No. 15-_____

In The
Supreme Court of the United States

CENTER FOR COMPETITIVE POLITICS,

Petitioner,

v.

KAMALA D. HARRIS,
ATTORNEY GENERAL OF CALIFORNIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a state official's demand for all significant donors to a nonprofit organization, as a precondition to engaging in constitutionally-protected speech, constitutes a First Amendment injury.

2. Whether the "exacting scrutiny" standard applied in compelled disclosure cases permits state officials to demand donor information based upon generalized "law enforcement" interests, without making any specific showing of need.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Plaintiff-Appellant in the court below, is the Center for Competitive Politics ("CCP"). CCP is a nonprofit corporation organized under 26 U.S.C. § 501(c)(3). CCP solicits financial contributions throughout the United States, including from donors who reside in California. CCP does not engage in electoral or candidate-related activity, but exists to educate the public on the benefits of political engagement.

CCP is not a publicly traded corporation, issues no stock, and has no parent corporation. There is no publicly held corporation with any ownership stake in CCP.

Respondent, who was Defendant-Appellee below, is Kamala D. Harris, in her official capacity as the Attorney General of California.

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The Center for Competitive Politics ("CCP") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 784 F.3d 1307 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of California is reproduced at App. 29a.

JURISDICTION

The Ninth Circuit issued its opinion and order below on May 1, 2015. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble. U.S. Const. amend. I.

Other pertinent statutes and regulations are reproduced in the Appendix at App. 29a.

INTRODUCTION

Individuals are not required to trust state officials with sensitive information about their private associations. Landmark rulings of this Court have long held that private association is a fundamental liberty, the invasion of which can only be permitted where the state carries its burden and specifically justifies the intrusion. The First Amendment contains no "trust us" exception for state officials wishing to pry into Americans' choices of charitable beneficiaries and ideological companions.

Nevertheless, California's Attorney General has demanded the identities of all significant donors to nonprofit educational and charitable groups as a precondition to speaking with potential donors. She has provided no evidence that seizing donor information will in fact advance any state interest, let alone that the use of subpoenas on a case-by-case basis would be ineffective.

Beginning with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and continuing through the facial ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court has consistently recognized that the freedom to associate, and to speak in concert with others, would inevitably be chilled by unjustified governmental intrusion. The point is sufficiently obvious that the federal courts of appeals, with the

exception of the Ninth Circuit, have required that forced disclosure of membership and donor information be justified under the heightened standard of "exacting scrutiny."

Below, the Ninth Circuit claimed to apply exacting scrutiny while in fact applying a weakened form of rational basis review. The court began by stating, contrary to this Court's many precedents, that compelled disclosure of donor information to the government imposes no First Amendment injury. It then blessed the Attorney General's demand based upon the mere invocation of a governmental interest, without any evidence of tailoring. This form of scrutiny is in no way exacting.

The Ninth Circuit's standard allows state governments to engage in the bulk collection of donor information from non-profit organizations, and its reasoning justifies the bulk collection of nearly any kind of information from any licensed speaker.

California, New York, and Florida – three of the wealthiest and most populous states in the Union – recently began demanding this information from all charities. If this Court permits the Ninth Circuit's approach to stand, rational basis review will rip away the First Amendment's protection of private association and belief, and chill charitable giving nationwide. Further, because "exacting scrutiny" is commonly used by the federal courts to analyze challenges to governmental regulation of speech and association more generally, this case provides an

ideal vehicle for clarifying the standard to be used in judging such cases.

Accordingly, this petition for a writ of certiorari should be granted.

STATEMENT OF THE CASE

1. The Attorney General Compels Donor Disclosure From All Charitable Organizations As A Precondition To Soliciting Donations In California

Before asking Californians for financial support, a § 501(c)(3) nonprofit corporation must be a member of that state's Registry of Charitable Trusts, which is administered by the Attorney General. CAL. GOV'T CODE §§ 12584; 12585. CCP has been a Registry member since 2008.

As part of its annual re-registration filings, CCP provides the Attorney General with its public copy of Form 990, the tax form filed by nonprofit corporations with the Internal Revenue Service ("IRS"). CODE OF CALIF. REGS. tit. 11, § 301; CAL. GOV'T CODE § 12586; 26 U.S.C. § 6033(b).

Form 990 is a lengthy, 12-part document.[1] An additional 16 schedules expand upon answers given

[1] Form 990 and its schedules are available via the IRS Website at: http://www.irs.gov/pub/irs-pdf/f990.pdf; http://www.irs.gov/uac/Form-990-Schedules.

on the main form. One of these, Schedule B, requires a nonprofit to list the names and addresses of contributors giving the greater of $5,000 or 2% of the total funds raised by the nonprofit in a calendar year. Return of Organization Exempt From Income Tax ("Form 990"), Sch. B; Form 990 Part VII, *l*. 1h. Pursuant to federal law, when filing copies of its Form 990 with the Registry, CCP redacts the names and addresses of those contributors.[2] 26 U.S.C. § 6104(d)(3)(A) (copies of Form 990 "shall not require the disclosure of the name or address of any contributor to the organization"). While several states require nonprofits to provide a copy of Form 990, those states have never objected when CCP provided a copy of Form 990 wherein the private information on Schedule B was redacted. Indeed, besides California, only New York and Florida, to CCP's knowledge, condition charitable registration upon the filing of confidential Schedule B information.[3]

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[2] The constitutionality of the *IRS*'s demand for donor information has never been reviewed by this Court, and is not challenged here. There are grounds for compelled disclosure in the IRS context that may survive exacting scrutiny. These include cross referencing Schedule B information against personal tax returns to catch fraudulent attempts to claim tax deductions for charitable gifts that were never made. No such interest is present here.

[3] The court of appeals suggested otherwise, at App. 5a n.1, explicitly referencing statutes from Hawaii, Kentucky, and Mississippi. But those statutes refer simply to Form 990, and do not suggest that state agencies are seeking non-public copies of that document.

The confidentiality of Schedule B information is protected by federal law and backed by significant sanctions. Internal Revenue Code § 6104 provides that § 501(c)(3) organizations may keep their donor lists private on public copies of Form 990, and prohibits the Treasury Secretary from revealing that donor information to state officials seeking that information "for the purpose of . . . the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations." 26 U.S.C. §§ 6104(d)(3)(A); 6104(c)(3). Federal and state officials face meaningful civil and criminal sanctions for improperly disclosing tax returns or permitting unauthorized inspection of those documents. 26 U.S.C. §§ 7431 (civil damages for unauthorized inspection or disclosure of returns or return information); 7213(a)(1) (criminal sanctions for disclosure of returns or return information by federal employees); 7213(a)(2) (same for state employees); 7213A(a)(2), 7213A(b)(1) (criminal sanctions for unauthorized inspection of returns or return information, including by state employees); 7216 (criminal sanctions for disclosure of tax return or return information by tax preparers). The State of California provides no such statutory protections against unauthorized release of material collected pursuant to the Attorney General's compulsory disclosure program.

On February 6, 2014, CCP received a letter, signed by Office Technician "A.B." App. 59a-60a. This letter informed CCP, for the first time, that the Attorney General considered its registration

"incomplete because the copy of Schedule B, Schedule of Contributors, d[id] not include the names and addresses of contributors." App. 59a (emphasis removed). This letter did not initiate a compliance audit, nor did it subpoena information predicated upon articulable suspicion.

Failure to comply with the Attorney General's demand would have serious consequences, as CCP would learn pursuant to a letter the Registry mailed three days after oral argument in the court of appeals. App. 61a-63a.

First, "the California Franchise Tax Board [would] be notified to disallow the tax exemption of [CCP]." App. 62a. Second, late fees would be imposed, and "[d]irectors, trustees, officers[,] and return preparers responsible for failure to timely file these reports [would be] **. . . personally liable** for payment of all late fees." *Id*. (bold in original). Third, "the Attorney General **w[ould] suspend the registration** of [CCP]." App. 63a (bold in original).

Were CCP's Registry membership suspended, the group would be barred from speaking with Californians in order to solicit financial support for its mission. *Compare Williams-Yulee v. The Florida Bar*, 576 U.S. ___, 135 S. Ct. 1656, 1665 (2015) (Roberts, C.J., controlling opinion) ("restricting the solicitation of contributions to charity . . . threaten[s] the exercise of rights so vital to the maintenance of democratic institutions") (citations and quotation marks omitted).

2. Proceedings Below

On March 7, 2014, CCP filed a complaint in the United States District Court for the Eastern District of California, asserting, *inter alia*, that the Attorney General's demand letter violated the First Amendment, as applied to the states via the Fourteenth Amendment. App. 29a.[4] On March 20, CCP moved for a preliminary injunction. In response, the Attorney General justified her demand by asserting that unredacted Schedule B information "allows her to determine 'whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices.'" App. 44a-45a (quoting Attorney General's briefing, internal citations omitted). She failed, however, to explain any mechanism by which knowing the names and addresses of CCP's donors would further any such end. Nonetheless, the district court denied the motion, and CCP timely appealed.

On May 29, 2014, the district court stayed its proceedings.

The Ninth Circuit heard oral argument on December 8, 2014. There, the Attorney General provided for the first time "an example," which appears to have been a hypothetical, "of how the Attorney General uses Form 990 Schedule B in order to enforce these laws." App. 5a.

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[4] The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, 2202, and 42 U.S.C. § 1983.

Specifically, counsel posited a scenario involving a lightly capitalized charity disclosing over $2 million in donations, the vast majority of which came from inflating the value of a worthless painting. Oral Argument at 28:25, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. Dec. 8, 2014). What California law enforcement (as opposed to federal tax enforcement) interest would be served by knowing the names of donors to such an organization was not identified and remains unknown.

Moreover, the public version of Form 990 would already provide the Attorney General with reason to be suspicious. It would show extremely low outlays and an extremely high professed income. Additionally, the public copy of Form 990 would list the *amount* of the painting donation, and that it was a non-cash contribution. Finally, a separate schedule of the Form, open to public inspection, would also list a "[d]escription of noncash property given," in this case that the donation was a painting, and its "FMV" (fair market value). Form 990, Sch. B., Part II; *see also* Form 990, Sch. M. (listing artwork as first reporting category for non-cash contributions). At that point, the Attorney General would be within her rights to subpoena additional information concerning the circumstances of that particular donation.

Three days after oral argument, the Attorney General sent a letter demanding that CCP turn over its donors' private information within 30 days or face the significant sanctions discussed *supra*. On December 18, 2014, citing the irreparable harm this demand posed, CCP requested an injunction pending appeal.

The Ninth Circuit granted that request on January 6, 2015.

On May 1, 2015, the Ninth Circuit affirmed the district court's denial of a preliminary injunction and lifted the injunction it had issued in January. The court of appeals neither followed the reasoning of the district court, nor cited the principal cases upon which the lower court had relied.

Instead, the Ninth Circuit rejected the view "that the Attorney General's disclosure requirement is, in and of itself, injurious to CCP's and its supporters' exercise of their First Amendment rights to freedom of association." App. 9a. The court then purported to apply exacting scrutiny, but merely "balance[d] the plaintiff's First Amendment injury against the government's interest," and did not, as this Court did in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), count compelled disclosure as a harm in and of itself. App. 12a. Rather, the court of appeals demanded evidence of some other, additional, "burden" on a specific group's association – such as evidence the Attorney General's disclosure regime was designed only to harass CCP or that disclosure to the Attorney General would result in threats, harassments, or reprisals against its donors. App. 10a-12a. The court of appeals then ruled that, because the Attorney General's "assert[ion] for the disclosure requirement" was not "wholly without rationality . . . CCP's First Amendment facial challenge to the Attorney General's disclosure requirement fail[ed] exacting scrutiny." App. 20a-21a (citation and quotation marks omitted).

On May 5, CCP asked the Ninth Circuit to stay the mandate and renew its injunction pending the filing of this Petition. On May 11, the Ninth Circuit agreed to stay the mandate, but declined to issue an injunction protecting CCP while it sought this Court's review.

3. Application To Circuit Justice

On May 13, mindful of the significant penalties threatened by the Attorney General's letter of December 8, CCP applied for an emergency injunction pending *certiorari* from the Circuit Justice for the Ninth Circuit. On May 18, the Circuit Justice declined to issue an injunction, but did so "without prejudice to renewal of the application in light of any further developments."

CCP has received no further communication from Respondent regarding its Registry membership and, accordingly, has not renewed its application with the Circuit Justice.

REASONS FOR GRANTING THE WRIT

I. In Holding That Compelled Disclosure Of Private Associations Creates No First Amendment Injury, The Ninth Circuit Has Both Misapplied This Court's Precedents And Contradicted The Authority Of Other Courts Of Appeals.

The court of appeals flatly declared that "no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury." App. 17a-18a. Not so. This Court long ago announced that unjustified "state scrutiny" of organizational membership was inconsistent with all Americans' right "to pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP*, 357 U.S. at 466.

