turn them into a "proportiona[lity]" test that loosely weighs the government's interests against the interference with associational rights. Opp.14. Asking whether the State is "not regulating in an unjustifiably broad way," Opp.15, is insufficient. *E.g.*, *Gibson*, 372 U.S. at 549 (requiring a "crucial relation," or that a disclosure measure be "essential" to a state's interests).

Wisely, the Attorney General does not seriously contend that it somehow satisfies narrow tailoring to require every charity in the country that wishes to fundraise in California to annually disclose its donors' names and addresses. This Court should grant the petition and definitively hold that such a policy is not narrowly tailored. And it should do so now before

other states advance the position that *every* disclosure mandate—inside or outside the electoral context—is the least restrictive means of advancing a state's interests simply because such mandates do not "directly regulate[] speech or associational activities themselves." Opp.16. Contra *NAACP* v. *Alabama*, 357 U.S. at 460–61.

II. The Attorney General offers no response to the Law Center's facial challenge, but that claim is ripe for this Court's review.

The Attorney General offers no substantive response to the Law Center's facial claim. Pet.27–29. Instead, he suggests that the district court "declined to address [it]." Opp.5. Again, not so. As the Ninth Circuit's opinion expressly explains, the district court held that the Law Center's "facial challenge[ ] [was] precluded by our opinion in *Center for Competitive Politics*." App.14a. Circuit precedent tied the district court's hands. App.57a–58a.

The reality is that the Law Center raised its facial claim at every stage of this case, which led the Ninth Circuit to reject it not once, but twice. App.43a, 79a, Because the Law Center's facial claim was pressed and passed on below, it is ripe for this Court's review. *United States* v. *Williams*, 504 U.S. 36, 41–45 (1992). And the Court should grant certiorari to address it. For if this case proves anything, it is that as-applied exemptions to disclosure rules are available in theory but not in fact in the Ninth Circuit.

Federal courts are demonstrably "insensitive" to showings of associational harm under facts "similar" to those in *NAACP* v. *Alabama*, contrary to *Buckley*'s assertions. 424 U.S. at 74. Years of litigation by numerous charities have proven that stronger medicine is required to cure the ills caused by the Attorney General's disclosure mandate. Charities across the country have chosen not to solicit in California rather than sacrifice their donors' privacy. *E.g.*, Inst. For Free Speech Br. at 1; New Civil Liberties Alliance Br. at 3–4; Pub. Interest Legal Found. Br. at 1. That outcome is extraordinary and proves that this blanket disclosure rule "abridg[es] the freedom of speech." U.S. Const. amend. I, as the Law Center's expert testimony confirms, Pet.13.

This withdrawal from California has deprived charities of resources, chilled their speech for nine years, Opp.5, and blocked dissemination of their ideas in our Nation's most populous state. Multiple nonprofits have sued; none has obtained final relief. The Ninth Circuit's foreclosure of all facial challenges and its impossibly high evidentiary standards mean as-applied exemptions are not available *at all*, let alone early enough "to avoid chilling protected speech." *John Doe No. 1*, 561 U.S. at 203 (Alito, J., concurring).

In fact, the Attorney General's own brief illustrates just how insurmountable the Ninth Circuit's standard for relief is. *Ibid.* Even *Buckley* only requires a reasonable probability of threats, harassment, or reprisals against donors to invalidate mandatory disclosure within the electoral context. 424 U.S. at 74. But the Ninth Circuit demanded far more outside it, including that: (1) the Law Center identify a specific individual who would not contribute specifically

based on disclosure to the Attorney General, Opp.8, 21; (2) the Law Center provide evidence that some donors are comfortable with disclosure to the IRS but not the Attorney General, Opp.8–9, 21–22; and (3) any public hostility towards donors resulted solely from their contributions to the Law Center and not their "deeper involvement" or association with "other controversial matters," Opp.9.

