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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

CENTER FOR COMPETITIVE POLITICS, Plaintiff, **v.** **KAMALA HARRIS, in her Official Capacity as Attorney General of the State of California,** Defendant.	2:14-cv-00636-MCE-DB **DEFENDANT ATTORNEY GENERAL KAMALA D. HARRIS'S REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12 (b)(6)** Date: October 6, 2016 Time: 2:00 p.m. Courtroom: 7, 14th Floor Judge: Hon. Morrison C. England, Jr. Trial Date: None Set Action Filed: March 7, 2014

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	1
I. Plaintiff's First Amendment Associational Rights Claim Fails as a Matter of Law	2
A. Plaintiff's Facial Challenge is Foreclosed.	2
B. Plaintiff Has Failed to Plead Adequately an As-Applied Challenge.	5
II. Plaintiff Has Failed to Allege a Plausible First Amendment Free Speech Claim	7
III. Plaintiff Has Failed to Allege a Plausible Fourth Amendment Claim	9
CONCLUSION	10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Americans for Prosperity Found. v. Harris
No. CV 14-9448-R, 2016 WL 1610591 (C.D. Cal. Apr. 21, 2016) 3

Americans for Prosperity Foundation v. Harris
809 F.3d 536 (9th Cir. 2015) .... *passim*

Ashcroft v. Iqbal
556 U.S. 662 (2009) 1

Brock v. Local 373, Plumbers Int'l Union of America
860 F.2d 346 (9th Cir. 1988) 5

Buckley v. American Constitutional Law Foundation, Inc.
525 U.S. 182 (1999) 8

Citizens United v. Fed. Election Comm'n
558 U.S. 310 (2010) 5, 7

Citizens United v. Schneiderman
No. 14-CV-3703 (SHS), 2016 WL 4521627 (S.D.N.Y. Aug. 29, 2016) 2, 5, 6

City of Lakewood v. Plain Dealer Publ'g Co.
486 U.S. 750 (1988) 8

City of Los Angeles v. Patel
135 S. Ct. 2443 (2015) 9

Coalition for Secular Gov't v. Williams
815 F.3d 1267 (10th Cir. 2016) 6

Ctr. for Competitive Politics v. Harris
784 F.3d 1307 (9th Cir. 2015) .... *passim*

Ctr. For Competitive Politics v. Harris
No. 2:14-CV-00636-MCE-DAD, 2014 WL 2002244 (E.D. Cal. May 14, 2014) 5

Ctr. for Individual Freedom v. Madigan
697 F.3d 464 (7th Cir. 2012) 5

Dole v. Local Union 375, Plumbers Int'l Union of America
921 F.2d 969 (9th Cir. 1990) 7

In re Grand Jury Subpoena, JK-15-029
828 F.3d 1083 (9th Cir. 2016) 9

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

John Doe No. 1 v. Reed
561 U.S. 186 (2010) 7

Lone Star Sec. & Video, Inc. v. City of Los Angeles
827 F.3d 1192 (9th Cir. 2016) 8

Minnesota Citizens Concerned for Life, Inc. v. Swanson
692 F.3d 864 (8th Cir. 2012) 6

Morales v. Daley
116 F. Supp. 2d 801 (S.D. Tex. 2000) 9

Moss v. U.S. Secret Service
572 F.3d 962 (9th Cir. 2009) 1

NAACP v. Alabama
357 U.S. 449 (1958) 5, 6

Nat'l Ass'n of Mfrs. v. Taylor
582 F.3d 1 (D.C. Cir. 2009) 5

Protectmarriage.com –Yes on 8 v. Bowen
752 F.3d 827 (9th Cir. 2014) 5, 7

Protectmarriage.com v. Bowen
599 F. Supp. 2d 1197 (E.D. Cal. 2009) 6

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr.
499 F.3d 1108 (9th Cir. 2007) 3