In denying this precedent, the panel purported to distinguish *Buckley v. Valeo*'s facial ruling limiting donor disclosure in the campaign finance context, ("we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," 424 U.S. at 64), arguing that *Buckley* "cited a series of Civil Rights Era as-applied cases in which the NAACP challenged compelled donor disclosure of its members' identities at a time when many NAACP members experienced violence or serious threats of violence based on their membership in that organization." App. 9a. Thus, the panel ignored the fact that *Buckley* itself was a facial challenge, and consigned some of the civil rights era's most significant

precedents – *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Bates v. City of Little Rock*, 361 U.S. 516 (1960); and *NAACP v. Alabama* – to a footnote, limiting them to the specific facts of a specific organization in a singular time and place. App. 9a-10a n.3.

The Ninth Circuit's startling error is made especially dangerous by its unambiguous language. Under this newly-articulated rule, state officials will be emboldened to demand the donor and membership lists of private associations upon the thinnest pretexts and without fear of effective judicial oversight. This holding alone presents a question of sufficient national importance to necessitate the granting of *certiorari.*

1. When a government compels disclosure of an organization's financial supporters, the government intrudes upon the First Amendment's protection of free association. *Buckley*, 424 U.S. at 64 (compelled disclosure has been "long . . . recognized" as a "significant encroachment[ ] on First Amendment rights"); *NAACP*, 357 U.S. at 462 ("[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association" as taxing First Amendment activity); *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 55 (1974) ("an organization may have standing to assert that constitutional rights of its members be protected from governmentally compelled disclosure of their membership in the

organization, and that absent a countervailing governmental interest, such information may not be compelled"); *id.* at 98 ("[t]he First Amendment gives organizations such as the ACLU the right to maintain in confidence the names of those who belong or contribute to the organization, absent a compelling governmental interest requiring disclosure") (Marshall, J., dissenting). Indeed, this Court has long taken for granted that disclosure imposes a First Amendment injury, one that "cannot be justified by a mere showing of some legitimate governmental interest." *Buckley*, 424 U.S. at 64. This position has been so obvious that there has been little need for courts to revisit it.

Yet, the Ninth Circuit determined that the existence of the Attorney General's unwritten disclosure policy – under which, beginning in 2014, she demanded CCP's list of substantial donors for the first time – imposed no "actual burden" upon the First Amendment rights of CCP or its supporters. App. 17a (citation omitted). *Cf. Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2010) (quoting *Buckley*, 424 U.S. at 64) ("We have repeatedly found that compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment") (punctuation altered, emphasis supplied).

Worse, under the Ninth Circuit's rule, governments may prohibit associations from engaging in other, fully protected First Amendment activities as the price for not turning over their membership lists or donor information. In this case, CCP will be

banned from speaking with potential donors in California unless it complies with the Attorney General's demand. Since any direct limit on charitable solicitations would unquestionably be reviewed under strict scrutiny, the harm here is especially pronounced. *See Williams-Yulee*, 135 S. Ct. at 1664 (strict scrutiny applies to "laws restricting the solicitation of contributions to charity"); *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) ("conducting fundraising for charitable organizations . . . [is] fully protected speech"); *Gaudiya Vaishnava Soc'y v. San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1991) (same). But there is no reason to believe that the Ninth Circuit's reasoning, or the Attorney General's "law enforcement" interest, is limited to the charitable solicitation context.

Consequently, this decision constitutes an extraordinary piercing of the associational veil. *NAACP*, 357 U.S. at 462 ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations"). It is also a grave misreading of fundamental legal precedents. "It is beyond debate 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." *NAACP*, 357 U.S. at 460. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious[,] or cultural matters . . . state action which may have the effect of curtailing the freedom to associate is subject to the closest

scrutiny." *Id*. at 460-61. After all, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were also not guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

In defense of its expansive ruling, the Ninth Circuit pointed to this Court's precedent in *Buckley v. Valeo*, which stated that "[c]ompelled disclosure, in itself can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley*, 424 U.S. at 64. The court of appeals placed great weight on the word "can," observing that just because government power "'can'" inflict serious injury, that does not mean that it "'always does.'" App. 9a. This is true, so far as it goes. But the Ninth Circuit ignores the *Buckley* Court's use of the modifier "serious." Disclosure *always* imposes First Amendment injuries. *Buckley*, 424 U.S. at 64 ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure *imposes* . . . ") (emphasis supplied). Some of the First Amendment injuries are "serious," some may be more modest, and perhaps the state can demonstrate that some injuries are necessary. But injuries they are, and the state must demonstrate some concrete need before imposing a dragnet disclosure regime.

In citing *Buckley*, the Ninth Circuit turned that case topsy-turvy. The *Buckley* Court imposed a narrowing gloss upon the portion of the Federal Election

Campaign Act that demanded a wide swath of disclosure from citizen groups labeled as "political committees." 424 U.S. at 79-81; *id.* at 80 n.108. This was a facial ruling, unencumbered by any caveat that the disclosure laws posed a danger of threats, harassments, and reprisals to groups that would otherwise have been regulated as political committees.

Indeed, where the Ninth Circuit dealt squarely with the *Buckley* opinion, insisting on a showing of threats or harassment in order to demonstrate irreparable injury, it relied upon the Court's rejection of an exemption from disclosure requirements for minor political parties, such as the Libertarian Party, one of the *Buckley* plaintiffs. But the court of appeals completely ignored *Buckley* as to non-candidate organizations that do not have "the major purpose" of influencing elections. For those groups – which include CCP – *Buckley* facially rewrote the statute to avoid constitutional overbreadth, and exempted all of them from compulsory disclosure. This was done with *no* specific factual showing of harassment at all, demonstrating how little support *Buckley* provides for the Ninth Circuit's dramatic narrowing of the First Amendment. In *Buckley*, unlike here, the state proffered a specific, concrete reason for requiring disclosure of donor information to candidate committees and political parties. But because the statute reached too far, even the invocation of that narrow, concrete interest was insufficient to carry the government's burden.

Nor was *Buckley* an outlier. This Court has not hesitated to strike down disclosure provisions, even

when "[t]he record is barren of any claim, much less proof . . . that [a plaintiff] or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility.'" *Talley v. California*, 362 U.S. 60, 69 (1960) (Clark, J., dissenting) (citing *NAACP*, 357 U.S. at 462, brackets in *Talley*).

To say, as the court of appeals did, that compelled disclosure imposes *no* First Amendment harm constitutes an expansive grant of power, allowing governments to rustle through the private workings of private organizations. It also, inherently, diminishes the value of privacy of association as a First Amendment right. The First Amendment's protection of free association "need[s] breathing space to survive," and is accordingly "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Thus, the Ninth Circuit misapplied or ignored important – indeed iconic – authority from this Court in reaching its decision.

2. Unsurprisingly, the Ninth Circuit's erroneous ruling also creates a split among the courts of appeals.

The Second Circuit recently held that the American Civil Liberties Union had standing to bring a First Amendment claim concerning the government's bulk collection of telephone metadata.

Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 802-03 (2d Cir. 2015). That decision was explicitly grounded in the ACLU's "members' interests in keeping their associations and contacts private," and the Second Circuit relied in part upon prior precedent holding that an injury in fact occurred merely when an organization's "information was obtained by the government," without more. *Id.* at 802 (quoting *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 147 (2d Cir. 2011)). Moreover, it noted that the "*potential* 'chilling effect'" of governmental scrutiny was itself a "concrete, fairly traceable, and redressable injury." *Id.* at 802 (emphasis supplied). In short, the Second Circuit does not require additional evidence of harm, nor the public dissemination of acquired information, before recognizing the injury inherent in governmental scrutiny of private association.[5]

The decision below also created a significant conflict with the Eleventh Circuit. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-67 (11th Cir. 1999). That case involved a municipal "provision that require[d] corporate applicants for adult business licenses to disclose the names of 'principal stockholders.'" *City of Jacksonville*, 176 F.3d at 1366.

[5] The Second Circuit resolved the appeal on statutory grounds and did not reach that plaintiff's constitutional claim. But in ruling upon the sufficiency of the ACLU's claimed injury, it nonetheless created a circuit split with the Ninth Circuit on this point.

This disclosure, like that at issue here, was made to city officials and was not publicly disseminated.

That court did not require the adult businesses to place any further evidence in the record, beyond the statute itself, to demonstrate "actual" First Amendment harm. Nor did it require Lady J. Lingerie, Inc. to demonstrate that the ordinance was designed merely to harass businesses or that its stockholders would suffer threats, harassment, or reprisals as a result of the disclosure. Instead, the Eleventh Circuit assumed that compelled disclosure *itself* was the First Amendment harm at issue, and applied "exacting scrutiny." *Id*. at 1366 (citing *Buckley v. Valeo* and *NAACP v. Alabama*).

This conflict among the circuits was avoidable. The *City of Jacksonville* court grounded its analysis in, *inter alia*, *Acorn Invs. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989), which also invalidated a compelled disclosure statute without requiring the plaintiff to demonstrate harm beyond the act of disclosure to city officials. The Ninth Circuit chose to distinguish its own precedent, which relied upon *Talley v. California*, *NAACP v. Alabama*, and *Buckley v. Valeo*, and which had required the governmental entity to provide "a substantial governmental interest that [was] furthered by requiring disclosure." *Acorn Invs.*, 887 F.2d at 225.

Consequently, the Ninth Circuit's ruling directly conflicts with decisions of the Second and Eleventh Circuits.

II. The Ninth Circuit's Conversion Of Exacting Scrutiny To Rational Basis Review Contradicts Decisions Of This Court And Nearly All Other Circuits.

1. The Ninth Circuit's ruling is at odds with this Court's decisions requiring the application of exacting scrutiny, "[t]he strict test established by *NAACP v. Alabama*," when governments seek to obtain private donor information from organizations. *Buckley*, 424 U.S. at 66. This Court has consistently refused to allow governments to obtain member and donor information based upon a "slender" or "mere showing of some legitimate government interest." *Gibson*, 372 U.S. at 556; *Buckley*, 424 U.S. at 64. By drastically shifting the burden of persuasion, the court of appeals's decision turns exacting scrutiny on its head.

Exacting scrutiny is premised upon the belief that governments must justify their demands for disclosure, not force citizens to explain why the State's accumulation of a vast database of private, constitutionally-protected information is harmless. *Elrod v. Burns*, 427 U.S. 347, 362 (1963) (to survive exacting scrutiny "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest . . . it is not enough that the means chosen in furtherance of the interest be rationally related to that end") (emphasis supplied). Nor is it enough for the government to simply invoke a general interest; the government must show that its disclosure regime is properly tailored to that interest. *Citizens United v. FEC*,

558 U.S. 310, 366-67 (2010). Such tailoring is not met simply because the government asserts a generalized law enforcement interest, backed up by a hypothetical at oral argument. *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1449 (2014) ("[T]here are compelling reasons not to define the boundaries of the First Amendment by reference to such a generalized conception of the public good"); *In re Primus*, 436 U.S. 412, 434 n.27 (1978) ("Rights of political expression and association may not be abridged because of state interests asserted by appellate counsel without substantial support in the record or findings of the state court"); *see also Uphaus v. Wyman*, 360 U.S. 72, 104 (1959) (Brennan, J., dissenting) ("It is anomalous to say . . . that the vaguer the State's interest is, the more laxly will the Court view the matter and indulge a presumption of the existence of a valid subordinating state interest"). As this Court has noted in the campaign finance context – where governments have traditionally been given greater latitude to regulate speech and association – "[i]n the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456.