In so doing, the Ninth Circuit morphed *Buckley*'s reasonable-probability standard into a practical-certainty requirement. Even the Law Center's undisputed evidence that its donors, clients, and employees face intimidation, death threats, hate mail, boycotts, vitriol, and even an assassination attempt was insufficient to justify as-applied relief. Pet.30–31. There is no doubt that charities cannot "obtain an as-applied exemption without clearing a high [if not impossible] evidentiary hurdle." *John Doe No.* 1, 561 U.S. at 204 (Alito, J., concurring).

Critically, the Attorney General regulates thousands of charities with no physical presence in California—those who merely send residents solicitations via email or post. Opp.24. The Attorney General is not a tax authority, and though he may view his jurisdiction as national and akin to that of the Internal Revenue Service, Opp.1–2, 21–23, that view is incorrect. Moreover, the district court rightly found—after a bench trial—that the Attorney General does not need or regularly use Schedule Bs and has abundant, less intrusive means to investigate charities, including Schedule L, which does not list donors. App.55a, 57a. If there is any scenario in which a facial challenge to a disclosure rule is justified, this is it.

III. The Attorney General bears the burden of proving that the disclosure mandate is constitutional, and pointing to last-minute, litigation-inspired reforms is insufficient.

The Attorney General bears the burden of satisfying First Amendment scrutiny with his blanket, speech-restricting disclosure mandate that facially extends to every charity in the Nation. *McCutcheon* v. *FEC.*, 572 U.S. 185, 210 (2014). Instead of carrying that burden, the Attorney General foists it on the Law Center, as did the Ninth Circuit. Opp.8 (claiming *the Law Center* did not "establish that compliance with the [mandate] would actually . . . deter contributors"). Again, that conflicts with this Court's precedent.

NAACP v. *Alabama* and its progeny place the burden of proof on the government to justify invasive disclosure mandates, not on private parties whose association is burdened. *E.g.*, *NAACP* v. *Alabama*, 357 U.S. at 463 ("whether Alabama has demonstrated an interest . . . sufficient to justify the deterrent effect[s]"); *Gibson*, 372 U.S. at 546 ("the State [must] convincingly show"). And the Attorney General never recognizes, let alone carries, his burden of proof because he is married to *Buckley*'s as-applied exemption, which assumes a disclosure mandate's constitutionality and requires nonprofits to justify an exception. Opp.8–10. But this Court does not assume that non-election-related disclosure mandates are lawful, especially those as broad and prophylactic as the Attorney General's. To the contrary, "[b]road prophylactic rules in the area of free expression are suspect." *Riley* v. *Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (citation omitted).

Any attempt to overcome the disclosure rule's presumptive unconstitutionality would be futile in any event. Confessing to rampant "confidentiality lapses," "technological vulnerabilities[,] and human error" is fatal. Opp.10. Indeed, the Attorney General's casual disregard for donor privacy speaks volumes. No one disputes that the Registry of Charitable Trusts misclassified dozens of Schedule Bs as public documents, outing hundreds of donors. Opp.10. Anyone with an internet connection could access every confidential document in the Registry's online database. Opp.10.

The Attorney General's only defense for this inexcusable neglect is that—on the eve of trial— the Registry implemented "new protocols and quality controls," and the Attorney General codified an old, informal policy against public disclosure that had long proved meaningless. Opp.4, 10. But repeatedly saying that donors' confidential information may "not be disclosed to the public" without a significant penalty for noncompliance does not alter the facts or make that statement true. Opp.1, 4.

The district court rightly rejected this eve-of-trial adoption of protocols, controls, and old policy as a nonevent. App.62a–63a. The district court found that no reasonable donor would find these changes heartening given the Attorney General's past reckless failure to protect donors' information under an identical, unwritten policy. App.62a–63a; Opp.4. That factual finding is correct, particularly after the Registrar admitted at trial that—despite the Attorney General's reforms—*he could not guarantee the confidentiality of donors' names and addresses*. Pet.6.

Yet the Ninth Circuit disregarded the Law Center's evidence and held that the Center failed to satisfy *its* burden merely because the Attorney General wrote a few empty words on paper. Opp.21. Under that approach, canny officials will *always* prevail, and as-applied exemptions to disclosure mandates will prove unattainable. That result violates the First Amendment, which protects freedom of speech and association and ensures they have breathing space to survive. *Gibson*, 372 U.S. at 544.

