

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

AMERICANS FOR PROSPERITY FOUNDATION, et al.,

Plaintiff-Appellee/Cross-Appellant,

v.

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

Defendant-Appellant/Cross-Appellee.

On Appeal from the United States District Court for the
Central District of California, Case No. 2:14-cv-09448-R-FFM,
Judge Manuel L. Real

**Brief of Amicus Curiae Electronic Privacy Information Center
(EPIC) in Support of Plaintiff-Appellee/Cross-Appellant**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), Amicus Curiae Electronic Privacy Information Center (“EPIC”) is a District of Columbia corporation with no parent corporation. No publicly held company owns 10% or more of EPIC stock.

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INTEREST OF THE AMICUS¹

The Electronic Privacy Information Center (“EPIC”) is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and other constitutional values.

EPIC has a special interest in protecting donor privacy. As a matter of Constitutional law, EPIC has filed several *amicus* briefs in the U.S. Supreme Court arguing that the First Amendment protects the right of individuals to engage in certain activities, free of government surveillance. *See, e.g., City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (arguing that hotel guest registries should not be made available for inspection absent judicial review); *Doe v. Reed*, 561 U.S. 186 (2010) (arguing that state law should not force the disclosure of petition signatories); *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Stratton, Ohio*, 536 U.S. 150 (2002) (arguing that door-to-door petitioners should not have to obtain a permit and identify themselves).

¹ The parties consent to the filing of this brief. In accordance with Rule 29, the undersigned states that no monetary contributions were made for the preparation or submission of this brief. Counsel for a party did not author this brief, in whole or in part.

EPIC, an organization dedicated to privacy protection, has itself taken measures to safeguard donor privacy. These include (1) encouraging anonymous contributions, (2) withholding the name of donors when requested, (3) not selling, transferring, trading, or otherwise disclosing the names of donors, except where required by law, and (4) promoting techniques that permit anonymous contributions.

SUMMARY OF THE ARGUMENT

Anonymous charitable contribution is deeply rooted in religious tradition. Since the days of Seneca and Maimonides, philosophers have recognized the importance of donation without recognition. According to the Torah scholar Maimonides, one of the highest forms of *tzedakah* (charity) is to give to an unknown person anonymously. “For this is performing a *mitzvah* [good deed] solely for the sake of Heaven. This is like the ‘anonymous fund’ that was in the Holy Temple [in Jerusalem]. There the righteous gave in secret, and the good poor profited in secret. Giving to a charity fund is similar to this mode of charity” *Mishneh Torah: Laws of Charity* 10:7-14 (Maimonides’ Eight Levels of Charity).

The state’s mandatory reporting requirement of donor information infringes on several First Amendment interests, including the free exercise of religion, the freedom to express views without attribution, and the freedom to join in association with others without government monitoring. When a state compels the

disclosure of a donor's identity, it diminishes her right to support, privately and modestly, those causes she values most. Nonprofit organizations, aware of the vital role of anonymous giving, undertake extensive measures to prevent such compelled disclosures.

The problem is further compounded because the State of California is unable to safeguard the personal donor information contained in the Schedule B forms it now demands. The careless publication of more than a thousand private donor lists, combined with California's spotty track record of data protection, raises genuine concern about the representations that the information gathered will be kept private. The collection of plaintiff-appellee's Schedule B should therefore end.

ARGUMENT

I. Anonymous Giving is Deeply Rooted in the Traditions of Christianity, Islam and Judaism.

A. Anonymous giving began more than 2,000 years ago.

The tradition of anonymous giving goes back at least as far as the first century. *See* James Allen Smith, *Anonymous Giving*, in 1 *Philanthropy in America: A Comprehensive Historical Encyclopedia* 23 (Dwight Burlingame ed., 2004). According to the stoic philosopher Seneca, gifts that are "glorious to receive," such as military decorations or public offices, should be given publicly, but gifts that help a person "when in weakness, in want, or in disgrace . . . should be given silently, and so as to be known only to those who profit from them." L. Annaeus