2. Other circuit courts of appeals have followed this Court's instruction that, in disclosure cases, exacting scrutiny requires the government to bear the burden of persuasion and demonstrate that it has tailored its response to a sufficiently-important state interest. *Delaware Strong Families v. Att'y General*, Case No. 14-1887, 2015 U.S. App. LEXIS 12277 (3d Cir. July 16, 2015) (Exacting scrutiny "is a heightened level of scrutiny, which accounts for the general

interest in associational privacy by requiring a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (quotation marks and citation omitted); *Ctr. for Individual Freedom v. Tennant*, 706 F.3d 270, 282 (4th Cir. 2012) (Exacting scrutiny "requires the government to show that the statute bears a substantial relation to a sufficiently important governmental interest") (quotation marks and citation omitted); *FEC v. La Rouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1982) ("[W]here the disclosure sought will compromise the privacy of individual political associations . . . the agency *must* make some showing of need for the material sought beyond its mere relevance to a proper investigation") (emphasis supplied); *Familias Unidas v. Briscoe*, 619 F.2d 391, 400 (5th Cir. 1980) ("Thus, the act of disclosure. . . . does bear a relevant correlation to the legitimate object of peaceful operation of the schools . . . Nonetheless, the disclosure requirement of section 4.28, while it is generally related to the effectuation of a permissible state purpose, sweeps too broadly, and therefore cannot stand").[6]

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[6] The list goes on. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 56-57 (1st Cir. 2011) ("[W]e will consider a law constitutional under exacting scrutiny standards where there is a substantial relation between the law and a sufficiently important governmental interest") (quotation marks and citation omitted); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 132-33 (2d Cir. 2014) ("[T]he statutes remain subject to exacting scrutiny, which requires a substantial relation between the disclosure

(Continued on following page)

To take one example, in the *City of Jacksonville* case the Eleventh Circuit found the proffered government interest, "[c]ombating the harmful secondary effects of adult businesses," to be "substantial." 176 F.3d at 1361. Nonetheless, conducting a tailoring analysis, the court of appeals ruled that the "City's

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requirement and a sufficiently important governmental interest") (quotation marks and citation omitted); *Justice v. Hosemann*, 771 F.3d 285, 297, 299 (5th Cir. 2014) ("The first question under the exacting scrutiny standard" is whether the government has identified a proper interest, if so, "[t]he only remaining question is whether [the] disclosure requirements are substantially related" to that interest) (punctuation altered, citations omitted); *Frank v. City of Akron*, 290 F.3d 813, 821 (6th Cir. 2002) ("The Supreme Court has 'repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.' As a result, 'the subordinating interests of the State must survive exacting scrutiny,' and there must 'be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed.' " (citing *Buckley*, 424 U.S. at 64); *Wisc. Right to Life, Inc. v. Barland*, 751 F.3d 804, 840 (7th Cir. 2014) ("So the Board must justify the rule under exacting scrutiny, which requires a substantial relationship between the disclosure requirements and an important governmental interest. This is not a loose form of judicial review") (quotation marks and citation omitted); *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (*en banc*); *Citizens United v. Gessler*, 773 F.3d 200, 210 (10th Cir. 2014) ("For the law to pass muster there must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (quotation marks and citation omitted); *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) (" 'Though possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp' ") (quoting *Minn. Citizens Concerned for Life*, 692 F.3d at 876).

best argument" for the disclosure ordinance, that "principal stockholders tend to have a discernable influence on management, and that the City needs to keep an eye on who is running adult businesses in town" flunked exacting scrutiny because "stockholders, *qua* stockholders, do not run corporations; officers and directors do. The City can enforce its rules through them." *Id*. at 1366 (citations omitted). Because of the statute's improper fit, it was struck as unconstitutional. *Id*. at 1367; *McCutcheon*, 134 S. Ct. at 1456 ("fit matters").

3. By contrast, the Ninth Circuit has effectively rewritten exacting scrutiny into a form of rational basis review. The Ninth Circuit did not find that the government had proven that its demand for CCP's donor information was properly tailored to a sufficient government interest, but rather that, absent specific evidence that CCP and its donors would be harmed, the Attorney General need only assert a "not wholly irrational" basis for her demand. In practice, then, the Ninth Circuit has held that any and all compelled disclosure regimes are appropriately tailored so long as the government offers a remotely plausible excuse for compelling private information from an organization. *But see Baird v. State Bar of Arizona*, 401 U.S. 1, 6 (1971) (plurality op.) ("[W]hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution").

This was a grave error, and a stunning departure from the normal operation of heightened judicial review. Once the Attorney General sought "state scrutiny" of CCP's donor information, this act alone triggered the need for at least exacting judicial review. Under exacting scrutiny, "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest." *Elrod*, 427 U.S. at 362 (citations omitted) (emphasis supplied). The Ninth Circuit inverted this requirement, instead requiring CCP to justify why it need not disclose sensitive information to the government.

Moreover, the burden upon the Attorney General does not end merely upon the invocation of a legitimate governmental interest. *Buckley*, 424 U.S. at 64 ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest"). CCP "asserts no right to absolute immunity from state investigation, and no right to disregard [California]'s laws." *NAACP*, 357 U.S. at 463. CCP concedes, as it has at every stage of this litigation, that the enforcement of laws against fraud, self-dealing, interested persons, and the like are vital and paramount interests for the government to pursue.[7]

[7] Furthermore, CCP has no objection to the Attorney General conducting compliance audits, or subpoenaing certain

(Continued on following page)

But the Attorney General has *never* provided *any* evidence of the mechanism by which CCP's donor information would vindicate that interest. CCP Mot. to Stay the Mandate and Mot. for Prelim. Inj. Relief at 7-8, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. May 5, 2015), Dkt. No. 37 (summarizing the Attorney General's repeated invocation of her governmental interest, without providing an explanation as to how CCP donor information would support that interest). At most, she provided "*an* example," for the first time, at oral argument on appeal, "of how the Attorney General uses Form 990 Schedule B in order to enforce these laws." App. 5a (emphasis supplied). As discussed *supra*, the Attorney General's sole example consists of a (possibly hypothetical) enforcement action based upon the inflation of the value of a worthless painting donated to a lightly funded group. This example, even if it actually happened and were properly presented, does not show that a dragnet demand for donors is sufficiently tailored. The hypothetical group's Form 990 would raise a number of

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donor information as part of an investigation if a charity's annual filing demonstrates a particularized suspicion of wrongdoing. *See* CAL. GOV'T CODE § 12588 ("[t]he Attorney General may investigate transactions and relationships of corporations and trustees subject to this article . . . "). That approach also protects the judiciary's role in supervising subpoenas and warrants, a vital check on governmental power required by both the First and Fourth Amendments. If the mere invocation of a "law enforcement" interest is sufficient to gather private information from any organization, law enforcement officers are unlikely to instead choose these more closely-scrutinized routes to that same information.

red flags. *Supra* at 8-9. Even granting credence to her example, whether reality or speculation, it cannot justify, under exacting scrutiny, obtaining *all* significant donors to *all* charities. *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 201, 204 (1999) (when demanded disclosure is only "tenuously related" to the state's interest in "compelled disclosure of the name[s] and addresses" of individuals, it "fail[s] exacting scrutiny") (citation and quotation marks omitted). Of course, this scenario was not briefed in the Ninth Circuit or provided to the district court in any form. *Gibson*, 372 U.S. at 555-56 (associational freedom "may not be substantially infringed upon such a slender showing as here made by the respondent").

Perhaps more troubling, it was upon this scintilla of far-fetched argument – it cannot be called evidence – that the court of appeals found that the state's dragnet demand for donor lists assisted "investigative efficiency." App. 6a; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000) ("[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden"); *McCullen v. Coakley*, 573 U.S. __, 134 S. Ct. 2518, 2534 (2014) ("[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency") (citation and quotation marks omitted). But the Attorney General has many tools at her disposal, from random audits to simple reviews of the other information available on Form 990. That form provides a highly-detailed view of potential conflicts of interest, payments to officers and directors, organizational finances, the dollar

amount of reported contributions, whether each was a non-cash contribution, and if so a description of the property contributed. If that information showed that the identity of a specific donor would be useful, the state would be within its rights to issue subpoenas subject to the supervision of the courts.

Put simply, the Ninth Circuit conducted no analysis as to whether the Attorney General's demand was properly tailored. *McCutcheon*, 134 S. Ct. at 1456 ("Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but . . . narrowly tailored to achieve the desired outcome") (citation and quotation marks omitted). Indeed, the Ninth Circuit did not even ask, as this Court did in *Shrink Missouri Government PAC*, whether "the novelty and plausibility of the justification raised" by the Attorney General could be justified by such a low, essentially non-existent, "quantum of empirical evidence." *Shrink Missouri*, 528 U.S. at 391.

Instead, at most the Ninth Circuit engaged in a very basic balancing test: having found that there was no First Amendment injury in compelled disclosure, it required the Attorney General to place only a featherweight, if that, on her side of the scales. There is reason to believe that, because it imposes a "wholly without rationality" test, this approach would not even be sufficient under the ordinary rational basis standard. *See Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) (under rational basis review, legislation "will be sustained if the

classification drawn by the statute is rationally related to a legitimate state interest") (citation and quotation marks omitted). Regardless, rational basis cannot be the standard here. *See District of Columbia v. Heller*, 554 U.S. 570, 629 n.27 (2008) ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect").

Under the Ninth Circuit's ruling, *NAACP v. Alabama*, its progeny, and those cases' defense of associational privacy against state review of membership information must have been overruled or dramatically narrowed. *Bates*, 361 U.S. at 525 ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion . . . "). Had the Ninth Circuit properly applied exacting scrutiny, it ought to have ruled for Petitioner. The Attorney General never demonstrated that "[t]he gain to the subordinating interest provided by the means" used to further that interest – in this case, a universal disclosure regime specifically targeting First Amendment sensitive data – was even remotely, let alone "narrowly tailored." *Elrod*, 427 U.S. at 362 (citations omitted); *McCutcheon*, 134 S. Ct. at 1456 (citations omitted).

The Ninth Circuit's "balancing test" thus directly conflicts with how other courts believe proper constitutional review operates. Indeed, as recently as

October 7, 2014, a different panel of the Ninth Circuit hearing a compelled disclosure case refused to treat exacting scrutiny as a balancing test susceptible to conversion into rational basis review. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 684 (9th Cir. 2014) (Kozinski, C.J.), *rev'd en banc*, 782 F.3d 520 (9th Cir. 2015) ("Moreover, it is the *government*'s burden to show that its interests are substantial, that those interests are furthered by the disclosure requirement, and that those interests outweigh the First Amendment burden the disclosure requirement imposes on political speech") (emphasis in original, other punctuation altered, citations omitted). This Court ought to grant the writ, so that it may restore the exacting scrutiny test in the Ninth Circuit and resolve the lower court's conflict with the other courts of appeals.

III. This Case Is An Excellent Vehicle For Defining Exacting Scrutiny In Associational Liberties Cases, A Pressing Constitutional Question That Can Only Be Addressed By This Court.

As the foregoing shows, the lower courts have too often misunderstood the "exacting scrutiny" standard *NAACP* and *Buckley* imposed to protect privacy of association and belief. That ambiguity emboldens overly-invasive state regulation and chills fundamental First Amendment rights. This case is an ideal vehicle for clarifying the proper standard in compelled disclosure cases. Since this question arises in

situations at the heart of First Amendment freedoms, where the potential for governmental abuse is gravest, the articulation of a clear and easily-applied standard is a matter of pressing national importance that can only be addressed by this Court.

1. Reviewing the disclosure regime of the Federal Election Campaign Act, this Court, in the context of a facial challenge to a compelled disclosure regime, applied the "strict test" of *NAACP v. Alabama*. *Buckley*, 424 U.S. at 66; *NAACP*, 357 U.S. at 460-61 ("[S]tate action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny").

In *Buckley*'s immediate aftermath, the federal judiciary treated that ruling as imposing what would now be thought of as strict scrutiny. *E.g. Bernbeck v. Moore*, 126 F.3d 1114, 1116 (8th Cir. 1997) ("[t]he strict or exacting scrutiny standard requires that a state must show the regulation in question is substantially related to a compelling government interest and is narrowly tailored to achieve that end") (citing *Burson v. Freeman*, 504 U.S. 191, 198 (1992)); *Clark v. Library of Congress*, 750 F.2d 89, 94 (D.C. Cir. 1984) (under exacting scrutiny, "the government must demonstrate that the means chosen to further its compelling interest are those least restrictive of freedom of belief and association"); *Familias Unidas*, 619 F.2d at 399 ("Even when related to an overriding, legitimate state purpose, statutory disclosure requirements will survive this exacting scrutiny only if drawn with sufficiently narrow specificity to avoid

impinging more broadly upon First Amendment liberties than is absolutely necessary").

For the past several Terms, this Court has suggested that exacting scrutiny is a form of review akin to strict scrutiny. In *United States v. Alvarez*, Justice Kennedy, writing for four members of the Court, determined that "exacting scrutiny" applied to the Stolen Valor Act of 2005, which prohibited falsely claiming that one had been awarded military honors. 567 U.S. ___, 132 S. Ct. 2537, 2543 (2012) ("When content-based speech regulation is in question, however, exacting scrutiny is required"). Justice Kennedy's plurality opinion alternated between calling the proper standard "exacting scrutiny" or the "most exacting scrutiny" – but clearly applied a form of strict scrutiny. *Alvarez*, 132 S. Ct. at 2551; *281 Care Comm. v. Arneson*, 766 F.3d 774, 783 n.7 (8th Cir. 2014).

Similarly, in *McCutcheon v. FEC*, the Chief Justice's controlling opinion noted that "[u]nder exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest." 134 S. Ct. at 1444; *see also McCullen*, 134 S. Ct. at 2530 (describing "strict scrutiny" as an "exacting standard"). This Term, the Chief Justice's controlling opinion adopted a similar formulation of exacting scrutiny in *Williams-Yulee*, 135 S. Ct. at 1664-65 (interchangeably referring to "exacting scrutiny" and "strict scrutiny," and holding that "[a] State may restrict the speech of a judicial

candidate only if the restriction is narrowly tailored to serve a compelling interest"); *id.* at 1673 (Ginsburg, J., concurring) ("I would not apply exacting scrutiny . . . "); *id.* at 1676-77 (Scalia, J., dissenting) ("We may uphold it only if the State meets its burden of showing that the Canon survives strict scrutiny . . . Canon 7C(1) fails exacting scrutiny and infringes the First Amendment").

Understanding exacting scrutiny as a form of strict scrutiny is especially appropriate in cases such as this, where the government seeks to pierce associational privacy as a condition of engaging in pure speech. This Court has made it perfectly clear that charitable solicitations are "characteristically intertwined with informative and perhaps persuasive speech," and that limits on that speech are subject to exacting scrutiny. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988). In that context, again, exacting scrutiny is equivalent to strict scrutiny: such regulations are upheld only if "narrowly tailored to serve a compelling interest." *Williams-Yulee*, 135 S. Ct. at 1664.

