KAMALA D. HARRIS, State Bar No. 146672
Attorney General of California
TAMAR PACHTER, State Bar No. 146083
Supervising Deputy Attorney General
ALEXANDRA ROBERT GORDON, State Bar No. 207650
JOSE A. ZELIDON-ZEPEDA, State Bar No. 227108
KEVIN A. CALIA, State Bar No. 227406
Deputy Attorneys General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5509
Fax: (415) 703-5480
E-mail: Alexandra.RobertGordon@doj.ca.gov
Attorneys for Defendant Attorney General Harris

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

CENTER FOR COMPETITIVE POLITICS, Plaintiff, **v.** **KAMALA HARRIS, in her Official Capacity as Attorney General of the State of California,** Defendant.	2:14-cv-00636-MCE-DB **DEFENDANT ATTORNEY GENERAL KAMALA D. HARRIS'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY RELIEF** Date: October 6, 2016 Time: 2:00 p.m. Courtroom: 7, 14th Floor Judge: Hon. Morrison C. England, Jr. Trial Date: None Set Action Filed: March 7, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

INTRODUCTION

To protect the public from fraud and the misuse of charitable donations, California regulates tax-exempt charitable organizations. Under state law, these organizations must file information and reports with the state Registry of Charitable Trusts. At issue here is the requirement that charitable organizations, as a condition of enjoying the benefits of tax-exempt status, annually submit a complete copy of Internal Revenue Service (IRS) Form 990, Schedule B, which lists the names and addresses of its major contributors. State law protects this information from public disclosure, and it is used by the Attorney General to ensure that charities comply with the law.

Although the Ninth Circuit has held that the Schedule B requirement does not facially infringe upon First Amendment rights and is substantially related to the State's compelling interest in enforcing the law, *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1316-17 (9th Cir.) *cert denied*, 136 S. Ct. 480 (2015) (*CCP*), plaintiff insists that the requirement violates its constitutional rights and has moved (again) to preliminarily enjoin its enforcement. Specifically, plaintiff argues that the Attorney General's demand for the same Schedule B on file with the IRS violates its First Amendment rights to freedom of association and speech as well as the Fourth Amendment. This Court should deny the motion because plaintiff has not met the standard for issuance of a preliminary injunction. As discussed in Defendant's companion motion to dismiss, ECF No. 44, plaintiff has not alleged and cannot allege plausible claims for relief, let alone demonstrated any chance of success on the merits of its claims. Plaintiff's association claim fails for the same reasons previously articulated by this Court and the Ninth Circuit: it has not established any harm to its donors flowing from the challenged disclosure requirement. It cannot prevail on its speech claim because the Schedule B requirement does not implicate speech within the meaning of the First Amendment. Finally, its Fourth Amendment claim is without merit because the requirement to submit a copy of the very same form on file with the IRS to the Attorney General for nonpublic use is not a search or seizure, and would be reasonable in any case.

Plaintiff's motion is also unsubstantiated by any evidence of injury that it would suffer in the absence of injunctive relief. By contrast, the harm to the State's ability to effectively enforce its laws and to the public interest, were a preliminary injunction to issue, would be considerable. Accordingly, the law, the balance of equities, and the public interest all weigh against issuing a preliminary injunction.

BACKGROUND

I. THE ATTORNEY GENERAL'S REGULATION OF TAX-EXEMPT CHARITABLE ORGANIZATIONS

In California, as in most other states, those entities that wish to enjoy the privilege and related benefits of operating and soliciting funds as a tax-exempt organization are supervised and regulated by the State. Charitable organizations play a vital role in our society, but the potential for and existence of charitable fraud and illegality is considerable.[1] *See, e.g.*, Roger Colinvaux, *Charity in the 21st Century: Trending Toward Decay*, 11 Fla. Tax Rev. 1, 19-39 (2011) (detailing scandals and various types of illegal activities by charities). In light of declining oversight by the IRS, state regulators are an increasingly critical part of the effort to police and prevent charitable fraud. *See generally* U.S. Gov't Accountability Off., *Tax-Exempt Organizations: Better Compliance Indicators and Data, and More Collaboration with State Regulators Would Strengthen Oversight of Charitable Organizations* 8 (2014) (hereinafter GAO 2014 Report). [2]

The Attorney General is responsible for supervising more than 110,000 registered charitable trusts and public benefit corporations organized or conducting business in the State of

[1] Charitable organizations are funded by private donations and subsidized by state and federal governments through their tax codes. These subsidies, in the form of charitable deductions, are extremely costly to both the federal and state governments and result in a significant loss of revenue that could otherwise be used to reduce the tax burden for the general public or increase government services. *See* Ray D. Madoff, et al., PRACTICAL GUIDE TO ESTATE PLANNING 10,01 (CH 2015). It is estimated that the charitable deduction cost the State of California $2.8 billion in 2015-2016. *See* http://w.dof.ca.gov/research/economic-financial/documents/2015- 16_TE_Report revised_01_15.pdf. Accordingly, it is especially important to ensure that the government's investment of resources is being used appropriately and that charitable dollars are used for their intended purpose.