Seneca, *On Benefits* 27 (Aubrey Stewart trans., 1887). Further, because a gift “should be given in the way which will be of most service to the receiver,” sometimes even the recipient of a gift should not know where it came from. *Id.* “You should be satisfied with the approval of your own conscience; if not, you do not really delight in doing good, but in being seen to do good.” *Id.*

Anonymous charitable giving is strongly rooted in religious tradition. In Christianity, the Sermon on the Mount preaches the virtue of secret giving: “[W]hen 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.” *Matthew* 6:3–4 (New International Version). As one commentator explains, “The encouragement for performing our acts of charity in secret is that it will be pleasing to God; that he will see the act, however secret it may be, and will openly reward it.” *Barnes’ Notes*, Bible Hub.²

The Quran also describes the value of private charity: “If you disclose your charitable expenditures, they are good; but if you conceal them and give them to the poor, it is better for you, and He will remove from you some of your misdeeds [thereby]. And Allah, with what you do, is [fully] Acquainted.” *Quran* 2:271 (Sahih International). Another scholar, Shaykh Muhammad Sarwar, translates this verse: “It is not bad to give alms in public. However if you give them privately to

² <http://biblehub.com/commentaries/barnes/matthew/6.htm>.

the poor, it would be better for you and an expiation for some of your sins. God is Well-Aware of what you do.” *Translation (Verse (2:271) - English Translation)*, The Quaranic Arabic Corpus.³

The Jewish scholar Maimonides placed anonymous giving among the highest forms of charity, behind only charity that helps a person become self-sufficient. Chaya Shuchat, *Eight Degrees of Giving*, Chabad.org.⁴ The next levels in Maimonides’ hierarchy are those in which (1) neither the giver or recipient know each other; (2) the giver knows the recipient but the recipient does not know the giver, and (3) the recipient knows the giver but the giver does not know the recipient. *Id.*

Many donors to charitable causes are guided by their religious beliefs; the importance of anonymous charitable giving runs throughout religious traditions.

B. Protecting donor privacy is an important duty for all charities.

Charities recognize the importance of protecting donor privacy. Two independent monitoring associations, Charity Navigator and the Better Business Bureau Wise Giving Alliance, include charities’ donor privacy policies among their accreditation and rating criteria. The Better Business Bureau Wise Giving Alliance privacy criteria consider whether charities (1) make it easy for donors to

³ <http://corpus.quran.com/translation.jsp?chapter=2&verse=271>.

⁴ http://www.chabad.org/library/article_cdo/aid/45907/jewish/Eight-Levels-of-Charity.htm (last visited Jan. 25, 2017).

opt out of having their information disclosed outside the organization and (2) have privacy policies that describe the information the charity collects and the security measures the charity uses to protect that information. *How We Accredit Charities*, BBB Wise Giving Alliance.⁵ Charity Navigator includes privacy as part of its accountability and transparency rating for an organization. *How Do We Rate Charities' Accountability and Transparency?*, Charity Navigator.⁶ The charity receives full marks if it has a privacy policy that says the charity will not disclose the donor's personal information or send mailings on behalf of another organization unless the donor gives permission. A charity receives partial credit if it has a privacy policy that requires donors to opt out of their data being disclosed.

The Association of Fundraising Professionals also provides guidance to charities on “best practices for accountability and transparency.” Barbara L. Ciconte, Ass'n of Fundraising Prof'ls, *Developing Fundraising Policies and Procedures: Best Practices for Accountability and Transparency* (2007).⁷ The Association recommends that nonprofits “explain how donor information will be used, if donor information is ever shared and how a donor's name can be removed

⁵ <http://www.give.org/for-charities/How-We-Accredit-Charities/> (last visited Jan. 25, 2017).

⁶ <http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=1093> (last visited Jan. 25, 2017).