These recent applications of "exacting scrutiny" as "strict scrutiny" have not gone unnoticed in the circuit courts. In 2012, the Fourth Circuit observed that "[t]he Supreme Court has equated the phrase 'most exacting scrutiny' with its frequently-used term 'strict scrutiny'." *United States v. Hamilton*, 699 F.3d 356, 370 n.12 (4th Cir. 2012); *also 281 Care Comm.*, 766 F.3d at 783 n.7 ("In *Alvarez*, though, no matter the cloudiness of its usage in prior case law, the

plurality's application of 'the most exacting scrutiny' is interchangeable with strict scrutiny"); *Minn. Citizens*, 692 F.3d at 876 (exacting scrutiny is "possibly less rigorous than strict scrutiny"); *see also Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 413 (6th Cir. 2014) ("'Exacting scrutiny,' despite the name, does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may").

2. By contrast, courts have sometimes concluded that exacting scrutiny, at least in the context of compelled disclosure cases, is a form of intermediate review. *Tennant*, 706 F.3d at 282 ("In *Citizens United*, the Supreme Court specified that courts should apply 'exacting scrutiny' to evaluate . . . disclosure provisions . . . [t]his standard requires the government to show that the statute bears a 'substantial relation' to a 'sufficiently important' governmental interest") (quoting 558 U.S. at 366-67); *Green Party of Conn. v. Garfield*, 616 F.3d 213, 229 n.9 (2d Cir. 2010) ("the Supreme Court has recently clarified . . . [that strict scrutiny and exacting scrutiny] are different"); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 549 (4th Cir. 2010) (describing exacting scrutiny as an "intermediate level" of review); *Vt. Right to Life Comm., Inc.*, 758 F.3d at 133 n.13 (noting the Second Circuit once believed that "mandatory disclosure requirements may represent a greater intrusion into the exercise of First Amendment rights of freedom of speech and association than do reporting provisions . . . [but t]his view now appears inconsistent

with *Citizens United*") (citation and quotation marks omitted); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 787 (9th Cir. 2006) (observing that *McConnell v. FEC*, 540 U.S. 93 (2003) applied a lighter version of exacting scrutiny than the *Buckley* Court).

This confusion as to the proper understanding of exacting scrutiny, especially when applied to an area of central concern to First Amendment interests, can only be resolved by this Court. Thus, this case offers an excellent vehicle, in a case uncluttered by dueling factual or statutory interpretations, to precisely state the level of "exactness" required of courts when applying exacting scrutiny in the compelled disclosure context.

CONCLUSION

Compelled disclosure constitutes a First Amendment injury, which must be justified under the "strict test" of exacting scrutiny. The Ninth Circuit's sharp departure from this rule ought to be swiftly reversed, and the appropriate standard of review in compelled disclosure cases announced. Accordingly, this Court ought to grant the petition for a writ of *certiorari.*

Dated: July 30, 2015

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR COMPETITIVE POLITICS, *Plaintiff-Appellant*, v. KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California, *Defendant-Appellee*.	No. 14-15978 D.C. No. 2:14-cv-00636-MCE-DAD OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr.,
Chief District Judge, Presiding

Argued and Submitted
December 8, 2014 – San Francisco California

Filed May 1, 2015

Before: A. Wallace Tashima and
Richard A. Paez, Circuit Judges, and
Gordon J. Quist, Senior District Judge.*

Opinion by Judge Paez

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* The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

COUNSEL

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Kamala Harris, California Attorney General, Alexandra Robert Gordon (argued), Deputy Attorney General, San Francisco, California for Defendant-Appellee.

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OPINION

PAEZ, Circuit Judge:

In order to solicit tax deductible contributions in California, a non-profit corporation or other organization must be registered with the state's Registry of Charitable Trusts. Cal. Gov. Code § 12585. To maintain its registered status, an entity must file an annual report with the California Attorney General's Office, and must include IRS Form 990 Schedule B. The Internal Revenue Service (IRS) requires non-profit educational or charitable organizations registered under 24 U.S.C. § 501(c)(3) to disclose the names and

contributions of their "significant donors" (donors who have contributed more than $5,000 in a single year) on Form 990 Schedule B. The Center for Competitive Politics (CCP), a non-profit educational organization under § 501(c)(3), brings this lawsuit under 42 U.S.C. § 1983, seeking to enjoin the Attorney General from requiring it to file an unredacted Form 990 Schedule B. CCP argues that disclosure of its major donors' names violates the right of free association guaranteed to CCP and its supporters by the First Amendment.

CCP appeals the district court's denial of CCP's motion for a preliminary injunction to prevent the Attorney General from enforcing the disclosure requirement. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

I.

A.

CCP is a Virginia non-profit corporation, recognized by the IRS as an educational organization under § 501(c)(3). CCP's "mission is to promote and defend the First Amendment rights of free political speech, assembly, association, and petition through research, education, and strategic litigation." CCP supports itself through financial donations from contributors across the United States, including California. CCP argues that the disclosure requirement infringes its and its supporters' First Amendment right to freedom of association. CCP also argues that

federal law preempts California's disclosure requirement.

Defendant Kamala Harris, the Attorney General of California, is the chief law enforcement officer of the State of California. *See* Cal. Const. art. 5, § 13. Furthermore, under the Supervision of Trustees and Fundraisers for Charitable Purposes Act (the Act), Cal. Gov't Code § 12580 et seq., the Attorney General also has primary responsibility to supervise charitable trusts and public benefit corporations incorporated in or conducting business in California, and to protect charitable assets for their intended use. Cal. Gov't Code §§ 12598(a), 12581. The Act requires the Attorney General to maintain a registry of charitable corporations and their trustees and trusts, and authorizes the Attorney General to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Gov't Code § 12584.

An organization must maintain membership in the registry in order to solicit funds from California residents. Cal. Gov't Code § 12585. The Act requires that corporations file periodic written reports, and requires the Attorney General to promulgate rules and regulations specifying both the filing procedures and the contents of the reports. Cal. Gov't Code § 12586(b), Cal. Code Regs. tit. 11, § 300 et seq. (2014). One of the regulations adopted by the Attorney General requires that the periodic written reports

include Form 990.[1] Cal. Code Regs. tit. 11, § 301 (2014). Although many documents filed in the registry are open to public inspection, *see* Cal. Code Regs. tit. 11, § 310, Form 990 Schedule B is confidential, accessible only to in-house staff and handled separately from non-confidential documents.

The Attorney General argues that there is a compelling law enforcement interest in the disclosure of the names of significant donors. She argues that such information is necessary to determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices. *See* Cal. Corp. Code §§ 5233, 5236, 5227. At oral argument, counsel elaborated and provided an example of how the Attorney General uses Form 990 Schedule B in order to enforce these laws: having significant donor information allows the Attorney General to determine when an organization has inflated its revenue by overestimating the value of "in kind" donations. Knowing the significant donor's identity allows her to determine what the "in kind" donation actually was, as well as its real value. Thus, having the donor's information immediately available

[1] California is not alone in requiring charitable organizations to file an unredacted Form 990 Schedule B. At least Hawaii, Mississippi, and Kentucky share the same requirement. Haw. Rev. Stat. Ann. § 467B-6.5 (2014); Ky. Rev. Stat. Ann. §§ 367.650-.670 (2014); Miss. Code Ann. § 79-11-507 (2014). According to Amicus Charles Watkins, Florida and New York also require unredacted versions of Form 990 Schedule B.

allows her to identify suspicious behavior. She also argues that requiring unredacted versions of Form 990 Schedule B increases her investigative efficiency and obviates the need for expensive and burdensome audits.

B.

CCP has been a member of the registry since 2008. Since its initial registration, CCP has filed redacted versions of Form 990 Schedule B, omitting the names and addresses of its donors. In 2014, for the first time, the Attorney General required CCP to submit an unredacted Form 990 Schedule B. In response to this demand, CCP filed suit, alleging that the Attorney General's requirement that CCP file an unredacted Form 990 Schedule B amounted to a compelled disclosure of its supporters' identities that infringed CCP's and its supporters' First Amendment rights to freedom of association. CCP also alleged that a section of the Internal Revenue Code, 26 U.S.C. § 6104, which restricts disclosure of the information contained in Schedule B, preempted the Attorney General's requirement.

As noted above, the district court denied CCP's motion for a preliminary injunction, ruling that CCP was unlikely to succeed on the merits of either of its claims, and that, therefore, CCP could not show that it would suffer irreparable harm or that the public interest weighed in favor of granting the relief it requested. *Ctr. for Competitive Politics v. Harris,* No.

2:14-cv-00636-MCE-DAD, 2014 WL 2002244 (E.D. Cal. May 14, 2014).

II.

We review a district court's ruling on a motion for preliminary injunctive relief for abuse of discretion. *See FTC v. Enforma Natural Prods.,* 362 F.3d 1204, 1211-12 (9th Cir. 2004); *Harris v. Bd. of Supervisors, L.A. Cnty.,* 366 F.3d 754, 760 (9th Cir. 2004). We review findings of fact for clear error and conclusions of law de novo. *See Indep. Living Ctr. of S. Cal., Inc. v. Shewry,* 543 F.3d 1050, 1055 (9th Cir. 2008). Our review of a denial of preliminary injunctive relief must be "limited and deferential." *Harris,* 366 F.3d at 760.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC,* 555 U.S. 7, 20 (2008). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22 (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997)). Thus, CCP bears the heavy burden of making a "clear showing" that it was entitled to a preliminary injunction.

We apply exacting scrutiny in the context of First Amendment challenges to disclosure requirements.

"Disclaimer and disclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking." *Citizens United v. FEC,* 558 U.S. 310, 366 (2010) (internal citations and quotation marks omitted). Therefore, courts have "subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 366-67 (quoting *Buckley v. Valeo,* 424 U.S. 1 (1976)).[2] Exacting scrutiny encompasses a balancing test. In order for a government action to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the *actual* burden on First Amendment rights." *John Doe No. 1,* 561 U.S. at 196 (quoting *Davis v. FEC,* 554 U.S. 724, 744 (2008)) (emphasis added).

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[2] Although most of the cases in which we and the Supreme Court have applied exacting scrutiny arise in the electoral context, *see John Doe No. 1 v. Reed,* 561 U.S. 186, 196 (2010) (referring to long line of such precedent), we have also applied the exacting scrutiny standard in the context of a licensing regime. *See Acorn Invs., Inc. v. City of Seattle,* 887 F.2d 219 (9th Cir. 1989). Moreover, the foundational compelled disclosure case, *NAACP v. Ala. ex. rel. Patterson,* arose outside the electoral context. In that case, the NAACP challenged a discovery order (arising out of a contempt proceeding) that would have forced it to reveal its membership lists. 357 U.S. 449 (1958).

III.

A.

CCP argues that the Attorney General's disclosure requirement is, in and of itself, injurious to CCP's and its supporters' exercise of their First Amendment rights to freedom of association. CCP further argues that the Attorney General must have a compelling interest in the disclosure requirement, and that the requirement must be narrowly tailored in order to justify the First Amendment harm it causes. This is a novel theory, but it is not supported by our case law or by Supreme Court precedent.

In arguing that the disclosure requirement alone constitutes significant First Amendment injury, CCP relies heavily on dicta in *Buckley v. Valeo,* in which the Supreme Court stated that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. Notably, the Court said "can" and not "always does." Furthermore, in making that statement, the Court cited a series of Civil Rights Era as-applied cases in which the NAACP challenged compelled disclosure of its members' identities at a time when many NAACP members experienced violence or serious threats of violence based on their membership in that organization.[3] *Id.* The Court went on to

[3] CCP also cites extensively to these cases; however, because all of them are as-applied challenges involving the NAACP (which had demonstrated that disclosure would harm

(Continued on following page)

explain that "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the *potential* for substantially infringing the exercise of First Amendment rights." *Id.* at 66 (emphasis added). The most logical conclusion to draw from these statements and their context is that compelled disclosure, without any additional harmful *state action,* can infringe First Amendment rights when that disclosure leads to private discrimination against those whose identities may be disclosed.