[2] As detailed by the GAO, IRS examinations of charities have steadily declined due to budget cuts and shrinking resources. In 2013, the IRS examined 0.71 percent of all charitable organization filings. GAO 2014 Report at 19-20.

California and for protecting the public from fraud and illegality. *See CCP*, 784 F.3d at 1310; Cal. Gov't Code §§ 12598(a), 12581. To ensure that charitable status is not abused, the Attorney General has "broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities." *CCP*, 784 F.3d at 1310; Cal. Gov't Code § 12598(a).[3] In order to regulate charitable organizations and ascertain whether the purposes of a corporation or trust are being carried out, the Attorney General may require any agent, trustee, fiduciary, beneficiary, institution, association, corporation, or other person to appear and to produce records. Cal. Gov't Code § 12588. Any such order has the same force as a subpoena. *Id.* § 12589. The Attorney General has specific authority to require periodic written reports deemed necessary to her supervisory and enforcement duties. *Id.* § 12586.

Under the state Supervision of Trustees and Fundraisers for Charitable Purposes Act (the Act), the Attorney General maintains a register of charitable corporations and their trustees and trusts (the Registry), and may obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Gov't Code § 12584. Every charitable corporation and trustee subject to the Act must file an initial registration form with the Registry within 30 days after first receiving property, *id.* § 12585, and thereafter must also file periodic written reports, *id.* § 12586(a). The Attorney General is required to promulgate rules and regulations specifying the time for filing reports, their contents, and the manner of executing and filing. *Id.* § 12586(b).

An organization must maintain membership in the Registry to solicit tax-deductible donations in California. Cal. Gov't Code § 12585. As one condition of membership, California law requires charitable organizations organized or doing business in the State to file with the state Registry a copy of their annual IRS Form 990, including Schedule B. *See Americans for Prosperity Foundation v. Harris*, 809 F.3d 536, 538 (9th Cir. 2015) (per curiam) (*AFPF*); *CCP*, 784 F.3d at 1310-11; Cal. Code Regs. tit. 11, § 301 (2014).[4] If a charitable organization wishes

[3] *See also* Cal. Bus. & Prof. Code §§ 17510-17510.95; Cal. Corp. Code §§ 5110, et seq.; *Hardman v. Feinstein*, 195 Cal. App. 3d 157, 161 (1987).

[4] Although plaintiff characterizes the Schedule B requirement as new, *see* Brief in Support (continued…)

to forego tax-exempt status and therefore does not solicit tax-deductible donations, it can still fundraise in California and may do so without registering with the Attorney General. Most charities submit all the information necessary for registration and reporting. Declaration of David Eller (Eller Decl.), ¶5. If a charity fails to do so, it will receive a series of letters, first informing it that its registration is incomplete and what it is required to submit. *Id.* at ¶ 7. If a charity continues to fail to comply with the law, it will become delinquent and subject to late fees of 25 dollars a month and suspension. It is also possible that Registry would notify the California Franchise Tax Board to disallow a charity's tax exemption, that the Tax Board might revoke its tax exempt status, and that it might be subject to the minimum tax penalty (by the Tax Board). Cal. Gov't Code § 12598 (e)(1).

As the Ninth Circuit determined, the Attorney General's Schedule B requirement "seeks only *nonpublic* disclosure of these forms, and she seeks them only to assist her in enforcing charitable organization laws and ensuring that charities in the Registry are not engaging in unfair business practices." *AFPF*, 809 F.3d at 538 (emphasis in original). Although certain charitable organization filings are open to public inspection, *see* Cal. Gov't Code § 12590, a registrant's Schedule B is not. Eller Decl. ¶ 8; Declaration of Tania Ibanez (Ibanez Decl.), ¶ 6. In keeping with federal and state law regarding the treatment of donor and personal information, the Registry treats Schedule B as a confidential document. *See AFPF*, 809 F.3d at 538; *CCP*, 784 F.3d at 1311; IRC § 6103; Cal. Civil Code §§ 1798 et seq. The Registry keeps these schedules in segregated files that are not publicly available, and uses them exclusively for the regulation of charitable organizations. *See CCP*, 784 F.3d at 1311. Registry staff that review and process periodic reports are instructed to remove all confidential documents, including the Schedule B, scan them separately, and upload them to a special database. *See* Eller Decl. ¶ 8. This non-public database is accessible only by a small number of government employees in the Attorney

(…continued)
of Motion for Preliminary Relief, ECF No. 39-1 (Brief), state regulations have consistently required charitable organizations to submit a complete copy of the federal form and all schedules.

General's office who are directly involved in regulating charitable organizations, including the Registrar, attorneys, investigators, and support staff. *See CCP*, 784 F.3d at 1311.