⁷ <http://www.afpnet.org/files/contentdocuments/9%20developing%20fundraising%20policies%20and%20procedures.pdf>.

from your mailing list.” *Id.* at 27. The brief version of its sample privacy policy is straightforward: “All information concerning donors or prospective donors, including their names, addresses and telephone numbers, the names of their beneficiaries, the amount of their gift, etc., shall be kept strictly confidential by the XYZ Organization, its staff and volunteers, unless permission is obtained from donors to release such information.” *Id.* at 28.

Several of the leading donor-advised funds ensure anonymous giving. For example, the Fidelity Charitable Fund provides for:

Anonymous Grants

When recommending a grant, an Account Holder may choose (i) to be identified by name and address, and Giving Account name (e.g., The Smith Family Fund) to the recipient charity; (ii) to be identified only by the name of the Giving Account; or (iii) to *remain anonymous and to not be identified, in which case the grant will be identified as recommended by a Fidelity Charitable Account Holder who wishes to remain anonymous*. Fidelity Charitable will not release the Account Holder’s name and contact information to any recipient charity without the Account Holder’s explicit consent.

* * *

Anonymous Endowed Giving Program grants

The Endowed Giving Program permits anonymous grants subject to the grantmaking guidelines beginning on page 16. *Account Holders can decide to which charities they wish to remain anonymous and to which charities they wish to disclose their identity*. Specifically, when an anonymous grant is made through the Endowed Giving Program, it will be identified as recommended by a Fidelity Charitable donor who wished to remain anonymous.

Fidelity Charitable, *Fidelity Charitable Policy Guidelines* 17, 27 (Aug. 2016) (emphasis added).⁸

The Vanguard Charitable Fund notes that “[o]ne of the unique aspects of a philanthropic account is the ability to grant anonymously or with full attribution. Choose how you want to be recognized—if at all—each time you recommend a grant.” *Grant Recommendations Process for Philanthropists (Recommend a Grant)*, Vanguard Charitable.⁹

According to the National Philanthropic Trust, “donors use donor-advised funds to give generously to the causes that mean the most to them.” National Philanthropic Trust, *2016 Donor Advised Fund Report* 4 (2016).¹⁰

C. Donor privacy promotes important values and protects both grantors and recipients.

EPIC, an organization dedicated to the protection of privacy and respecting the religious traditions of many of its members, has itself taken steps to safeguard donor privacy.

Encouraging anonymous contributions

EPIC routinely receives anonymous contributions through the Fidelity Charitable Gift Fund and the Vanguard Charitable Fund described above. EPIC

⁸ <https://www.fidelitycharitable.org/docs/Giving-Account-Policy-Guidelines.pdf>.

⁹ https://www.vanguardcharitable.org/granting/recommend_grant (last visited Jan. 27, 2017).

¹⁰ <https://www.nptrust.org/daf-report/pdfs/donor-advised-fund-report-2016.pdf>.

also receives modest contributions in the form of money orders and small cash donations. In both instances, we respect the decision of our donors to protect their identity and safeguard their privacy.

EPIC also makes use of an online donation service that provides for anonymous giving. As the company explains to donors, “[i]f you do not wish share your name and contact information with the charity or charities you supported through Network for Good or you choose to make your donation anonymously, Network for Good will not share your name or contact information. Network for Good provides a field to include an optional dedication with the donation.” *Our Privacy, Security & Disclosures Statement (Special Privacy & Security Provisions for Donors)*, Network for Good (Sept. 23, 2016).¹¹

Withholding the name of donors when requested

EPIC routinely withhold the names of donors when so requested. *See, e.g., EPIC 2016 Champions of Freedom Awards Dinner* (listing several “Anonymous” contributors).¹² This practice respects the wishes of the donor and acknowledges the ongoing importance of anonymous charitable giving.

Not selling, transferring, trading, or otherwise disclosing the names of donors, except where required by law

¹¹ <http://www.networkforgood.com/about/privacy/>.

¹² <https://epic.org/june6/>.