Of course, compelled disclosure can also infringe First Amendment rights when the disclosure

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its members), these cases are all inapposite: *Gibson v. Fla. Legislative Investigation Comm.,* 372 U.S. 539 (1963) (holding that the NAACP was not required to comply with a subpoena and disclose membership lists to a Florida state legislative committee investigating communist activity); *NAACP v. Button,* 371 U.S. 415 (1963) (upholding NAACP's challenge to a Virginia statute barring the improper solicitation of legal business, which the state had attempted to use to prohibit the organization's operation); *Shelton v. Tucker,* 364 U.S. 479 (1960) (striking down on First Amendment grounds an Arkansas statute requiring public school teachers to disclose all organizations to which they had belonged or contributed in the past five years); *Bates v. Little Rock,* 361 U.S. 516 (1960) (invalidating an Arkansas local ordinance requiring disclosure of membership lists on First Amendment grounds as applied to the NAACP, given the substantial record of the threats and harassment that members of the organization would experience as a result of disclosure); *NAACP v. Alabama,* 357 U.S. 449 (1958) (holding that the NAACP was not required to comply with a discovery order requiring disclosure of its membership lists). In *Shelton,* while the NAACP was not a party, the primary plaintiff, Shelton, was a member of the NAACP. 364 U.S. at 484.

requirement is itself a form of harassment intended to chill protected expression. Such was the case in *Acorn Investments, Inc. v. City of Seattle,* another opinion upon which CCP bases its theory that compelled disclosure alone constitutes First Amendment injury. In *Acorn,* the plaintiff brought a First Amendment challenge to Seattle's licensing fee scheme and its concomitant requirement that panoram businesses disclose the names and addresses of their shareholders. 887 F.2d at 220. Panorams, or "peep shows," were a form of adult entertainment business strongly associated with criminal activity. *Id.* at 222-24. Seattle's disclosure requirement exclusively targeted the shareholders of panoram businesses, and the only justification that the city advanced was "accountability." *Id.* at 226. The plaintiff argued that the disclosure requirement was intended to chill its protected expression, and, given the absence of any reasonable justification for the ordinance, we held that it violated the First Amendment. *Id.* In so holding, we found especially instructive and cited as indistinguishable a Seventh Circuit case, *Genusa v. City of Peoria,* 619 F.2d 1203 (7th Cir. 1980), in which "the court concluded that there could be 'no purpose other than harassment in requiring the individual . . . stockholders to file separate statements or applications.'" *Id.* (quoting *Genusa,* 619 F.3d at 1217). However, here, there is no indication in the record that the Attorney General's disclosure requirement was adopted or is enforced in order to harass members of the registry in general or CCP in particular. Thus, the concern

animating the holdings of *Acorn* and *Genusa* does not apply here.

CCP is correct that the chilling *risk* inherent in compelled disclosure triggers exacting scrutiny – "the strict test established by *NAACP v. Alabama,*" *Buckley,* 424 U.S. at 66 – and that, presented with a challenge to a disclosure requirement, we must examine and balance the plaintiff's First Amendment injury against the government's interest. However, CCP is incorrect when it argues that the compelled disclosure *itself* constitutes such an injury, and when it suggests that we must weigh that injury when applying exacting scrutiny. Instead, the Supreme Court has made it clear that we must balance the "seriousness of the *actual* burden" on a plaintiff's First Amendment rights. *John Doe No. 1,* 561 U.S. at 196 (emphasis added); *Chula Vista Citizens for Jobs & Fair Competition v. Norris,* No. 12-55726, ___ F.3d ___, 2015 WL 1499334, at *13 (9th Cir. Apr. 3, 2015) (en banc) (applying this standard in evaluating a First Amendment challenge to a disclosure requirement under exacting scrutiny). Here, CCP has not shown any "actual burden" on its freedom of association.

B.

CCP's creative formulation, however, does affect the scope of its challenge. In *John Doe No. 1,* signatories

of a referendum petition challenged the Washington Public Records Act (PRA),[4] which permitted public inspection of such petitions. 561 U.S. at 191. The plaintiffs sought to prevent the disclosure of the names of those who had signed a referendum petition to challenge and put to a popular vote a Washington state law that had extended benefits to same-sex couples. *Id.* The complaint charged both that the PRA was unconstitutional as to the referendum petition to overturn the same-sex benefits law and as to referendum petitions generally. *Id.* at 194. Thus, there was some dispute as to whether their challenge was best construed as an as-applied or as a facial challenge. *Id.* The Court explained that "[t]he label is not what matters." *Id.* Rather, because the "plaintiffs' claim and the relief that would follow . . . reach[ed] beyond the particular circumstances of these plaintiffs," they were required to "satisfy our standards for a facial challenge to the extent of that reach." *Id.*

In formulating its claim such that the disclosure requirement itself is the source of its alleged First Amendment injury, CCP's claim "is not limited to [its] particular case, but challenges application of the law more broadly to all [registry submissions]." *Id.* Were we to hold that the disclosure requirement at issue here itself infringes CCP's First Amendment rights, then it would necessarily also infringe the rights of all organizations subject to it. Even though CCP only

[4] Wash. Rev. Code § 42.56001 et seq.

seeks to enjoin the Attorney General from enforcing the disclosure requirement against itself, the Attorney General would be hard-pressed to continue to enforce an unconstitutional requirement against any other member of the registry.[5] Therefore, because "the relief that would follow . . . reach[es] beyond the particular circumstances of th[is] plaintif[f,] [CCP's claim] must . . . satisfy our standards for a facial challenge to the extent of that reach." *Id.* (citing *United States v. Stevens,* 559 U.S. 460, 472-73 (2010)).

"Which standard applies in a typical [facial challenge] is a matter of dispute that we need not and do not address. . . ." *Stevens,* 559 U.S. at 472. The Supreme Court has at different times required plaintiffs bringing facial challenges to show "that no set of circumstances exists under which [the challenged law] would be valid," *United States v. Salerno,* 481 U.S. 739, 745 (1987), or that it lacks any "plainly legitimate sweep," *Washington v. Glucksberg,* 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring) (internal quotation marks omitted). Alternatively, in the First Amendment context, the Court has sometimes employed a different standard to evaluate facial overbreadth challenges, "whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens,* 559 U.S. at 473 (quoting *Wash. State Grange v.*

[5] CCP conceded at oral argument that its challenge is best understood as a facial challenge.

Wash. State Republican Party, 552 U.S. 442, 449, n. 6 (2008)).

The least demanding of these standards is that of the First Amendment facial overbreadth challenge. Because CCP cannot show that the regulation fails exacting scrutiny in a "substantial" number of cases, "judged in relation to [the disclosure requirement's] plainly legitimate sweep," we need not decide whether it could meet the more demanding standards of *Salerno* and *Glucksberg.*

C.

Although not for the reasons that CCP posits, *Buckley v. Valeo* is instructive for assessing CCP's facial challenge. In *Buckley,* the plaintiffs challenged the disclosure requirements of the Federal Election Campaign Act[6] as overbroad on two grounds. 424 U.S. at 60-61. The first ground was that the disclosure requirement applied to minor party members, such as members of the Socialist Labor Party, who might face harassment or threats as a result of the disclosure of their names. *Id.* The plaintiffs sought a blanket exemption for minor parties. The second ground of the *Buckley* plaintiffs' challenge was that the thresholds triggering disclosure were too low, because the requirement attached to any donation of $100 or more (with additional reporting requirements to a

[6] Then codified at 2 U.S.C. § 431 et seq., now at 52 U.S.C. § 30101 et seq.

Committee, though not to the public, for donations over $10). *Id.*

After applying exacting scrutiny, the *Buckley* Court rejected the plaintiffs' minor party challenge because "no appellant [had] tendered record evidence of the sort proffered in *NAACP v. Alabama,*" and so had failed to make the "[r]equisite [f]actual [s]howing." *Id.* at 69-71. Where the record evidence constituted "[a]t best . . . the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure . . . the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." *Id.* at 71-72. The Court, however, left open the possibility that if a minor party plaintiff could show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties," then it could succeed on an as-applied challenge. *Id.* at 74. Thus, even where, unlike here, the plaintiffs adduced some evidence that their participation would be chilled, the *Buckley* Court rejected a facial challenge.

Further undermining CCP's argument, the *Buckley* Court also rejected the plaintiffs' "contention, based on alleged overbreadth, . . . that the monetary thresholds in the record-keeping and reporting provisions lack[ed] a substantial nexus with the claimed governmental interests, for the amounts involved [were] too low." *Id.* at 82. The Court noted that they

were "indeed low," but concluded that it "[could not] say, on this bare record, that the limits designated [were] wholly without rationality," because they "serve[d] informational functions," and "facilitate[d] enforcement" of the contribution limits and disclosure requirements. *Id.* at 83. Thus, the *Buckley* Court rejected the plaintiffs' overbreadth challenge both with respect to minor parties and the donation thresholds.

Engaging in the same balancing that the *Buckley* Court undertook, we examine the claims and interests the parties assert here. In contrast to the *Buckley* plaintiffs, CCP does not claim and produces no evidence to suggest that their significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirement.[7] CCP has not demonstrated any "actual burden," *John Doe No. 1,* 561 U.S. at 196, on its or its supporters' First Amendment rights. As discussed *supra,* contrary to CCP's contentions, no case has ever held or implied

[7] The minor parties in *Buckley* feared harassment because they advocated unpopular positions. CCP has not alleged that its supporters would face a similar backlash. However, amicus National Organization for Marriage contends that, like the minor party donors and members in *Buckley,* its significant donors could face retaliatory action if their names were ever released to the public.

that a disclosure requirement in and of itself constitutes First Amendment injury.[8]

Furthermore, unlike in *John Doe No. 1* or in other cases requiring the disclosure of the names of petition signatories, in this case, the disclosure would not be public. The Attorney General keeps Form 990 Schedule B confidential. Although it is certainly true that non-public disclosures can still chill protected activity where a plaintiff fears the reprisals of a government entity, CCP has not alleged any such fear here. CCP instead argues that the Attorney General's systems for preserving confidentiality are not secure, and that its significant donors' names might be inadvertently accessed or released. Such arguments are speculative, and do not constitute evidence that would support CCP's claim that disclosing its donors to the Attorney General for her confidential use

[8] Contrary to CCP's contention, *Talley v. California,* 362 U.S. 60 (1960), is not such a case. In *Talley,* the Supreme Court struck down a law that outlawed the distribution of hand-bills that did not identify their authors. *Id.* at 64. In so doing, the Court did not explicitly apply exacting scrutiny, though it cited *NAACP v. Alabama* and *Bates. Id.* at 65. The basis for the Court's holding was the historic, important role that anonymous pamphleteering has had in furthering democratic ideals. *Id.* at 64 ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression . . . Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."). Thus, in that case, the Court was certain of the First Amendment harm that the ordinance imposed.

would chill its donors' participation.[9] *See United States v. Harriss,* 347 U.S. 612, 626 (1954).[10]

On the other side of the scale, as CCP concedes, the Attorney General has a compelling interest in enforcing the laws of California. CCP does not contest

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[9] CCP also argues that only an informal policy prevents the Attorney General from publishing the forms and requires her to take appropriate measures to ensure the forms stay confidential. However, where a record is exempt from public disclosure under federal law, as is Form 990 Schedule B, it is also exempt from public inspection under the California Public Records Act. Cal. Gov't Code § 6254(k) (2015). Thus, it appears doubtful that the Attorney General would ever be required to make Form 990 Schedule B publicly available. Moreover, while the exemption under § 6254(k) is permissive, and not mandatory, *Marken v. Santa Monica Malibu Unified Sch. Dist.,* 136 Cal. Rptr. 3d 395, 405 (Ct. App. 2012), where public disclosure is *prohibited* under state or federal law, the responsible California agency is also prohibited from public disclosure. *See* Cal. Gov't Code § 6254(f) ("This section shall not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."). As public disclosure (distinct from disclosure to the Attorney General) of significant donor information is not authorized by federal law, it is likely not authorized by California law, either. However, because CCP has not provided any evidence that even public disclosure would chill the First Amendment activities of its significant donors, the potential for a future change in the Attorney General's disclosure policy does not aid CCP in making its facial challenge.

[10] In *Harriss,* the Supreme Court rejected a First Amendment challenge to an act imposing disclosure requirements on lobbyists, where plaintiffs presented "[h]ypothetical borderline situations" where speech might be chilled, because "[t]he hazard of such restraint is too remote" to require striking down an otherwise valid statute.

that the Attorney General has the power to require disclosure of significant donor information as a part of her general subpoena power. Thus, the disclosure regulation has a "plainly legitimate sweep." *Stevens,* 559 U.S. at 473. CCP argues instead that the disclosure requirement does not bear a substantial enough relationship to the interest that the Attorney General has asserted in the disclosure, and that the Attorney General should be permitted only to demand the names of significant donors if she issues a subpoena. CCP's argument that the disclosure requirement exceeds the scope of the Attorney General's subpoena power is similar to the *Buckley* plaintiffs' argument that the low monetary thresholds exceeded the scope of Congress's legitimate regulation.

Like the *Buckley* Court, we reject this argument, especially in the context of a facial challenge. The Attorney General has provided justifications for employing a disclosure requirement instead of issuing subpoenas. She argues that having immediate access to Form 990 Schedule B increases her investigative efficiency, and that reviewing significant donor information can flag suspicious activity. The reasons that the Attorney General has asserted for the disclosure requirement, unlike those the City of Seattle put forth in *Acorn,* are not "wholly without rationality." *See Buckley,* 424 U.S. at 83. Faced with the Attorney General's "unrebutted arguments that only modest burdens attend the disclosure of a typical [Form 990 Schedule B]," we reject CCP's "broad challenge," *John Doe No. 1,* 561 U.S. at 201. We conclude that the

disclosure requirement bears a "substantial relation" to a "sufficiently important" government interest. *See Citizens United,* 558 U.S. at 366 (internal citations omitted).

However, as the Supreme Court did in *Buckley* and *John Doe No. 1,* we leave open the possibility that CCP could show "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties" that would warrant relief on an as-applied challenge. *See McConnell v. FEC,* 540 U.S. 93, 199 (2003) (rejecting a facial challenge, but leaving open the possibility of a future as-applied challenge).