The Attorney General's longstanding policy of keeping Schedule B confidential recently has been codified in a regulation. *See* Cal. Code Regs., tit. 11, § 310(b) (effective July 8, 2016). Specifically, California Code of Regulations section 310 has been amended as follows:

> Donor information exempt from public inspection pursuant to Internal Revenue Code section 6104 (d)(3)(A) shall be maintained as confidential by the Attorney General and shall not be disclosed except as follows: (1) In a court or administrative proceeding brought pursuant to the Attorney General's charitable trust enforcement responsibilities; or (2) In response to a search warrant.

Cal. Code Regs., tit. 11, § 310(b) (2016).

In 2015-2016, plaintiff's expert in *Americans for Prosperity Foundation* located 1,178 Schedules B that were inadvertently housed over the course of years on the Registry's public-facing website. The disclosures account for approximately one-tenth of one percent of all documents contained on the Registry website. Eller Decl. ¶¶ 10, 12. In accordance with Registry practice, the documents were taken down immediately. *Id.* at ¶12; Ibanez Decl. ¶ 9. The Registry then instituted additional, enhanced procedures to guard against inadvertent disclosures in the future. Eller Decl. ¶¶ 11-13. For example, all documents are now searched multiple times both before and after uploading and reports are generated every day. *Id.* at ¶ 13.

II. RELEVANT PROCEDURAL HISTORY

Plaintiff never filed with the Registry a copy of its IRS Form 990 Schedule B with its major donor information, as required by law, but this compliance failure was not caught until early 2014. ECF No. 37, ¶ 10. Plaintiff then received a letter from the Attorney General's Office dated February 6, 2014, instructing it to submit a complete copy of its Schedule B as filed with the IRS. In response, plaintiff sued the Attorney General, in her official capacity, seeking declaratory and injunctive relief. *See* ECF No. 1. Plaintiff subsequently filed a motion for a preliminary injunction, which this Court denied. *See* ECF Nos. 9 & 17.

Plaintiff appealed and the Ninth Circuit affirmed. *CCP*, 784 F.3d 1307. The court of appeals determined, in relevant part, that the requirement to disclose Schedules B to the Attorney

General posed no actual burden on the First Amendment rights of tax-exempt charitable organizations, and was facially constitutional. *See id.* at 1317. Assessing the burden on plaintiff's First Amendment rights resulting from the disclosure requirements, the panel made clear that compelled disclosure alone does not constitute a First Amendment injury. *See id*. at 1314. Rather, to prevail on a First Amendment challenge to compelled disclosure of its donor information, plaintiff was required to produce "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 requirements." *Id*. at 1316. Plaintiff did not attempt, and thus failed to make, this showing. *Id.*

Against the absence of any actual burden on plaintiff's First Amendment rights, the Ninth Circuit weighed the Attorney General's "compelling interest in enforcing the laws of California," which includes having "immediate access to Form 990 Schedule B" filings. *Id*. at 1316. The panel recognized that immediate access to Schedule B filings "increases her investigative efficiency," by allowing her to "flag suspicious activity" through reviewing significant donor information. *Id*. at 1317. The court concluded that the requirement to disclose Schedules B "bears a 'substantial relation'" to a "'sufficiently important' government interest" and thus passed exacting scrutiny. *Id*. It also determined that plaintiff's preemption claim failed as a matter of law. *See id.* at 1318-19.

Plaintiff filed a petition for writ of certiorari, which was denied on November 9, 2015. *See* 136 S. Ct. 480 (2015). Plaintiff filed its First Amended Complaint on August 12, 2016, ECF No. 37, followed by the instant motion for preliminary relief on August 19, 2016, ECF No. 39. The Attorney General filed her motion to dismiss plaintiff's First Amended Complaint on September 8. ECF No. 44.

ARGUMENT

I. LEGAL STANDARD

To prevail on a motion for a preliminary injunction, a plaintiff "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. Natural Res. Def. Council, Inc*., 555 U.S. 7, 20 (2008). Alternatively, "[a] preliminary injunction is appropriate when a plaintiff demonstrates…that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal quotations omitted). A plaintiff must establish all four *Winter* factors even under the alternative sliding scale test. *Id*. at 1135.

"A preliminary injunction is an extraordinary remedy never awarded as a matter of right. In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (internal quotations and citations omitted). Because a preliminary injunction is an extraordinary remedy, the moving party must establish the elements necessary to obtain injunctive relief by a "clear showing." *Id.* at 22. A plaintiff's burden is particularly heavy when, as here, it seeks to enjoin operation of a statute because "it is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined." *Coalition for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997). "A strong factual record is therefore necessary before a federal district court may enjoin a State agency." *Cupolo v. Bay Area Rapid Transit*, 5 F. Supp. 2d 1078, 1085 (N.D. Cal. 1997).

II. PLAINTIFF HAS FAILED TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS OF ANY OF ITS CLAIMS

As a threshold matter, plaintiff has not established any cognizable injury and/or that "the balance of hardships tips sharply in [its] favor," and thus that it need only demonstrate "serious questions going to the merits of its claims." *See Cottrell*, 632 F.3d at 1131-35. Accordingly, it must demonstrate a likelihood of success on the merits of its claims. *See id*. Regardless of what formulation is applied, however, to obtain a preliminary injunction, a movant must establish "at an irreducible minimum," a "fair chance of success" and/or a "serious question" on the merits.