Reed v. Town of Gilbert
135 S. Ct. 2218 (2015) 7, 8

Ridge at Red Hawk, L.L.C. v. Schneider
493 F.3d 1174 (10th Cir. 2007) 1

Riley v. Nat'l Fed'n of the Blind of N.C.
487 U.S. 781 (1988) 7

Sec'y of State of Md. v. Joseph H. Munson Co.
467 U.S. 947 (1984) 7

Shroyer v. New Cingular Wireless Services, Inc.
622 F.3d 1035 (9th Cir. 2010) 1

1
2
3
4
5
6
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8
9
10
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TABLE OF AUTHORITIES
(continued)

Page

Solis v. City of Fresno
2012 WL 868681 (E.D.Cal. Mar.13, 2012) 3

Talley v. California
362 U.S. 60 (1960) 6

United States v. Lundin
817 F.3d 1151 (9th Cir. 2016) 9

United States v. Place
462 U.S. 696 (1983) 10

Village of Schaumburg v. Citizens for a Better Environment
444 U.S. 620 (1980) 7

Wyman v. James
400 U.S. 309 (1971) 9

STATUTES

California Business and Professions Code
§ 17511.1 8
§ 17550 8

California Civil Code
§ 2945.45 8

California Code of Regulations, Title 11
§ 301 8
§ 310 .... 3, 4

CONSTITUTIONAL PROVISIONS

United States Constitution
First Amendment .... *passim*
Fourth Amendment 1, 8, 10

COURT RULES

Federal Rule of Civil Procedure
rule 8 1

OTHER AUTHORITIES

11A Wright & Miller, *Federal Practice & Procedure* § 2948.1 (3d ed. 2014) 6

INTRODUCTION

This Court should dismiss plaintiff's First Amended Complaint (FAC) in its entirety because plaintiff has not alleged and cannot allege plausible claims for relief. In addition to failing to meet its pleading burden, all of plaintiff's claims fail as a matter of law. Plaintiff's association claim founders for the same reasons previously articulated by this Court and the Ninth Circuit: it has not established any harm to its donors flowing from the challenged disclosure requirement and the requirement is substantially related to the Attorney General's compelling interest in enforcing the law and protecting the public. Plaintiff cannot prevail on its speech claim because the Schedule B requirement does not implicate speech within the meaning of the First Amendment. Finally, its Fourth Amendment claim is without merit because the requirement to submit a copy of the very same form on file with the Internal Revenue Service (IRS) to the Attorney General for nonpublic use is not a search or seizure, and would be reasonable in any case.[1] Accordingly, the FAC should be dismissed with prejudice and judgment entered for defendant.

ARGUMENT

As a threshold matter, plaintiff's repeated assertions that it need only meet a "low bar" at the pleading stage and thus should survive a motion to dismiss are misplaced. *See* Brief in Opposition (Opposition), ECF No. 50 at 3-4. Dismissal is appropriate when a complaint either fails to allege a cognizable legal theory or fails to allege sufficient facts to support a cognizable legal theory. *See Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010). The FAC fails to do both. Although the pleading requirements are fairly liberal, Federal Rule of Civil Procedure 8 does requires, at a minimum, "factual content that allows the court to draw the reasonable inference that [] defendant[s] are liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009). The FAC falls well short of this standard. *See Moss*, 572 F.3d at 969; *see also Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) ("[T]he mere

[1] Plaintiff appears to concede that its preemption claim fails as a matter of law. Accordingly, that claim is not discussed herein.

metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.”).