In sum, CCP's First Amendment facial challenge to the Attorney General's disclosure requirement fails exacting scrutiny.

IV.

CCP also contends that federal tax law preempts the Attorney General's disclosure requirement. CCP argues that Congress intended to protect the privacy of the donor information of non-profit organizations from all public disclosure when it added 26 U.S.C. § 6104, part of the Pension Protection Act of 2006, and that, therefore, permitting state attorneys general to require this information from non-profit organizations registered under § 501(c)(3) would conflict with that purpose. CCP's argument is unavailing.

Federal law is supreme and Congress can certainly preempt a state's authority. However, principles of federalism dictate that we employ a strong presumption against preemption. *Arizona v. United States,* 132 S. Ct. 2492, 2500 (2012). Therefore, federal law will only preempt state law if such preemption was "the clear and manifest purpose of Congress." *Id.* at 2501. Congress can express that intent explicitly, or the intent can be inferred when a state law irreconcilably conflicts with a federal law. *Id.* Alternatively, "the intent to displace state law altogether can be inferred" when the federal government has established a legislative framework "so pervasive that Congress left no room for states to supplement it." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)). A state law can be in conflict with a federal law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*; *see also Barnett Bank of Marion Cnty. N.A. v. Nelson,* 517 U.S. 25, 31 (1996) (holding that such an obstacle can arise even where the two laws are not directly in conflict).

CCP argues that 26 U.S.C. § 6104(c)(3) expressly preempts the Attorney General's disclosure requirement. That section provides:

> Upon written request by an appropriate State officer, the Secretary may make available for inspection or disclosure returns and return information of any organization

> described in section 501 (c) (*other than organizations described in paragraph (1) or (3) thereof*) for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations.

(emphasis added). CCP reads this language to ban the Secretary from sharing the tax information of § 501(c)(3) organizations with state attorneys general. The language is better construed as a limited grant of authority than as a prohibition. However, even if CCP's reading were accurate, a statute restricting the disclosures that the Commissioner of the IRS may make does not expressly preempt the authority of state attorneys general to require such disclosures directly from the non-profit organizations they are tasked with regulating.

CCP further argues that the Attorney General's disclosure requirement conflicts with the purpose of § 6104, but neither of the two subsections of § 6104 upon which CCP relies can support its argument. Neither subsection indicates that Congress sought to regulate states' access to this information for the purposes of enforcing their laws, or that Congress sought to regulate the actions of any entity other than the IRS. The first subsection allows for the public availability of the tax returns of certain organizations and trusts, but goes on to qualify that "[n]othing in this subsection shall *authorize the Secretary* to disclose the name or address of any

contributor to any organization or trust." 26 U.S.C. § 6104(b) (emphasis added). The second subsection lays out disclosure requirements for § 501(c)(3) organizations generally, and then provides an exception to those requirements, such that they "shall not require the disclosure of the name or address of any contributor to the organization." *Id.* § 6104(d)(3)(A).

These subsections may support an argument that Congress sought to regulate the disclosures that the IRS may make, but they do not broadly prohibit other government entities from seeking that information directly from the organization. Nor do they create a pervasive scheme of privacy protections. Rather, these subsections represent exceptions to a general rule of disclosure. Thus, these subsections do not so clearly manifest the purpose of Congress that we could infer from them that Congress intended to bar state attorneys general from requesting the information contained in Form 990 Schedule B from entities like CCP.

The district court relied on our opinion in *Stokwitz v. United States,* 831 F.2d 893 (9th Cir. 1987), in holding that CCP was unlikely to succeed on its preemption argument. In that case, an attorney for the U.S. Navy was charged with misconduct and his personal tax returns were seized. *Id.* at 893. He argued that 26 U.S.C. § 6103, regulating public disclosure of such documents, forbade their use in the proceedings against him. *Id.* at 894. We disagreed: "[c]ontrary to appellant's contention, there is no indication in either the language of section 6103 or its

legislative history that Congress intended to enact a general prohibition against public disclosure of tax information." *Id.* at 896. Instead, the legislative history of the section revealed that "Congress's overriding purpose was to curtail loose disclosure practices by the IRS." *Id.* at 894. Here, since nothing in the legislative history of § 6104 suggested that its purpose was in any way different from that of § 6103, the district court concluded that the Attorney General's disclosure requirement was likewise not preempted.

While CCP is correct that Congress added § 6104 thirty years after § 6103, and that, therefore, Congress's intent may have differed, our opinion in *Stokwitz* is nevertheless instructive. The very legislative history to which CCP directs us describes the operation of sections 6103 and 6104 in tandem. *See* Staff of the Joint Committtee on Taxation, 109th Cong., Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" at 327-29 (Comm. Print 2006). Nothing in the legislative history suggests that Congress sought to extend the regulatory scheme it imposed on the IRS with § 6103 to other entities when it added § 6104. Moreover, when two sections operate together, and when Congress clearly sought to regulate the actions of a particular entity with one section, it is not unreasonable to infer that Congress sought to regulate the same entity with the other. Therefore, *Stokwitz* supports our conclusion that § 6104, like § 6103, is intended to regulate the IRS, and not to ban all means of accessing donor information.

Section 6104 does not so clearly manifest the purpose of Congress that we could infer from it that Congress intended to bar state attorneys general from requesting the information contained in Form 990 Schedule B. *See Arizona,* 132 S.Ct. at 2501. CCP's preemption claim must fail.

V.

In order to prevail on a motion for a preliminary injunction, a plaintiff must show a likelihood of success on the merits and that irreparable harm is not only possible, but likely, in the absence of injunctive relief. *Winter,* 555 U.S. at 20. CCP has not shown a likelihood of success on the merits. Because it is not likely that the Attorney General's disclosure requirement injures CCP's First Amendment rights, or that it is preempted by federal law, it is not likely that CCP will suffer irreparable harm from enforcement of the requirement. Thus, CCP cannot meet the standard established by *Winter*.

For the foregoing reasons, the district court's denial of CCP's motion for a preliminary injunction is **AFFIRMED**.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTER FOR COMPETITIVE POLITICS, Plaintiff-Appellant, v. KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California, Defendant-Appellee.	No. 14-15978 D.C. No. 2:14-cv-00636-MCE-DAD Eastern District of California, Sacramento ORDER (Filed May 11, 2015)

Before: TASHIMA and PAEZ, Circuit Judges and QUIST,* Senior District Judge.

Appellant's unopposed motion to stay the mandate is GRANTED. Fed. R. App. P. 41(d)(2)(B). Appellant's motion for preliminary injunctive relief pending filing of a petition for a writ of certiorari is DENIED.

* The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTER FOR COMPETITIVE POLITICS, Plaintiff-Appellant, v. KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California, Defendant-Appellee.	No. 14-15978 D.C. No. 2:14-cv-00636-MCE-DAD Eastern District of California, Sacramento ORDER (Filed Jan. 6, 2015)

Before: TASHIMA and PAEZ, Circuit Judges and QUIST,* Senior District Judge.

Appellant Center for Competitive Politics' Motion to supplement the record and for an injunction (Dkt. 29-1) is **GRANTED** as follows:

The Attorney General shall take no action against the Center for Competitive Politics for failure to file an un-redacted IRS Form 990 Schedule B pending further order of this court.

* The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CENTER FOR COMPETITIVE POLITICS, Plaintiff, v. KAMALA HARRIS, Defendant.	No. 2:14-cv-00636-MCE-DAD **MEMORANDUM AND ORDER**

On March 7, 2014, Plaintiff Center for Competitive Politics ("Plaintiff") filed a Complaint for Declaratory and Injunctive Relief against Defendant Kamala Harris in her official capacity as Attorney General of the State of California ("Defendant"). Compl., ECF No. 1. Plaintiff then filed a motion for a preliminary injunction seeking to enjoin Defendant from requiring an unredacted copy of Plaintiff's IRS Form 990 Schedule B as a condition of soliciting funds in California. ECF No. 9. Defendant opposed the Motion, ECF No. 10, and the Court held a hearing on the Motion on April 17, 2014. At the hearing, the Court took the Motion under submission; this written order follows. For the following reasons, Plaintiff's Motion for a Preliminary Injunction, ECF No. 9, is DENIED.

BACKGROUND[1]

Plaintiff is a Virginia nonprofit corporation recognized by the Internal Revenue Service as a § 501(c)(3) educational organization. To support its activities, Plaintiff solicits charitable contributions nationwide. In order to legally solicit tax-deductible contributions in California, an entity must be registered with the state's Registry of Charitable Trusts ("Registry"), which is administered by California's Department of Justice. To maintain membership in the Registry, nonprofit corporations must file annual periodic written reports with the state Attorney General, which include the Annual Registration Renewal Fee Report as well as the Internal Revenue Service Form 990. Form 990 has a supplement, Schedule B, which lists the names and addresses of an organization's contributors.[2]

Plaintiff has been a member of the Registry since 2008. On January 9, 2014, Plaintiff filed its Annual Registration Renewal Fee Report with Defendant, including a copy of its Form 990 and a redacted

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[1] The facts are taken, often verbatim, from Plaintiff's Complaint, ECF No. 1, and Motion, ECF No. 9, unless stated otherwise.

[2] To reduce the reporting burden on filers, Defendant adopted IRS Form 990 as the primary reporting document for charitable entities required to file annual reports with the Registry. Opp'n, ECF No. 10 at 11 (citing Cal. Code Regs. tit. 11, § 301). The Schedule B filed by public charities is treated as a confidential document and is not made available for public viewing. *See id.*; ECF No. 10-8 at 2-3.

version of its Schedule B omitting the names and addresses of its contributors. Plaintiff subsequently received a letter from Defendant dated February 6, 2014 ("Letter"). *See* ECF No. 1-1. In the Letter, Defendant acknowledged receipt of Plaintiff's periodic written report, but stated that "[t]he filing is incomplete because the copy of [its] Schedule B, Schedule of Contributors, does not include the names and addresses of contributors." *Id.* (emphasis omitted). The Letter states that "[t]he Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers" and requires that Plaintiff must "[w]ithin 30 days of the date of this letter . . . submit a complete copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service." *Id.* (emphasis omitted).

Plaintiff seeks to enjoin Defendant from requiring an unredacted copy of its IRS Form 990 Schedule B as a condition of soliciting funds in California. Plaintiff argues that Defendant's demand is preempted by federal law and that it unconstitutionally infringes upon the freedom of association. Mot., ECF No. 9.

STANDARD

A preliminary injunction is an extraordinary remedy, and the moving party has the burden of proving the propriety of such a remedy by clear and convincing evidence. *See Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 442 (1974). The party

requesting preliminary injunctive relief must show that "he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter*). To grant preliminary injunctive relief, a court must find that "a certain threshold showing is made on each factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

Alternatively, under the so-called sliding scale approach, as long as the Plaintiffs demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in Plaintiffs' favor. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-36 (9th Cir. 2011) (concluding that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after *Winter*).

These two alternatives represent two points on a sliding scale, pursuant to which the required degree of irreparable harm increases or decreases in inverse correlation to the probability of success on the merits. *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998); *United States v. Nutri-cology, Inc.*, 982 F.2d 1374, 1376 (9th Cir. 1985). Under either formulation of the test for granting a preliminary injunction, however,

the moving party must demonstrate a significant threat of irreparable injury. *Oakland Tribune, Inc. v. Chronicle Publ'g. Co.*, 762 F.2d 1374 (9th Cir. 1985).

ANALYSIS

A. Likelihood of Success on the Merits

Through this action, Plaintiff seeks to block Defendant from requiring that it provide an unredacted copy of Plaintiff's IRS Form 990 Schedule B to Defendant as a condition of soliciting funds in California. Plaintiff asserts that it will prevail on the merits on two separate grounds. First, Plaintiff argues that the Internal Revenue Code shields the information that Defendant seeks and that Defendant's demand is therefore preempted by federal law. Second, Plaintiff contends that Defendant's demand unconstitutionally infringes upon its freedom of association. The Court will address each argument in turn.

1. Federal Law

As discussed above, Plaintiff files tax information on Form 990 with the IRS. While some of Plaintiff's tax return information is available to the public, the IRS does not publically disclose the names or addresses of any of Plaintiff's contributors. *See* 26 U.S.C. § 6104(b), (d)(3) (providing that the public inspection copy of 501(c)(3) organization's tax information "shall not require the disclosure of the name or address of any contributor to the organization").

Federal law also prevents the Secretary of the Treasury from releasing the names and addresses of contributors to section 501(c)(3) organizations to state agencies. *See* 26 U.S.C. § 6104(c)(3) ("Upon written request by an appropriate State officer, the Secretary may make available for inspection or disclosure returns and return information of any organization described in section 501(c) *(other than organizations described in paragraph (1) or (3) thereof)* for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations.") (emphasis added). Through this statutory language, Plaintiff argues that federal law preempts Defendant's request for a copy of its unredacted Schedule B form.