Pimentel v. Dreyfus, 670 F.3d 1096, 1111 (9th Cir. 2012). Plaintiff has not made this showing with respect to any of its claims and its motion for preliminary relief must thus be denied.

A. The Schedule B Requirement Does Not Violate the First Amendment Right to Association.

Charities soliciting funds as tax-exempt organizations in California are required to submit a complete copy of their federal IRS Form 990 Schedule B to the Registry, where it is protected from public disclosure. *See* Cal. Gov't Code §§ 12598(a), 12584, 12586(b); Cal. Code Regs. tit. 11, § 301. This requirement is precisely the type of law enforcement tool that courts have repeatedly approved as a permissible means of serving significant government interests in protecting the public from fraud and illegality. *See, e.g.*, *Riley v. Nat'l Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988); *Secretary of State v. Munson,* 467 U.S. 947, 968 n. 16 (1984).[5] Indeed, because the Registry protects the confidentiality of Schedule B information, the Attorney General's disclosure requirement is much more limited than compared to the laws requiring *public* disclosure of donors that the Supreme Court consistently has upheld. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 192-93 (2010); *Citizens United v Fed. Election Comm'n*, 558 U.S. 310, 366-71 (2010); *Buckley v. Valeo*, 424 U.S. 1, 69-72 (1976); *CCP*, 784 F.3d at 1316.

Despite clear instructions from the Ninth Circuit as to its burden to allege and to prove First Amendment harm, *see CCP*, 784 F.3d at 1316-17; *AFPF*, 809 F.3d at 539-41, plaintiff has not provided any evidence of cognizable injury to its First Amendment rights arising from the Schedule B requirement. Plaintiff also attempts to downplay the holding of both cases that in the absence of any evidence of actual harm, the Schedule B disclosure requirement poses no actual burden on the First Amendment rights of tax-exempt charitable organizations, is substantially related to the Attorney General's compelling interest in enforcing the law and protecting the public, and thus satisfies exacting scrutiny and is facially constitutional. *See CCP*, 784 F.3d at

[5] *See also* Sean McMahon, *Deregulate But Still Disclose?: Disclosure Requirements for Ballot Question Advocacy After Citizens United v. FEC and Doe v. Reed*, 113 Columbia L. Rev. 733, 746-759 (April 2013) (detailing the Court's "strong affirmation of the constitutionality and utility of disclosure requirements").

1316-17; *AFPF*, 809 F.3d at 538. These holdings are controlling and foreclose plaintiff's associational rights claim.

1. There is no evidence of any burden on plaintiff's associational rights.

Plaintiff fails to make the requisite preliminary factual showing that the Schedule B requirement will cause an actual chilling effect on its associational rights. First Amendment challenges to disclosure requirements are evaluated under "exacting scrutiny." *See John Doe No. 1*, 561 U.S. at 196; *CCP*, 784 F.3d at 1314. In analyzing First Amendment challenges to disclosure requirements under this standard, the Court "first ask[s] whether the challenged regulation burdens First Amendment rights. If it does, [it] then assess[es] whether there is a 'substantial relation' between the burden imposed by the regulation and a 'sufficiently important' governmental interest." *Protectmarriage.com –Yes on 8 v. Bowen*, 752 F.3d 827, 832 (9th Cir. 2014), *cert. denied sub nom. Protectmarriage.com-Yes on 8 v. Padilla*, 135 S. Ct. 1523 (2015). As the Ninth Circuit has held, compelled disclosure, alone, does not constitute First Amendment injury and need not be weighed when applying exacting scrutiny. *See CCP*, 784 F.3d at 1314. Rather, the Court must "balance the 'seriousness of the *actual* burden on a plaintiff's First Amendment rights.'" *Id.* (citing *John Doe No. 1*, 561 U.S. at 196) (emphasis in original).

While the Ninth Circuit acknowledged that plaintiff theoretically could prevail on a future as-applied challenge, plaintiff has not demonstrated "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisal from either Government officials or private parties[.]" *CCP*, 784 F.3d at 1317 (quoting *Buckley*, 424 at 74, and *John Doe No.* 1, 561 U.S. at 196); *see also Brock v. Local 373, Plumbers Int'l Union of America*, 860 F.2d 346, 349-50 (9th Cir. 1988) (requiring plaintiffs to demonstrate through objective and articulable facts, a "prima facie showing of arguable first amendment infringement" caused by the challenged disclosure). The "reasonable probability" standard requires objective evidence, not just unfounded speculation, fear, and uncertainty untethered to the requirement at issue. *See Citizens United*, 558 U.S. at 366-371; *Dole v. Service Employees Union, AFL-CIO, Local 280* (*Dole II*), 950 F.2d 1456, 1469 (9th Cir. 1991); *Dole v. Local Union 375, Plumbers Int'l Union of America* (*Dole*), 921 F.2d 969, 973-74 (9th Cir. 1990); *Brock*, 860 F.2d at 349-50.