EPIC, an incorporated non-profit organization, is required to by law to make available certain donor information. 26 C.F.R. § 1.6033-2(a)(2)(ii)(f). Otherwise, EPIC does not disclose donor information to third parties. In fact, contributors to EPIC frequently includes notes with their charitable contributions specifically requesting that EPIC not disclose the fact of their contribution to others. One donor to EPIC recently stated: “Do not share my name or other personal information with other organizations—failure to do so will result in discontinued support.” Letter from Anonymous to EPIC (2016) (on file with EPIC). Another asked that EPIC “[p]lease treat this as an anonymous contribution, and please do not trade, sell or give my address to any other organizations, mailers, etc.” Letter from Anonymous to EPIC (Dec. 12, 2016) (on file with EPIC).

Promoting techniques that permit anonymous contributions.

Several members of EPICs Advisory Board are distinguished experts in the field of privacy technologies.¹³ For example, David Chaum is the inventor of many cryptographic protocols, as well as ecash and DigiCash. *David Chaum*, Wikipedia.¹⁴ Chaum’s technique for DigiCash has inspired methods for online anonymous contribution. Chaum’s anonymous virtual currencies, and modern successors such as Bitcoin, allow people to send money without revealing their

¹³ See EPIC Advisory Board, https://epic.org/epic/advisory_board.html.

¹⁴ https://en.wikipedia.org/wiki/David_Chaum.

identities. They work like an electronic equivalent to cash. A Bitcoin transaction, for example, does not reveal the sender's name—only his or her wallet identifier. Timothy B. Lee, *12 Questions About Bitcoin You Were too Embarrassed to Ask*, Wash. Post (Nov. 9, 2013).¹⁵ Organizations dedicated to Internet freedom, such as the Free Software Foundation, accept Bitcoin contributions. Free Software Foundation, “Support the Free Software Foundation.”¹⁶

D. Donor privacy protects both grantors and recipients.

Anonymous donations also help promote the integrity of a non-profit organization. The ability to accept anonymous donations can mitigate concerns that particular donors will exert undue influence over charities. A donor in one study observed, “If you’re interested in an organization that is self-determining and self-empowering and you make a \$1,000 contribution to that organization and the organization only has a \$100,000 budget, you are buying more than your \$1,000 should buy in terms of power.” Paul G. Schervish, *The Sound of One Hand Clapping: The Case For and Against Anonymous Giving*, 5 *Voluntas: Int’l J. of Voluntary and Nonprofit Orgs.* 1, 5 (1994). Maintaining anonymity as to the source of a donation can help to avoid that problem.

¹⁵ <https://www.washingtonpost.com/news/the-switch/wp/2013/11/19/12-questions-you-were-too-embarrassed-to-ask-about-bitcoin/>.

¹⁶ <https://my.fsf.org/donate>.

Donors also seek anonymity for the ethical reasons discussed by Seneca, Maimonides, the Bible, and the Quran: anonymity “curtails the proclivity to highlight the giver rather than the gift.” *Id.* at 8. As one donor explained, “Many times people give because of some plaque that gives them credit for it. . . . The most difficult gift to give is the anonymous gift where it goes into a pot and there isn’t any plaque on the wall.” *Id.* Another commented, “I’ve seen a \$550,000 gift to one of the hospitals I’m involved in, with a statement that if you check who gave this money or give us any publicity we won’t give to the hospital. Now that’s one of the greatest gifts I’ve ever seen.” *Id.* at 10.

II. The State Does Not Safeguard the Sensitive Donor Information It Collects.

Concomitant with the collection of sensitive personal information is the obligation to safeguard the information gathered. Despite the sensitive nature of the donor information contained in a Schedule B, the office of the California Attorney General has failed to safeguard the information the state demands. The Attorney General notes that Schedule B is “a confidential document not subject to public inspection,” AG Br. at 11, and that the forms “should never be accessible through its Registry’s public website.” Order at 8. Yet the State has failed to implement basic data protection standards. More than a thousand donor lists from the Registry of Charitable Trusts were mistakenly published online. Order at 9. This included the names and addresses of hundreds of donors to Planned