I. PLAINTIFF'S FIRST AMENDMENT ASSOCIATIONAL RIGHTS CLAIM FAILS AS A MATTER OF LAW

Plaintiff's opposition, like its FAC, completely ignores its burden to allege that disclosure of its Schedule B to the Attorney General for non-public use will subject its donors 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.) *cert denied*, 136 S. Ct. 480 (2015) (*CCP*), and that failure to do so is fatal to its First Amendment claims. *Americans for Prosperity Foundation v. Harris*, 809 F.3d 536, 540-41 (9th Cir. 2015) (per curiam) (*AFPF*); *Citizens United v. Schneiderman*, No. 14-CV-3703 (SHS), 2016 WL 4521627, at *7 (S.D.N.Y. Aug. 29, 2016). Plaintiff also fails to recognize that because it has not alleged First Amendment harm, its associational rights claim is controlled and foreclosed by the Ninth Circuit's ruling in *CCP*. Instead, plaintiff offers a number of digressions that purportedly excuse its failure to plead First Amendment injury and undermine the binding decisions of the Ninth Circuit in *CCP* and *AFPF*. None of these arguments has merit and plaintiff's First Amendment associational rights claim thus must be dismissed.

A. Plaintiff's Facial Challenge is Foreclosed.

In *CCP*, the Ninth Circuit unanimously rejected plaintiff's facial First Amendment challenge and upheld the Schedule B reporting requirement. *CCP*, 784 F.3d at 1316-17. This ruling precludes plaintiff's attempt to state a facial challenge to the Schedule B requirement.[2]

Plaintiff contends that *CCP* is not conclusive authority because it was an appeal from a preliminary inunction. Opposition 6-7. However, at a minimum, the determination that the

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[2] As the Ninth Circuit has noted, while there is some question as to the standard for assessing First Amendment facial challenges, because the Schedule B requirement has a “plainly legitimate sweep,” plaintiff could not prevail even under the least demanding possible standard. *CCP*, 784 F.3d at 1315.

Schedule B requirement does not place any facial burden on First Amendment rights and that the Attorney General has a compelling interest in enforcing the law and protecting the public from fraud and illegality are conclusions on pure issues of law that are binding and control the outcome here. *See Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr.*, 499 F.3d 1108, 1114 (9th Cir. 2007). For that reason, the Ninth Circuit reaffirmed its holding regarding the constitutionality of the Schedule B requirement in *AFPF*. *See* 809 F.3d at 538 ("We are bound by our holding in *Center for Competitive Politics*, 784 F.3d at 1317, that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional."); *see also Americans for Prosperity Found. v. Harris*, No. CV 14-9448-R, 2016 WL 1610591, at *1 (C.D. Cal. Apr. 21, 2016) (rejecting plaintiff's invitation to revisit facial challenge where the trial court record was "denser" than at the time of the *CCP* decision).

Plaintiff wrongly asserts that these legal conclusions are somehow nullified by its allegations reciting the findings of Judge Real that: (1) the Attorney General does not use Schedule B before commencing investigations or "in its day-to-day business" and thus "the Schedule B program does not further any governmental interest whatsoever," Opposition 10; and (2) despite a longstanding policy of keeping Schedule B confidential, which has now been codified in regulation, Cal. Code Regs., tit. 11, § 310(b) (2016), over the course of years a number of Schedules B were inadvertently housed on the public-facing website. Opposition 8. However, even presuming that these allegations are "true" for purposes of this motion, plaintiff vastly overstates their legal significance.[3]

Contrary to plaintiff's understanding, nothing in the Ninth Circuit's legal rulings about the facial constitutionality of the Schedule B requirement was based on "facts" or "representations" that have now been "disproven" or refuted by plaintiff's allegations. Opposition 9-10. Against the absence of any actual burden on CCP's First Amendment rights, the Ninth Circuit weighed the Attorney General's "compelling interest in enforcing the laws of California," which includes

[3] Plaintiff's allegations on "information and belief," such as that the Attorney General has not taken "concrete steps" to ensure compliance with section 310(b), FAC ¶ 38, are insufficient to survive a motion to dismiss for failure to state a claim. *Solis v. City of Fresno,* 2012 WL 868681, at *8 (E.D. Cal. Mar. 13, 2012).