The few cases in which as-applied challenges to disclosure have been upheld involved plaintiffs who were generally minority groups that were "unpopular, villified, and historically rejected by the government and the citizenry," such as the NAACP in the pre-Civil Rights Era and the Socialist Party during the Cold War. *Brown v. Socialist Workers '74 Campaign*, 459 U.S. 87, 88 (1982); *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *cf. John Doe No.* 1 *v. Reed*, 823 F. Supp. 2d 1195, 1201 (W.D. Wash. 2011) (noting that as-applied exemption from disclosure requirements have "been upheld in only a few cases"). These groups were subjected to government-sponsored hostility and brutal, pervasive private violence both generally and as a result of disclosure. *See, e.g.*, *Brown*, 459 U.S. at 98-99; *Bates v. Little Rock*, 361 U.S. 516, 525 (1960); *NAACP*, 357 U.S. at 462-63. They also could not seek adequate relief from law enforcement or the legal system. *See Protectmarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1217-18 (E.D. Cal. 2009).

Plaintiffs bringing successful as-applied challenges in these cases demonstrated that the specific (public) disclosure requirement at issue would result in threats, harassment, reprisals, and other negative consequences that would discourage the exercise of First Amendment rights. *Brown*, 459 U.S. at 98-99 ("reasonable probability" standard met where Court had before it "substantial evidence of both government and private hostility toward and harassment of [Socialist Worker Party] members and supporters"); *NAACP*, 357 U.S. at 462-63 (considering "uncontroverted showing" that on past occasions disclosure of its members' identities had exposed them to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility."); *see also Buckley*, 424 U.S. at 71-72 (rejecting as-applied challenge and stating "where it exists, the type of chill and harassment identified in *NAACP v. Alabama* can be shown," but "no appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*"); *Protectmarriage.com*, 599 F. Supp. 2d at 1215 ("Notably absent from this case is any evidence that those burdens hypothesized by the Supreme Court would befall the current Plaintiffs.").

Here, by contrast, plaintiff has not offered any evidence that the Attorney General's demand for and collection of Schedule B forms for nonpublic use has had any effect on it or its

members at all, let alone caused any threats, harm, or negative consequences.[6] Plaintiff states only that it is at "critical risk of having its Schedule B information distributed" and has thus decided to stop fundraising in California. Brief 7. However, the Ninth Circuit determined, even before the Registry's adoption of enhanced procedures to ensure the confidentiality of donor information, that the Attorney General has an adequate confidentiality policy, *see CCP*, 784 F.3d at 1316, which has now been codified in a formal regulation. Cal. Code Regs., tit. 11, § 310(b) (2016). It has further held that " allegations that technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure of their Schedule B forms are too speculative to support issuance of an injunction." *AFPF*, 809 F.3d at 541. With respect to plaintiff's voluntary decision to forego the privilege of soliciting funds as a tax-exempt entity rather than comply with a constitutional state law, *see CCP*, 784 F.3d at 1316-17; *AFPF*, 809 F.3d at 538, this is not cognizable First Amendment harm. *See Citizens United v. Schneiderman*, No. 14-CV-3703 (SHS), 2016 WL 4521627, at *7 (S.D.N.Y. Aug. 29, 2016); *cf. Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir. 1995). Accordingly, plaintiff's associational rights claim fails at the threshold.

2. The Schedule B requirement is substantially related to the State's compelling law enforcement interest

Because plaintiff did not make an initial showing of First Amendment injury, this case is controlled by *CCP* and the Court need not reexamine whether the contested Schedule B

[6] Not only has plaintiff failed to demonstrate any actual burden on First Amendment rights flowing from the requirement to disclose its Schedule B forms for nonpublic use, but, given that a trivial percentage of plaintiff's donors are listed on Schedule B, it is extremely unlikely that it ever could. Organizations, such as plaintiff, must file Schedule B only if they receive a contribution that exceeds the greater of $ 5,000 or two percent of the organization's total gifts, grants, and contributions. Declaration of Kevin Calia, Exhs. A-F. Plaintiff has used the two percent threshold since 2010. *Id.*, Exhs. B-F. Between 2010 and 2014, the annual threshold for being listed on plaintiff's Schedule B ranged from $27,500 to nearly $40,000. *Id.* at ¶¶ 4-9, Exhs. B-F. During that time, between seven and ten donors were listed on each annual Schedule B form. *Id.* Well over half of those Schedule B donors are private foundations that are legally required to and have *publicly* disclosed their donations. *Id.*, Exh. G. Despite years of public disclosure of these donors' identities and the wide availability of those disclosures to be found on the internet, plaintiff has offered no evidence (nor even an allegation) that any harm has come to any of these donors, much less that any harm has come from nonpublic disclosure to the IRS or another government agency.

disclosure requirement is substantially related to the State's compelling interest in enforcing the law and protecting the public. *See CCP*, 784 F.3d at 1316-17; *Protectmarriage.com*, 752 F.3d at 832; *Dole*, 921 F.2d at 974. However, even if the Court were to undertake this analysis, the requirement would be valid.