The Supreme Court has articulated two cornerstones of its preemption jurisprudence. "First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, in all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal citations and quotations omitted). "Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it." *Viva! Int'l Voice For Animals v. Adidas*

Promotional Retail Operations, Inc., 162 P.3d 569, 572 (Cal. 2007) (internal citations omitted). Here, Plaintiff contends that because Defendant's actions contravene the clear intent of Congress, Defendant's actions are invalid through express preemption, field preemption, and conflict preemption.

2. Express Preemption

Relying on 26 U.S.C. § 6104, Plaintiff contends that the Internal Revenue Code ("IRC") "expressly preempts a state attorney general from compelling Plaintiff to hand over its Schedule B as filed." Mot., ECF No. 9-1 at 13-14. "[E]xpress preemption arises when Congress defines explicitly the extent to which its enactments pre-empt state law. . . . and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one." *Viva! Int'l Voice For Animals*, 162 P.3d at 571-72.

Plaintiff's argument is unsupported by the text of the IRC. The IRC only bars the *IRS* from providing the requested Schedule B to state agencies, it does not address whether a state official, such as Defendant, may request such information directly from an organization such as Plaintiff. *Cf. Stokwitz v. United States*, 831 F.2d 893, 896 (9th Cir. 1987) (noting that "there is no indication in either the language of section 6103 or its legislative history that Congress intended to enact a general prohibition against public disclosure of tax information"). Therefore, because Congress did not express any intent to prevent state

agencies from making requests for tax information such as Defendant's directly from 501(c)(3) organizations in the language of Section 6104, or any other section of the IRC, Plaintiff may not rely on express preemption.

3. Field and Conflict Preemption

Plaintiff also argues that Defendant's action is preempted because "Congress has well occupied the field regarding the disclosure of federal tax returns" and that "the [Defendant's] actions stand[ ] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Mot., ECF No. 9-1 at 15-16 (internal citation omitted). "Even without an express provision for preemption, . . . [w]hen Congress intends federal law to 'occupy the field,' state law in that area is preempted. And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute." *Crosby*, 530 U.S. 363, 372-73 (2000).

Plaintiff asserts that because the "IRC comprehensively regulates how confidential tax return information must be treated – and assesses significant sanctions for violations[,]" Defendant's action, "if fully implemented, would interfere with Congress's occupation of the field." ECF No. 9-1 at 15-16. Plaintiff points only to the statutory language of the IRC, specifically sections 6103 and 6104, to support its contention. *See* ECF No. 9-1 at 15. An examination of

the IRC's legislative history reveals that Congress's intent in enacting "the elaborate disclosure procedures of section 6103" was not directed toward preventing actions such as Defendant's, but instead to "[control] the distribution of information the IRS receives directly from the taxpayer-information the taxpayer files under compulsion and the threat of criminal penalties." *Stokwitz*, 831 F.2d at 895 (citing the Congressional Record). The Ninth Circuit explained that

> [t]he legislative history of section 6103 indicates Congress's overriding purpose was to curtail loose disclosure practices *by the IRS*. Congress was concerned that IRS had become a "lending library" to other government agencies of tax information filed with the IRS, and feared the public's confidence in the privacy of returns filed with IRS would suffer. The Senate Report explained: "[T]he IRS probably has more information about more people than any other agency in this country. Consequently, almost every other agency that has a need for information . . . logically seeks it from the IRS." Congress also sought to end "the highly publicized attempts to use the Internal Revenue Service for political purposes" involving delivery of tax returns to the White House by the IRS; *and to regulate "the flow of tax data from the IRS to State Governments*." In short, section 6103 was aimed at curtailing abuse by government agencies of information filed with the IRS. At the same time, Congress realized tax

> information on file with the IRS was often important to other government agencies. Revised section 6103 represents a legislative balancing of the right of taxpayers to the privacy of tax information in the hands of the IRS and the legitimate needs of others for access to that information.

Stokwitz, 831 F.2d at 894-95 (9th Cir. 1987) (internal citations and quotations omitted) (emphasis added). The Ninth Circuit also noted that "the statutory definitions of 'return' and 'return information' to which the entire statute relates, confine the statute's coverage to information that is *passed through the IRS*," not information provided by a taxpayer to another entity. *Id.* at 895-96 (emphasis added). Thus, it is clear that Congress's intent in regulating how confidential tax return information must be treated was to restrict how tax information is obtained from the IRS, not from taxpayers directly.

Nonetheless, Plaintiff argues that "[Defendant's] interpretation [of section § 6104] would render [it] devoid of any practical effect [and that] Congress's purpose would be plainly frustrated if state officials regulating charitable solicitations could unilaterally compel Schedule B information from tax-exempt organizations." Reply, ECF No. 11 at 6-7. However, in *Stokwitz*, the Ninth Circuit rejected a similar argument. In that case, the appellant argued that the "purpose of the protection afforded tax data by sections 6103 and 7213 'would be meaningless if such protection were not extended to copies of tax returns

and to the pertinent data and information in the hands of the taxpayer.'" *Stokwitz*, 831 F.2d at 896. The Ninth Circuit rejected that contention noting that "[i]t is quite clear . . . that this was not Congress's view when it revised section 6103." *Id.* Citing the Senate report, the Court concluded that Congress "disclaimed any intention 'to limit the right of an agency (or other party) to obtain returns or return information directly from the taxpayer.'" *Id.* Therefore, there is little doubt that Congress's intent was to regulate the IRS, not state agencies.

Plaintiff's attempts to distinguish *Stokwitz* are unavailing. Although the provision in question, namely section § 6104, was added in 2006, there is no legislative record to suggest that Congress intended to deviate from its intent as expressed in *Stokwitz*. Absent any evidence that Congress intended to prevent state Attorneys General from obtaining the requested information directly from organizations, Plaintiff cannot meet its burden in showing that it is likely to succeed on the merits of its preemption argument. Therefore, a preliminary injunction on the basis of preemption is not warranted.

4. Freedom of Association

Plaintiff also argues that it will prevail on the merits because Defendant's demand unconstitutionally infringes upon its First Amendment freedom of association. Specifically, Plaintiff objects to Defendant's demand because "[f]inancial support is the

lifeblood of organizations engaged in public debate" and because Defendant's action "threatens to curtail that necessary supply of resources." Mot., ECF No. 9-1 at 18. Plaintiff argues that while "a government may compel certain disclosures in certain circumstances[,] . . . associational freedom may [only] be limited, so long as the state does so narrowly and specifically, in pursuit of an obvious and compelling government interest." *Id.* at 17. Thus, Plaintiff argues that because "the Attorney General has provided no particularized rationale for obtaining CCP's donor information[,]" Defendant's request violates the First Amendment. Reply, ECF No. 11 at 11.

However, in the Ninth Circuit, courts first address whether a plaintiff has presented a prima facie showing of arguable first amendment infringement. *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009). Such a showing requires Plaintiff to demonstrate that Defendant's action "will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Brock v. Local 375, Plumbers Int'l Union of Am., AFL-CIO*, 860 F.2d 346, 350 (9th Cir. 1988) (citations omitted); *see also Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-61 (9th Cir.1991). "This must be shown by presentation of objective and articulable facts, which go beyond broad allegations or subjective fears." *Van Fossen v. United States*, CV-F-93-137-DLB, 1993 WL 655008 at *2 (E.D. Cal. Dec. 27, 1993)

(citing *Brock*, 860 F.2d at 350). "A merely subjective fear of future reprisals is an insufficient showing of infringement of associational rights." *Id.* (citing *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976)). If Plaintiffs "can make the necessary prima facie showing, the evidentiary burden will then shift to" Defendant. *Brock*, 860 F.2d at 350.

Rather than argue that Plaintiff has satisfied the prima facie requirement, Plaintiff disputes its applicability arguing that *Brock* and *Dole* were factually distinguishable labor cases.[3] Instead, Plaintiff argues that the Court should follow a line of cases where plaintiffs were not required to first make a prima facie showing of first amendment infringement. Plaintiff points to *Talley v. California*, 362 U.S. 60, 65 (1960) and *Acorn Investments v. City of Seattle*, 887 F.2d 219, 225 (9th Cir. 1989) as examples of such cases. However, these cases are distinguishable from the facts at hand as they pertain to instances where members of groups would be publicly identified and, as a result, face retaliation. *See Talley*, 362 U.S. at 65 (relying on earlier holdings where the "identification [of group members] and fear of reprisal might deter perfectly peaceful discussions of public matters of importance"); *Acorn Investments*, 887 F.2d at 225 (striking down a city ordinance requiring the public disclosure of the names and addresses

[3] The Ninth Circuit has also applied this first amendment framework, however, in non-labor cases. *See, e.g., Perry v. Schwarzenegger*, 591 F.3d 1126, 1140 (9th Cir. 2009).

of shareholders of corporations because it may have a chilling effect on expression). In contrast, here, Plaintiff is challenging Defendant's request to view Plaintiff's Schedule B in confidence and has not alleged that its members would face any retaliation or reprisals.

Brock provides a more analogous set of facts. In that case, the Secretary of Labor, pursuant to his statutory powers, "initiated a compliance audit" of Local 375 after the Department of Labor discovered a discrepancy. *Brock*, 860 F.2d at 348. The Secretary of Labor subpoenaed "all records pertaining to the fund" and the union refused to comply, arguing that doing so would violate its First Amendment rights. *Id.* The Ninth Circuit held that in order to prevail on a freedom of association claim in the face of a "lawful governmental investigation[,]" the union must demonstrate a "prima facie showing of arguable first amendment infringement." *Id.* at 349-51.

Based on the evidence provided to the Court, Defendant's request appears to be justified by a legitimate law enforcement purpose pursuant to Defendant's role as the chief regulator of charitable organizations in the state. *See* Cal. Gov't Code §§ 12598(a), 12581. Under California's Supervision of Trustees and Fundraisers for Charitable Purposes Act, Defendant is charged with supervising charitable trusts and public benefit corporations incorporated in, or conducting business in California and to protect charitable assets for their intended use. *See* Opp'n, ECF No. 10 at 10 (citing Cal. Gov't Code §§ 12598(a),

12581). In addition, Defendant has "broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities." Cal. Gov't Code § 12598(a). Defendant may investigate transactions and relationships to ascertain whether the purposes of the corporation or trust are being carried out. Opp'n, ECF No. 10 at 10. In order to do so, Defendant may require any agent, trustee, fiduciary, beneficiary, institution, association, or corporation, or other person to appear and to produce records. *Id.* (citing Cal. Gov't Code § 12588). Such an order "shall have the same force and effect as a subpoena." Cal. Gov't Code § 12589. Defendant may also require periodic written reports from charitable organizations. *See* Cal. Gov't Code § 12586. Further, pursuant to the Supervision of Trustees and Fundraisers for Charitable Purposes Act, Defendant maintains the Registry, and in so doing, has the power to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." *Id.* (citing Cal. Gov't Code § 12584). In light of Defendant's role as the state's chief regulator of charitable organizations, Defendant's request is more analogous to the facts in *Brock* and *Dole* than the challenges to ordinances in *Talley* and *Acorn Investments*. Therefore, the Court concludes that the prima facie showing requirement as articulated by the Ninth Circuit in *Brock* is applicable in this case.

Here, Plaintiff has not articulated any, objective specific harm that will result to its members if

Defendant is permitted to require that Plaintiff produce an unredacted copy of its Schedule B. Plaintiff only suggests that if it is forced to comply with Defendant's demand, such an action "threatens to curtail" its financial support. ECF No. 9-1 at 18. As Defendant notes, "[m]ere speculation about or opinion of the possible consequences of such disclosure is entirely inadequate" to support a prima facie showing of arguable first amendment infringement. ECF No. 10 at 18; *see Dole*, 921 F.2d at 974. For example, in *Dole*, the Ninth Circuit held that "two letters from members who stated that they would no longer attend meetings" satisfied the prima facie showing requirement and "clearly suggest[ed] 'an impact on . . . the members' associational rights.'" *Dole*, 950 F.2d at 1460 (citing *Brock*, 860 F.2d at 350). Plaintiff did not make such a showing here. Therefore, because Plaintiff failed to establish a prima facie showing of arguable first amendment infringement, it has not demonstrated that it is likely to prevail on the merits at this point in the proceeding.

Moreover, even if Plaintiff had presented a prima facie showing, based on the evidence before the Court at this time, Defendant's request appears to be justified by compelling state interests and is narrowly tailored to achieve those interests. Defendant's interest in performing her regulatory and oversight function as delineated by state law is compelling and substantially related to the disclosure requirement. Defendant points out that the requested information allows her to determine "whether an organization has

violated the law, including laws against self-dealing, Cal. Corp. Code § 5233; improper loans, *id.* § 5236; interested persons, *id.* § 5227; or illegal or unfair business practices, Cal. Bus. & Prof. Code § 17200." Opp'n, ECF No. 10 at 19-20. Further, the required disclosure appears to be narrowly tailored with respect to Plaintiff's right of association because the Registry is kept confidential and Plaintiff's Schedule B would not be disclosed publically. On this ground too, then, Plaintiff failed to show it is likely to succeed on the merits.