having "immediate access to Form 990 Schedule B" filings. *CCP*, 784 F.3d at 1311, 1317. The panel recognized that immediate access to Schedule B filings "increases her investigative efficiency," by allowing her to "flag suspicious activity" through reviewing significant donor information. *Id*. at 1317. Nowhere in the opinion is it suggested, (nor did the Attorney General represent), that every member of the Registry or of the legal and audit staff of the Attorney General's Charitable Trusts Section reviews every Schedule B that is filed and/or uses it daily or before complaints are filed. Rather, the court held that given the total lack of First Amendment injury caused by the requirement, the utility of the information contained in Schedule B and the efficiency of having it upfront were sufficient to satisfy exacting scrutiny. *Id.* This remains the law. *See AFPF*, 809 F.3d at 538.

Plaintiff's argument regarding the supposed import of inadvertent disclosures is similarly weak. The Ninth Circuit has determined that the Attorney General has an adequate confidentiality policy, *see CCP*, 784 F.3d at 1316; *AFPF*, 809 F.3d at 538, which has now been codified in a formal regulation. Cal. Code Regs., tit. 11, § 310(b) (2016). The court's decision in *CCP* was based on the Attorney General's *policy* and not on any representation the Registry has never made a mistake, or made a mistake two-tenths of one percent of the time, and accidentally uploaded Schedule B to the public database, where someone theoretically could have accessed it. The Ninth Circuit was presented with most of the evidence upon which Judge Real's findings are based, including the out-of-context quotes in the FAC, *see, e.g.*, FAC ¶¶ 26-28; Defendant's Request for Judicial Notice, ECF No. 44-1, Exhibits A & B, and held that "allegations that technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure of their Schedule B forms are too speculative to support issuance of an injunction." *AFPF*, 809 F.3d at 541. This applies with at least equal force here.[4]

[4] Plaintiff misunderstands the Attorney General's argument regarding public disclosure. *See* Opposition 12. It is not that the Attorney General has any intention of departing from her long-standing policy or the regulation requiring Schedule B to be kept confidential. *See AFPF*, 809 F.3d at 538. Rather, it is that in the absence of any evidence of First Amendment harm, public disclosure would be constitutional. *See id.* at 542.

B. Plaintiff Has Failed to Plead Adequately an As-Applied Challenge.

To the extent that plaintiff suggests that it has alleged an as-applied challenge to the Schedule B disclosure requirement, this argument fails. As discussed more fully in the Attorney General's opening brief, *see* Memorandum of Points and Authorities in Support of Motion to Dismiss, (Memorandum) ECF No. 44 at 9-13, to succeed on an as-applied challenge, a plaintiff must, as an initial matter, allege "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisal from either Government officials or private parties[.]" *CCP*, 784 F.3d at 1317 (quoting *Buckley*, 424 U.S. 1, 74 (1976), and *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010)); *see also Brock v. Local 373, Plumbers Int'l Union of America*, 860 F.2d 346, 349-50 (9th Cir. 1988). To satisfy this standard, plaintiff must, at a minimum, plead some factually specific and plausible allegations of harassment, reprisals, or other negative consequences flowing from the Schedule B requirement. *See Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464, 482-83 (7th Cir. 2012); *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 21–22 (D.C. Cir. 2009); *Citizens United*, 2016 WL 4521627, at *8. If a plaintiff makes this showing, the Court then "assess[es] whether there is a 'substantial relation' between the burden imposed by the regulation and a 'sufficiently important' government interest." *Protectmarriage.com –Yes on 8 v. Bowen*, 752 F.3d 827, 832 (9th Cir. 2014), *cert. denied sub nom. Protectmarriage.com-Yes on 8 v. Padilla*, 135 S. Ct. 1523 (2015); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366 (2010). Where as here, there is no well-pled nexus to an actual First Amendment burden caused by the challenged disclosure, plaintiff cannot state a plausible First Amendment associational rights claim and dismissal is warranted. *See AFPF*, 809 F.3d at 540-41; *Citizens United*, 2016 WL 4521627, at *7. [5]