As the Ninth Circuit has held, requiring charitable organizations to submit a copy of Schedule B reflecting their major donor information is "substantially related" to the achievement of the State's compelling interests. *See CCP*, 784 F.3d at 1316-17. Requiring charitable organizations to make detailed financial and operational disclosures, including reporting information about contributors, helps protect the public welfare by ensuring that organizations are not abusing their charitable and exempt designations. Specifically, Schedule B information, which reveals not just how much revenue a charity receives, but also who is donating it and how it is being donated (for example, in cash or in kind), allows the Attorney General 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. It also allows the Attorney General to determine whether a charity is truly operating as a charity deserving of tax-exempt status or whether it is engaged in improper activities, including political activities. *See* I.R.C. §§ 501(c)(3); 4955(d).

Plaintiff incorrectly suggests that certain findings of facts regarding the use of Schedule B made by the Honorable Manuel L. Real, District Judge for the Central District of California, in *Americans for Prosperity v. Harris*, Case No. 2:14–cv–09448–R–FFM, somehow eradicate the basis for controlling decisions of the Ninth Circuit in *CCP* and *AFPF* that the Schedule B requirement does not burden First Amendment rights, is substantially related to the State's compelling interests, and thus satisfies exacting scrutiny and is facially constitutional. Judge Real's findings, which are on appeal and regardless are not binding on this Court,[7] do not alter the

[7] To the extent that plaintiff argues that Judge Real's factual findings have preclusive effect in this case, it is mistaken. As Judge Real recently held, his ruling regarding the as-applied challenge in *Americans for Prosperity Foundation* does not apply to anyone other than Americans for Prosperity Foundation. *See Thomas More Law Center v. Harris*, Case No. 2:15-cv-03048-R-FFM (C.D. Cal.), Order Denying Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment, ECF No. 115.

fact that where, as here, there is a complete absence of First Amendment harm, the Schedule B requirement is constitutional.

Moreover, the evidence in *Americans for Prosperity*, as well as that in the related case of *Thomas More Law Center v. Harris*, No. 2:15-cv-03048-R-FFM (which was tried before Judge Real on September 13-15, 2016), supports the Ninth Circuit's determination that the Schedule B requirement is substantially related to the state's compelling interests. Upon receiving a complaint about a charity, legal and audit staff typically begin the review process by studying the entire Form 990, including Schedule B. Ibanez Decl. ¶ 12; Declaration of Alexandra Robert Gordon (Gordon Decl.), Exh. A at 97:18-23 & C at 64:9-14. Schedule B provides specific information about revenue coming into a charity that is not available anywhere else in the Form 990 and that when looked at together with the other schedules, provides a cross-check and a more fulsome picture of the charity's activities. *Id.*, Exh. C at 71:25-72:13; 81:15-22. By examining the Schedule B in conjunction with other required information under the Act, legal and audit staff can ascertain whether a donor is also an officer or director of a charity and whether more than 49 percent of "interested persons" are being compensated by the charity in violation of California Corporations Code section 5227. *Id.*, Exh. C at 65:6-13. Staff can also discover donors who are "self dealing" by passing money through to family members (who may not be "interested persons" who would appear in other schedules) or to fund enterprises that are for their own benefit and not for a public charitable purpose in violation of California Corporations Code sections 5233 and 5236.[8] Ibanez Decl. ¶ 15 (discussing investigation of L.B. Research and Education in which Schedule B was used, among other ways, to confirm that the founder of L.B. Research was using the charity to fund his own research, projects, and employment); *id.* (discussing scam in which Schedule B revealed that donations by family member of a charity's founder were being used to fund personal expenses of the founder and relations, such as her honeymoon and trips to Las Vegas and numerous other destinations). Legal and audit staff also

[8] All of these acts would also violate California Business and Professions Code section 17200. *See State Farm Fire & Casualty Co. v. Sup. Ct.*, 45 Cal. App. 4th 1093, 1103 (1996).

use major donor information to determine whether donors are related to entities that are doing business with a charity, as well as to test whether complaints filed against an organization alleging self dealing and other violations are frivolous or whether they merit further investigation, often without subjecting that organization to the intrusion and burden of an audit. Ibanez Decl. ¶ 14; Gordon Decl., Exhs. A at 97:24-98:22 & C at 69:24-71:11.

Because Schedule B requires a charity to report the type of gifts in kind it received, and the value of each such donation, it is particularly useful in determining whether a charity is improperly including overvalued gifts in kind in its reported revenues and program services expenses, thus misrepresenting its size and efficiency to the donating public. Gift-in-kind scams have become a "huge problem" in the United States that harm the donating public and the regulatory agencies that rely on charities' Form 990s to evaluate the organizations' efficiency. These scams also harm legitimate nonprofit organizations that abide by the law and compete with fraudulent nonprofits for donations. Ibanez Decl. ¶ 16; *see also* Gordon Decl. Exh. B. In a recent, major lawsuit against four cancer charities that included an international gift-in-kind scam of more than $200 million, Schedule B was the connective document that confirmed the charities had misrepresented the value of donations of pharmaceuticals received, in violation of state and federal law. Ibanez Decl. ¶ 17. Schedule B has been useful at uncovering gift-in-kind scams in a number of other investigations as well. *Id.* at ¶ 18; Gordon Decl., Exh. C at 67:13-69:5.