B. Irreparable Harm, Balancing the Hardships, and Public Interest

Plaintiff asserts that it will suffer irreparable injury through the loss of its First Amendment freedoms. While "[a]n alleged constitutional infringement will often alone constitute irreparable harm . . . In this case, however, the constitutional claim is too tenuous to support" the issuance of a preliminary injunction. *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984). Because "the Court finds [that] no serious First Amendment questions are raised. . . . there is no risk of irreparable injury to Plaintiffs' contributors." *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d at 1226; *see Dex Media W., Inc. v. City of Seattle*, 790 F. Supp. 2d 1276, 1280-81 (W.D. Wash. 2011) (stating that "[b]ecause the court ultimately concludes that Plaintiffs fail to establish either a likelihood of irreparable injury or that a preliminary injunction would

be in the public interest"). Based on the evidence before it, the Court does not find that Plaintiff will suffer irreparable harm if a preliminary injunction is not issued. Moreover, in light of the facts as presented to the Court at this stage in the proceeding, it is in the public interest that Defendant continues to serve chief regulator of charitable organizations in the state in the manner sought.

CONCLUSION

Because Plaintiff failed to demonstrate that it is likely to succeed on the merits or that Defendant's action will cause a significant threat of irreparable injury, Plaintiff's Motion for Preliminary Injunction, ECF No. 9, is DENIED.

IT IS SO ORDERED.

Dated: May 13, 2014

/s/ Morrison C. England, Jr.
MORRISON C. ENGLAND, JR.,
CHIEF JUDGE
UNITED STATES DISTRICT COURT

1. CAL. GOV'T CODE § 12584 provides:

Register of charitable corporations and trustees

The Attorney General shall establish and maintain a register of charitable corporations, unincorporated associations, and trustees subject to this article and of the particular trust or other relationship under which they hold property for charitable purposes and, to that end, may conduct whatever investigation is necessary, and shall obtain from public records, court officers, taxing authorities, trustees, and other sources, whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register.

2. CAL. GOV'T CODE § 12586 provides, in relevant part:

Report on assets and administration; Rules and regulations for reports; Time for filing first report; Requirements when gross revenue in excess of $2 million; Access to other audits; Review and approval of compensation

(a) Except as otherwise provided and except corporate trustees which are subject to the jurisdiction of the Commissioner of Financial Institutions of the State of California under Division 1 (commencing with Section 99) of the Financial Code or to the Comptroller of the Currency of the United States, every

charitable corporation, unincorporated association, and trustee subject to this article shall, in addition to filing copies of the instruments previously required, file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation, unincorporated association, or trustee, in accordance with rules and regulations of the Attorney General.

(b) The Attorney General shall make rules and regulations as to the time for filing reports, the contents thereof, and the manner of executing and filing them. The Attorney General may classify trusts and other relationships concerning property held for a charitable purpose as to purpose, nature of assets, duration of the trust or other relationship, amount of assets, amounts to be devoted to charitable purposes, nature of trustee, or otherwise, and may establish different rules for the different classes as to time and nature of the reports required to the ends (1) that he or she shall receive reasonably current, periodic reports as to all charitable trusts or other relationships of a similar nature, which will enable him or her to ascertain whether they are being properly administered, and (2) that periodic reports shall not unreasonably add to the expense of the administration of charitable trusts and similar relationships. The Attorney General may suspend the filing of reports as to a particular charitable trust or relationship for a reasonable, specifically designated time upon written application of the trustee filed with the

Attorney General and after the Attorney General has filed in the register of charitable trusts a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports are not required for proper supervision by his or her office.

3. CAL. CODE REGS, tit.11, § 391 provides:

Periodic Written Reports

Except as otherwise provided in the Act, every charitable corporation, unincorporated association, trustee, or other person subject to the reporting requirements of the Act shall also file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by such corporation, unincorporated association, trustee, or other person. Except as otherwise provided in these regulations, these reports include the Annual Registration Renewal Fee Report, ("RRF-1" 3/05), hereby incorporated by reference, which must be filed with the Registry of Charitable Trusts annually by all registered charities, as well as the Internal Revenue Service Form 990, which must be filed on an annual basis with the Registry of Charitable Trusts, as well as with the Internal Revenue Service. At the time of the annual renewal of registration filing the RRF-1, the registrant must submit a fee, as set forth in section 311.

A tax-exempt charitable organization which is allowed to file form 990-PF or 990-EZ with the Internal Revenue Service, may file that form with the Registry of Charitable Trusts in lieu of Form 990.

A charitable organization that is not exempt from taxation under federal law shall use Internal Revenue Service Form 990 to comply with the reporting provisions of the Supervision of Trustees and Fundraisers for Charitable Purposes Act. The form shall include, at the top of the page, in 10-point type, all capital letters, "THIS ORGANIZATION IS NOT EXEMPT FROM TAXATION."

Registration requirements for commercial fundraisers for charitable purposes, fundraising counsel for charitable purposes, and commercial coventurers are set forth in section 308.

4. CAL. GOV'T CODE § 12591.1 provides, in relevant part:

Civil penalty; Cease and desist orders; Suspension of registration; Hearing; Opportunity to correct violation

* * *

(c) The Attorney General may impose a penalty on any person or entity, not to exceed one thousand dollars ($1,000) per act or omission, for each act or omission that constitutes a violation of this article or Chapter 4 (commencing with Section 300) of Division 1 of Title 11 of the California Code of Regulations. At

least five days prior to imposing that penalty, the Attorney General shall provide notice to the person or entity that committed the violation by certified mail to the address of record at the Registry of Charitable Trusts. Penalties shall accrue, commencing on the fifth day after notice is given, at a rate of one hundred dollars ($100) per day for each day until that person or entity corrects that violation. Penalties shall stop accruing as of the date set forth in the written notice provided by the Attorney General that the violation or omission subject to penalties has been corrected or remedied.

(d) If the Attorney General assesses penalties under this section, the Attorney General may suspend the registration of that person or entity in accordance with the procedures set forth in Section 999.6 of Title 11 of the California Code of Regulations. Registration shall be automatically suspended until the fine is paid and no registration shall be renewed until the fine is paid.

5. CAL. GOV'T CODE § 12598 states, in relevant part:

Attorney General's powers for enforcement responsibilities; Recovery of costs

* * *

(e)

(1) The Attorney General may refuse to register or may revoke or suspend the registration of a charitable corporation or trustee, commercial fundraiser,

fundraising counsel, or coventurer whenever the Attorney General finds that the charitable corporation or trustee, commercial fundraiser, fundraising counsel, or coventurer has violated or is operating in violation of any provisions of this article.

6. 26 U.S.C. § 6104(c) provides, in relevant part:

Publicity of information required from certain exempt organizations and certain trusts.

* * *

(3) Disclosure with respect to certain other exempt organizations. Upon written request by an appropriate State officer, the Secretary may make available for inspection or disclosure returns and return information of any organization described in section 501(c) (other than organizations described in paragraph (1) or (3) thereof) for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations. Such information may only be inspected by or disclosed to a person other than the appropriate State officer if such person is an officer or employee of the State and is designated by the appropriate State officer to receive the returns or return information under this paragraph on behalf of the appropriate State officer.

7. 26 U.S.C. § 6104(d) provides in relevant part:

(d) Public inspection of certain annual returns, reports, applications for exemption, and notices of status.

* * *

(3) Exceptions from disclosure requirement.

(A) Nondisclosure of contributors, etc. In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization. In the case of an organization described in section 501(d), paragraph (1) shall not require the disclosure of the copies referred to in section 6031(b) with respect to such organization.

7. 26 U.S.C. § 7213 provides, in relevant part:

Unauthorized disclosure of information.

(a) Returns and return information.

(1) Federal employees and other persons. It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a

felony punishable upon conviction by a fine in any amount not exceeding $ 5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

(2) State and other employees. It shall be unlawful for any person (not described in paragraph (1)) willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)) acquired by him or another person under subsection (d), (i)(3)(B)(i) or (7)(A)(ii), (k)(10), (l)(6), (7), (8), (9), (10), (12), (15), (16), (19), (20), or (21) or (m)(2), (4), (5), (6), or (7) of section 6103 or under section 6104(c). Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $ 5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(3) Other persons. It shall be unlawful for any person to whom any return or return information (as defined in section 6103(b)) is disclosed in a manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $ 5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(4) Solicitation. It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $ 5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(5) Shareholders. It shall be unlawful for any person to whom a return or return information (as defined in section 6103(b)) is disclosed pursuant to the provisions of section 6103(e)(1)(D)(iii) willfully to disclose such return or return information in any manner not provided by law. Any violation of this paragraph shall be a felony punishable by a fine in any amount not to exceed $ 5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

* * *

(c) Disclosures by certain delegates of Secretary. All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

* * *

(e) Cross references.

(1) Penalties for disclosure of information by preparers of returns. For penalty for disclosure or use of information by preparers of returns, see section 7216.

(2) Penalties for disclosure of confidential information. For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

8. 26 U.S.C. § 7431 provides, in relevant part:

Civil damages for unauthorized inspection or disclosure of returns and return information.

(a) In general.

(1) Inspection or disclosure by employee of United States. If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) Inspection or disclosure by a person who is not an employee of United States. If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or

discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 or in violation of section 6104(c), such taxpayer may bring a civil action for damages against such person in a district court of the United States.

(b) Exceptions. No liability shall arise under this section with respect to any inspection or disclosure –

(1) which results from a good faith, but erroneous, interpretation of section 6103, or

(2) which is requested by the taxpayer.

(c) Damages. In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of –

(1) the greater of –

(A) $ 1,000 for each act of unauthorized inspection or disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of –

(i) the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus

(ii) in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action, plus

(3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), reasonable attorneys fees, except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party (as determined under section 7430(c)(4)).

(d) Period for bringing action. Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized inspection or disclosure.

(e) Notification of unlawful inspection and disclosure. If any person is criminally charged by indictment or information with inspection or disclosure of a taxpayer's return or return information in violation of –

(1) paragraph (1) or (2) of section 7213(a),

(2) section 7213A(a), or

(3) subparagraph (B) of section 1030(a)(2) of title 18, United States Code, the Secretary shall notify such taxpayer as soon as practicable of such inspection or disclosure.

KAMALA D. HARRIS ***State of California***
Attorney General ***DEPARTMENT*** [SEAL]
OF JUSTICE

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February 6, 2014

CENTER FOR
COMPETITIVE POLITICS
124 S. WEST STREET, #201
ALEXANDRIA VA 22314

CT FILE NUMBER:
CT0149998

RE: IRS Form 990, Schedule B, Schedule of Contributors

We have received the IRS Form 990, 990-EZ or 990-PF submitted by the above-named organization for filing with the Registry of Charitable Trusts (Registry) for the fiscal year ending 12/31/2012. **The filing is incomplete** because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.

The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service. The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Within 30 days of the date of this letter, please submit a *complete* copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service. Please address all correspondence to the undersigned.

Sincerely,

/s/ AB
Office Technician
Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

KAMALA D. HARRIS ***State of California***
Attorney General ***DEPARTMENT*** [SEAL]
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December 11, 2014

CENTER FOR
COMPETITIVE POLITICS
124 S. WEST STREET, #201
ALEXANDRIA VA 22314

CT FILE NUMBER:
CT0149998

RE: **WARNING OF ASSESSMENT OF PENALTIES AND LATE FEES, AND SUSPENSION OR REVOCATION OF REGISTERED STATUS**

The Registry of Charitable Trusts has not received annual report(s) for the captioned organization, as follows:

1. The IRS Form 990, 990-EZ or 990-PF submitted for the fiscal year ending **12/31/12** does not contain a copy of the Schedule B, Schedule of Contributors, with the names and adddresses [sic] of the contributors as required. The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service. The Registry

retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Failure to timely file required reports violates Government Code section 12586.

Unless the above-described report(s) are filed with the Registry of Charitable Trusts within thirty (30) days of the date of this letter, the following will occur:

1. The California Franchise Tax Board will be notified to disallow the tax exemption of the above-named entity. The Franchise Tax Board may revoke the organization's tax exempt status at which point the organization will be treated as a taxable corporation (See Revenue and Taxation Code section 23703) and may be subject to the minimum tax penalty.

2. Late fees will be imposed by the Registry of Charitable Trusts for each month or partial month for which the report(s) are delinquent. Directors, trustees, officers and return preparers responsible for failure to timely file these reports are **also personally liable** for payment of all late fees.

   PLEASE NOTE: Charitable assets **cannot** be used to pay these avoidable costs. Accordingly, directors, trustees, officers and return preparers responsible for failure to timely file the above-described report(s) are **personally liable** for payment of all penalties, interest and other costs incurred to restore exempt status.

3. In accordance with the provisions of Government Code section 12598, subdivision (e), the Attorney General **will suspend the registration** of the above-named entity.

   If you believe the above described report(s) were timely filed, they were not received by the Registry and another copy must be filed within thirty (30) days of the date of this letter. In addition, if the address of the above-named entity differs from that shown above, the current address must be provided to the Registry prior to or at the time the past-due reports are filed.

In order to avoid the above-described actions, please send all delinquent reports to the address set forth above, within thirty (30) days of the date of this letter.

Thank you for your attention to this correspondence.

Sincerely,

Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

Detailed instructions and forms for filing can be found on our website at http://ag.ca.gov/charities.