IV. The Attorney General confirms the circuit conflict and the need to resolve it.

The Attorney General cannot plausibly deny the entrenched circuit conflict. Pet.32–35. So he seeks to minimize it by: (1) making factual distinctions that are irrelevant to the standard of review, Opp.17, 20–21; (2) labeling the First, Fourth, Fifth, Sixth, and D.C. Circuits' holdings old, though they remain good law and address both *NAACP* v. *Alabama* and *Buckley*, Opp.16–17; (3) using euphemisms for "different," such as "broadly similar," Opp.18; and (4) claiming, among other things, that a disclosure rule applicable to thousands of charities across the country annually is "focused and limited," Opp.23. None of these tactics are convincing.

For starters, the Attorney General candidly quotes the Fifth Circuit's strict-scrutiny test. Opp.19 ("compelling" interest and burden on First Amendment rights that is not broader than "absolutely necessary") (cleaned up). The same is true of his combined discussion of the Fourth and Sixth Circuits' rulings. Opp.19 ("compelling government interest and narrowly tailored to serve that interest")

(cleaned up). Yet the Attorney General concedes that the Ninth Circuit refused to apply strict scrutiny. Opp.6. Thus, he also concedes the circuit conflict.

Similarly, the Attorney General all but admits that the First Circuit articulated "a more stringent standard of scrutiny than the [Ninth Circuit] decision below." Opp.20. Confirming another conflict supports granting the petition, not denying it.

The Attorney General chooses not to address the Tenth and D.C. Circuits' standard of review for non-election-related disclosures. Opp.20–21. Instead, he tries to distinguish them based on the level of "intrusive[ness]" involved. Opp.21. But the Attorney General's blanket disclosure mandate is *highly* invasive. This non-answer again concedes the circuit conflicts outlined in the petition, Pet.32–35, and Judge Ikuta's en banc dissent, App.115a–116a.

V. The Attorney General's *ipse dixit* does not erase the obvious parallels between the Law Center's case and *NAACP* v. *Alabama* and its progeny.

The Attorney General's last-ditch argument is that *NAACP* v. *Alabama* and its progeny involved compelling evidence that charities' donors would face "threats, violence, or economic reprisals" if their identities were disclosed, whereas this case does not. Opp.24. Such argument is based on the Ninth Circuit's appellate factfinding and outcome-driven record rewrite. Opp.8–10. The Law Center presented undisputed evidence at trial that its employees, donors, and clients face intimidation, death threats, hate mail, boycotts, vitriol, and even an assassination

plot that resulted in two men going to jail. Pet.30–31. Any reasonable person would conclude—as did the district court—that outing the Law Center's donors would subject them to risks much like those NAACP members experienced in the Civil Rights Era. App.59a–61a. And this danger is not ameliorated by the Attorney General's "assurance" of confidentiality. Opp.25. *NAACP* v. *Alabama* also concerned the forced disclosure of supporters to a state attorney general, 357 U.S. at 451, and this Court held for the NAACP without citing *any* evidence that information would become public, *id.* at 462–63. That is why 23 briefs raise the exact same concern on behalf of dozens of *amici*—including 14 states—here and in the related case.

And in today's age of online databases, hackers, and doxing, the question is not *if* donors' identities will be disclosed, but *when*. Years of litigation have not induced the Attorney General to do the bare minimum to prevent leaks. He still imposes no mandatory punishment, even for those who willfully and maliciously disclose donors' identities. As in *NAACP*, the law does not require donors to blindly trust state employees', interns', and contractors' *noblesse oblige*.

VI. The Attorney General never disputes that this case is a clean vehicle.

The Attorney General never disputes that the present case is a clean vehicle, and for good reason. Just before the bench trial here, the Attorney General implemented his last-minute reforms. The district court fully considered those reforms and rejected them as inadequate. That factual finding is correct, and it is key to resolving the questions presented.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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