In all these ways the required disclosure serves the Attorney General's interest in ensuring compliance with and enforcing the law. *See CCP*, 784 F.3d at 1316-17; *Buckley*, 424 U.S. at 64, 66, 68-72. Further, and as the Ninth Circuit determined, "having immediate access to Form 990 Schedule B increases [the Attorney General's] investigative efficiency." *CCP*, 784 F.3d at 1316. Because the Attorney General polices more than 100,000 charities with a very small staff, having information upfront and without having to conduct resource-intensive and time-consuming audits is critical. Ibanez Decl. ¶ 20. It has also been the experience of the Attorney General's Office that once a charity is made aware that it is under suspicion, it is more likely to hide or tamper with evidence, including instructing its donors what they should say in response to questioning. *See id.*; Gordon Decl., Exh. C at 70:16-19. The uniform requirement that all charities provide a

complete Schedule B avoids sending a signal that could trigger such interference and allows the Attorney General to obtain more accurate information.

Accordingly, even if plaintiff had presented a prima facie case of infringement, the disclosure requirement and the Attorney General's enforcement of it is substantially related to important state interests, is sufficiently tailored to achieve those interests, and therefore cannot support issuance of a preliminary injunction. *See Citizens United v. Schneiderman*, 115 F. Supp. 3d 457, 467 (S.D.N.Y. 2015), *appeal withdrawn* (Oct. 23, 2015) (denying motion for preliminary injunction and stating that New York Attorney General's Schedule B policy "bears a substantial relation to the important governmental interests of enforcement of charitable solicitation laws and the oversight of charitable organizations for the protection of New York residents.").

B. The Schedule B Requirement Does Not Violate the First Amendment Right to Free Speech.

Plaintiff's free speech claim also does not support its request for preliminary relief. Plaintiff erroneously contends that the Schedule B requirement is a content-based restriction on speech that is subject to strict scrutiny. Brief 8. This argument fails because the challenged requirement merely demands an "after-the-fact" reporting of the identities and expenditures of major donors, and so does not unconstitutionally regulate speech within the meaning of the First Amendment. *See John Doe*, 561 U.S. at 196 (noting that "a disclosure requirement" is "not a prohibition on speech," because while such "requirements may burden the ability to speak, . . . they do not prevent anyone from speaking"). Because disclosure laws are a "less restrictive alternative to more comprehensive regulations of speech," strict scrutiny does not apply. *Citizens United*, 558 U.S. at 366, 369; *see also John Doe No. 1*, 561 U.S. at 196.

There is no support for plaintiff's notion that because solicitation of charitable contributions is protected speech, *see Riley*, 487 U.S. at 789, any regulation that may somehow impact the ability or willingness to secure or donate funds is constitutionally invalid. Charitable solicitation is protected not because the First Amendment contemplates the right to raise money, but because the act of soliciting funds is "characteristically intertwined with informative and perhaps persuasive speech." *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S.

620, 632 (1980); *Friends of the Vietnam Veterans Mem'l v. Kennedy*, 116 F.3d 495, 497 (D.C. Cir. 1997). By contrast, the act of later reporting to the government on the outcome of charitable solicitation does not have the same communicative element and does not impermissibly "burden" speech. *See Riley*, 487 U.S. at 800; *ACLU v. Heller*, 378 F.3d 979, 992 (9th Cir. 2004); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003).

Accordingly, there is a significant constitutional distinction between requiring the reporting of funds that may be used to finance speech and the direct regulation of speech itself. *See, e.g.*, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 187, 198-99 (1999); *Heller*, 378 F.3d at 987, 990-92. The former category regularly is upheld, while the latter generally is not. *Compare John Doe 1*, 561 U.S. at 201-02, *and Citizens United,* 558 U.S. at 366-371, *and Buckley*, 424 U.S. at 69-72, *with Riley*, 487 U.S. at 788-802, *and McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345-47, 357 (1995).[9] Here, the law requires all charitable organizations to furnish information about their donors to a confidential registry; it does not place any limitations on protected speech nor does it compel any speech by fundraisers. *See* Cal. Gov't Code §§12584 & 12586; Cal. Code Regs. tit. 11, §§ 301 & 306 (2014).

Given that the Schedule B requirement does not regulate speech, it follows that it cannot be a content-based restriction on speech subject to strict scrutiny. *See Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir.), *cert. denied*, 134 S. Ct. 2871 (2014). For this reason, *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), on which plaintiff relies, is not applicable. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 409 (9th Cir. 2015), *cert. denied sub nom. Int'l Franchise Ass'n, Inc. v. City of Seattle, Wash.*, 136 S. Ct. 1838 (2016); *Swisher*, 811 F.3d at 311-13.