Parenthood Affiliates of California—information with the potential to be “very damaging” to those donors. *Id.*

The Supreme Court has long recognized the need to protect the private information of individuals associated with causes that may be unpopular or controversial. In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Court rejected the efforts of the state of Alabama to compel the disclosure of the membership records of the NAACP. Emphasizing the “vital relationship between freedom to associate and privacy in one's associations,” the Court likened “compelled disclosure of membership in an organization engaged in advocacy of particular belief” to a “requirement that adherents of particular religious faiths or political parties wear identifying arm-bands[.]” *Id.* at 462. The Court explained that “[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.” *Id.* That is true of Planned Parenthood and many of the other organizations required to submit Schedule B to the Attorney General.

This Court previously noted that there were “serious questions” about the Attorney General's ability to “actually prevent[] public disclosure” of Schedule B forms. *Americans for Prosperity Found. v. Harris*, 809 F.3d 536, 542 (9th Cir. 2015). Reports by the Attorney General reveal the extent of the problem. In the most recent report, Attorney General Harris wrote that “[i]n the last four years,

nearly 50 million records of Californians have been breached and the majority of these breaches resulted from security failures.” Kamala D. Harris, Attorney General, California Department of Justice, *California Data Breach Report* (Feb. 2016).¹⁷ The report states further:

In the past four years, the Attorney General has received reports on 657 data breaches, affecting a total of over 49 million records of Californians. In 2012, there were 131 breaches, involving 2.6 million records of Californians; in 2015, 178 breaches put over 24 million records at risk. This means that nearly three in five Californians were victims of a data breach in 2015 alone.

Id.

Given the inability to protect donor privacy and California’s growing problem of data breaches, many donors will understandably shy away from making contributions for fear that their personal information will someday become public. The Attorney General’s Schedule B disclosure requirement thus impermissibly burdens First Amendment interests.

The solution lies in a basic tenet of data protection: *don’t collect what you can’t protect*. This requirement runs through many modern privacy statutes, including the California Information Practices Act of 1977:

Each agency shall establish appropriate and reasonable administrative, technical, and physical safeguards to ensure compliance with the provisions of this chapter, to ensure the security and confidentiality of records, and to protect against anticipated threats or hazards to their security or integrity which could result in any injury.

¹⁷ <https://oag.ca.gov/breachreport2016>.

Cal. Civ. Code § 1798.21 (West); *see also* 5 U.S.C. § 552a (2012) (“Each agency that maintains a system of records shall . . . establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records . . .”). That obligation is all the more important where disclosure is legally mandated. *See* A. Michael Froomkin, *Government Data Breaches*, 24 Berkeley Tech. L.J. 1019, 1019–20 (2009) (“[C]oercive or unbargained-for disclosures impute a heightened moral duty on the part of the government to exercise careful stewardship over private data.”); Barber, *supra*, at 112 (“To protect the public interest in privacy, the government must fulfill its obligation to safeguard from public access the personal information with which it has been entrusted.”).

The Court should impose the same requirement when an agency attempts to mandate disclosure of First Amendment-protected donor activity. In other words: if a government agency lacks appropriate safeguards to protect such donor information and to preserve donor anonymity, it may not—consistent with the First Amendment—mandate the disclosure of that data. *Cf.* 5 U.S.C. § 552a(e)(7) (barring government agencies from collecting most records that describe “how any individual exercises rights guaranteed by the First Amendment”).

Anonymous charitable contributions are time-honored, widely recognized, and constitutionally protected. Yet the Attorney General’s mandatory collection of

sensitive donor information and inability to safeguard the information gathered impermissibly burdens First Amendment interests.

CONCLUSION

EPIC respectfully requests that this Court affirm the lower court's order enjoining the Blanket Schedule B Submission Requirement.

January 27, 2017

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because it contains 3,302 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word for Mac in 14 point Times New Roman style.

Dated: January 27, 2017

/s/ Marc Rotenberg

Marc Rotenberg

CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 27, 2017

/s/ Marc Rotenberg

Marc Rotenberg