Plaintiff attempts to escape its burden to allege First Amendment injury by (1) disclaiming it; and (2) attempting to shift the burden to the Attorney General to justify the disclosure

[5] Plaintiff's assertion that the Attorney General is "improper[ly] attempti[ng] to impose a "threshold test" on First Amendment challenges, Opposition 2, is incorrect. This requirement comes from well-established Supreme Court and Ninth Circuit precedent. *See* Memorandum 10-13; *Citizens United*, 558 U.S. at 366-71; *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *CCP*, 784 F.3d at 1313-14 & n.3; *Brock*, 860 F.2d at 349-50. Contrary to plaintiff's view, the requirement is not limited to the electoral context. *See CCP*, 784 F.3d at 1317 n.2.

requirement in the first instance. *See* Opposition 7-12. These efforts are misguided. Although plaintiff argues, as it argued unsuccessfully to this Court and the Ninth Circuit, *see CCP*, 784 F.3d at 1312-1314 & n.3, 1316 n.8; *Ctr. For Competitive Politics v. Harris*, No. 2:14-CV-00636-MCE-DAD, 2014 WL 2002244, at *5-6 (E.D. Cal. May 14, 2014), that courts have invalidated disclosure requirements without a showing of harm, Opposition 11-12, the cases it relies upon for that proposition are inapposite and/or do not support its position. *Talley v. California*, 362 U.S. 60 (1960), for example, did not address associational rights; it concerned the right to anonymity for people engaged in political speech. Unlike in *Talley*, there is no serious allegation here that the challenged disclosure requirement has any effect on protected expression, let alone that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." *Talley*, 362 U.S. at 65. Plaintiff's other cases, such as *Coalition for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2016), and *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874 (8th Cir. 2012), both involved "onerous" and highly burdensome reporting requirements that "chilled" the First Amendment rights of smaller political organizations without being justified by any proportional state interest. *See* 692 F.3d at 873-74. That is not the case here. *See CCP*, 784 F.3d at 1316-17.

Plaintiff's argument that because exacting scrutiny is "fact based," it need not allege harm, is incorrect. Opposition 11. Even where an asserted government interest is marginal or illusory, which is not the case here, and a plaintiff could allege a successful as applied challenge with a weaker showing of injury than the courts generally have required, *see NAACP v. Alabama*, 357 U.S. at 462-63; *Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1217-18 (E.D. Cal. 2009), the plaintiff is still required to allege a burden on its First Amendment rights caused by the requirement. *See CCP*, 784 F.3d at 1316; *AFPF*, 809 F.3d at 541; *Citizens United*, 2016 WL 4521627, at *8. The FAC is devoid of any such allegation. As discussed in the Attorney General's Memorandum, the only allegation in the FAC regarding the effect of the Schedule B requirement on plaintiff is that it has chosen to forego fundraising in California rather comply with a constitutional requirement. This does not amount to a plausible showing of First

1 Amendment harm. *See* Memorandum 11; *Citizens United*, 2016 WL 4521627, at *7; *cf.* 11A
2 Wright & Miller, *Federal Practice & Procedure* § 2948.1 (3d ed. 2014).
3 Because plaintiff has failed to meet its burden to allege First Amendment harm caused by
4 the disclosure requirement, its claim fails and all of its allegations regarding the utility of
5 Schedule B are legally irrelevant. *See CCP*, 784 F.3d at 1316-17; *Protectmarriage.com*, 752 F.3d
6 at 832; *Dole v. Local Union 375, Plumbers Int'l Union of America* (*Dole*), 921 F.2d 969, 974 (9th
7 Cir. 1990) However, even if the Court were to consider these allegations, the Schedule B
8 requirement passes exacting scrutiny and is constitutional. As plaintiff notes "[s]omething
9 outweighs nothing every time." Opposition 10 (citation and internal punctuation omitted). As
10 discussed above, where, as here, there is no cognizable burden on plaintiff's First Amendment
11 rights caused by the Schedule B requirement, that requirement is substantially related to the
12 Attorney General's compelling interest in enforcing the law and protecting the public from fraud
13 and illegality and thus satisfies exacting scrutiny. *See CCP*, 784 F.3d at 1316-17.
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II. PLAINTIFF HAS FAILED TO ALLEGE A PLAUSIBLE FIRST AMENDMENT FREE SPEECH CLAIM

16 Plaintiff's claim that the Schedule B requirement is a content-based restriction on speech
17 that is subject to and fails strict scrutiny fails for the simple reason that reporting requirements do
18 not "prevent anyone from speaking." *Citizens United*, 558 U.S. at 366 (internal quotation marks
19 and citation omitted). Because disclosure laws are a "less restrictive alternative to more
20 comprehensive regulations of speech," exacting scrutiny , not strict scrutiny, applies. *Id.* at 366,
21 369; *see also John Doe No. 1*, 561 U.S. at 196. This is true even when after-the-fact disclosure
22 applies to donors of to a charity or organization that may be engaged in solicitation or otherwise
23 expressive activity. *Cf. Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 795 (1988); *Sec'y*
24 *of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 962 n.9, 967 n.16 (1984); *Village of*
25 *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637-38 & n. 12 (1980).
26 Although plaintiff suggests that *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), marked a
27 "sea change" in First Amendment jurisprudence, nothing in *Reed* changes the analysis of
28 disclosure requirements or suggests that thereafter they are subject to strict and not exacting

1 scrutiny.[6] At issue in *Reed* was a sign code that "identifie[d] various categories of signs based on
2 the type of information they convey, then subject[ed] each category to different restrictions." *Id.*
3 at 2224. Because the restrictions applicable "to any given sign. . . depend[ed]entirely on the
4 communicative element of the sign," they were "content-based discrimination." *Id.* at 2224,
5 2230. In contrast to the sign code in *Reed*, the Schedule B disclosure requirement is neutral and
6 generally applicable. There is no credible argument that Schedule B is expressive speech or is
7 required "because of the topic discussed or the idea or message expressed" in the IRS form or that
8 charities are exempted from the requirement based on the "communicative content" of their
9 forms.[7] *Reed*, 135 S. Ct. at 2227; *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d
10 1192, 1195 (9th Cir. 2016). Rather, Schedule B is required of all charities as part of a reporting
11 scheme that allows the Attorney General to monitor charities, enforce the law, and protect the
12 public from charitable fraud and illegality. *See CCP*, 784 F.3d at 1310-11; Cal. Code Regs. tit. 11,
13 § 301 (2014). Plaintiff thus fails to allege a plausible claim for relief for violation of its First
14 Amendment freedom of speech rights.
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17 [6] Plaintiff mistakenly relies on Justice Breyer's expression of concern in his concurrence
18 that the analysis in *Reed could* be applied improperly to various categories of speech that are the
subject of government regulation.. Justice Breyer did not state, nor has that Court held, that it
19 *should* or *would* be. Opposition 15 (citing 135 S. Ct. at 2235 (Breyer, J., concurring)).

[7] Plaintiff's contention that the Attorney General's registration and reporting scheme for
20 charities is content-based because "for any other category of speech [she] does not impose a
similar licensing scheme" is legally and factually groundless. As discussed above and in the
21 Memorandum, there is a significant constitutional distinction between requiring the reporting of
funds that may be used to finance speech and the direct regulation of speech itself. *See, e.g.*,
22 *Buckley v. American Constitutional Law Foundation, Inc*., 525 U.S. 182, 187, 198-99 (1999);
Memorandum 16-17. An analysis of content-based discrimination has no application to the
23 former category. Furthermore, it is not the case that no other type of entity that may be engaged
in speech or expression has to register and report to the government. California law is replete
24 with examples of such requirements. *See, e.g.*, Cal. Bus. & Prof. Code §§ 17550 et seq.
(registration requirements for seller of travel); Cal. Civ. Code §§ 2945.45 (foreclosure consultant
25 registration requirements); Bus. & Prof. Code § 17511.1 (registration requirements for telephonic
sellers). Finally, to the extent that plaintiff is suggesting that the Schedule B requirement operates
26 as a prior restraint, not only is this not alleged in the FAC, but the Supervision of Trustees and
Fundraisers for Charitable Purposes Act does not confer "unbridled discretion" on the Attorney
27 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, 763-774, 770-772 (1988).
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III. Plaintiff Has Failed to Allege a Plausible Fourth Amendment Claim

Plaintiff also fails to meet the plausibility standard on its Fourth Amendment claim. The Schedule B requirement is not a search, administrative or otherwise, and thus Plaintiff cannot state a claim for a Fourth Amendment violation.[8]

Plaintiff relies largely on *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), which involved a municipal law requiring hotel operators to maintain specified information about guests, and to make this information available to police upon demand. *Id.* at 2448. The information had to be kept on premises for 90 days, and failure to comply with the law was a misdemeanor, which could subject hotel operators to a fine or jail time. *Id.* To pass constitutional muster, the Court held that this type of "administrative search" must allow the subject an opportunity to obtain precompliance review before a neutral decision maker. *Id.* at 2452. *Patel* is inapposite here, for several reasons. This case does not involve an "administrative search" of the Plaintiff's premises or an individual's home; it does not involve a search at all. Nor are immediate arrest, criminal fines, or a jail terms the consequence of a charity's failure to comply with the Schedule B requirement. Rather, the Schedule B requirement is more akin to licensing requirements and to a host of state laws requiring individuals and businesses to register with the state and fulfill certain basic requirements. *See Wyman v. James*, 400 U.S. 309 (1971); *Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000).

Plaintiff's reliance on cases involving actual searches are thus inapposite. For example, the Ninth Circuit's decision in *In re Grand Jury Subpoena, JK-15-029*, 828 F.3d 1083, 2016 WL 3745541 (9th Cir. 2016) (*Kitzhaber*), involved a broad grand jury subpoena seeking, among other things, a former state governor's e-mails over many years, regardless of the content, senders, or

[8] Plaintiff mistakenly conflates the Schedule B registration requirement with the Attorney General's authority under state law to investigate the propriety of a charity's transactions (and the attendant power to require a charity or its officers to appear and produce records). Opposition 17. Contrary to Plaintiff's assertion, the Schedule B requirement is not a "form of non-judicial subpoena." *Id.* Instead, it is merely a regulatory requirement in order for any charitable organization to operate in the state, the same way that an individual wishing to drive a car must submit information the Department of Motor Vehicles, or an individual wishing to practice law must comply with the requirements of the California State Bar.

recipients of the communications and involving particularly personal subjects. *Id.*, 2016 WL at *4. *United States v. Lundin*, 817 F.3d 1151 (9th Cir. 2016), involved a police stakeout and warrantless search of a home, seizing handguns. The court determined that the search was presumptively unreasonable, given that the officers "physically occupie[d]" the curtilage of the house. *Id.* at 1157. By contrast, this case involves a regulatory requirement that a charity soliciting funds in California as a tax-exempt entity must submit the same Schedule B it files with the IRS to the Attorney General for nonpublic use. Not only is the Schedule B requirement not a search or seizure, but even assuming that plaintiff has a privacy interest in the names of its donors, whatever minimal intrusion into plaintiff's reasonable expectations of privacy the Schedule B requirement might cause is more than outweighed by the Attorney General's interest in enforcing the law and protecting the public from fraud. *See United States v. Place*, 462 U.S. 696, 703 (1983); *cf. CCP*, 784 F.3d at 1316-17.

This Court should thus dismiss Plaintiff's Fourth Amendment claim with prejudice.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the Court dismiss the First Amended Complaint in its entirety and enter judgment for defendant.

Dated: September 29, 2016

Respectfully Submitted,

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