At issue in *Reed* was a sign code prohibiting the display of outdoor signs without a permit, but exempting 23 categories of signs, including "ideological signs," "political signs," and

[9] For this reason, the remaining cases relied upon by plaintiff, which involve the direct regulation of solicitation, expression, or prior restraints, are inapposite. *See* Brief 8-9 (citing *Riley*, 487 U.S. at 798, *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 474 (1989); *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016); and *Gaudiya Vaishnava Society v. City & County of San Francisco*, 952 F.2d 1059 (9th Cir.1990)).

"temporary directional signs." *Reed*, 135 S. Ct. at 2224-25. The sign code this "identifie[d] various categories of signs based on the type of information they convey, then subject[ed] each category to different restrictions." *Id.* at 2224. Because the restrictions applicable "to any given sign. . . depend[ed]entirely on the communicative element of the sign," and was thus found to be "content-based discrimination." *Id.* at 2224, 2230. In contrast to the sign code in *Reed*, the Schedule B disclosure requirement is neutral and generally applicable. There is no serious argument that Schedule B is required "because of the topic discussed or the idea or message expressed" in the IRS form or that charities are exempted from the requirement based on the "communicative content" of their forms. *Reed*, 135 S. Ct. at 2227; *Lone Star Sec. & Video, Inc. v. City of Los Angeles*, 827 F.3d 1192, 1195 (9th Cir. 2016). Rather, Schedule B is required of all charities as part of a reporting scheme that allows the Attorney General to monitor charities, enforce the law, and protect the public from charitable fraud and illegality. *See CCP*, 784 F.3d at 1310-11; Cal. Code Regs. tit. 11, § 301 (2014).

C. The Schedule B Requirement Does Not Violate the Fourth Amendment.

Plaintiff has not demonstrated any chance of success on the merits of its Fourth Amendment claim. The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...." To establish a Fourth Amendment claim, a plaintiff must first establish that there was a search and seizure within the meaning of the Fourth Amendment, that it was unreasonable, and conducted without consent. *See Rakas v. Illinois*, 439 U.S. 128, 143 (1978); *United States v. Rubio*, 727 F.2d 786, 796-797 (9th Cir. 1983). There are two ways in which the government's conduct may constitute a "search" implicating the Fourth Amendment. First, a Fourth Amendment search occurs when "the person invoking its protection can claim a justifiable, a reasonable, or a legitimate expectation of privacy that has been invaded by government action." *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citations and quotation marks omitted). Under this test, plaintiff must also establish that the search occurred where it had manifested a legitimate expectation of privacy in the place searched or the item seized. This expectation is established where a plaintiff can show: (1) a subjective expectation of privacy; and (2) an objectively

reasonable expectation of privacy. *See Katz v. United States*, 389 U.S. 347, 351 (1967); *United States v. Shryock*, 342 F.3d 948, 978 (9th Cir. 2003). It is plaintiff's burden to establish both elements. *See Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980). Second, a Fourth Amendment search occurs where the government unlawfully, physically occupies private property for the purpose of obtaining information and without consent. *United States v. Jones*, 132 S. Ct. 945, 949-54 (2012). A "seizure" occurs when there is some "meaningful interference with an individual's possessory interests in [] property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

Plaintiff has not explained, and it is not obvious, that the requirement to submit a copy of the very same form on file with the IRS to the Attorney General for nonpublic use is a search or seizure within the meaning of the Fourth Amendment. *See id.*, 466 U.S. at 120-24. Plaintiff also has failed to show that it has any reasonable expectation of privacy in the information regarding the donors listed on Schedule B with respect to a confidential disclosure to government agencies. *Shryock*, 342 F.3d at 978. Plaintiff further fails to establish that the demand for its Schedule B involves government "trespass," and/or "meaningful interference" with its property. *See Jones*, 132 S. Ct. at 949, 951-52; *Jacobsen*, 466 U.S. at 120-24. Not surprisingly, plaintiff also has not adduced a single authority, and research reveals none, that suggests that the requirement to produce information on a government form in exchange for a privilege, here the privilege of conducting business in a state as a tax-exempt entity, falls within the scope of the Fourth Amendment.[10] What legal authority there is suggests quite the opposite. *See Katz*, 389 U.S. at

[10] The cases cited by plaintiff do not address this issue. Instead, plaintiff relies upon inapposite cases involving the administrative search exception to the Fourth Amendment, which upheld airport screening searches of persons and property, *United States v. Aukai*, 497 F.3d 955 (9th Cir. 2004), and the seizure by government agents of allegedly adulterated products from a drug manufacturer's premises, *United States v. Argent Chem. Labs., Inc.*, 93 F.3d 572 (9th Cir. 1996). Plaintiff also cites inapplicable cases finding no administrative search exception to warrantless searches of abortion clinics where "where the expectation of privacy is heightened," *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 550 (9th Cir.2004); and "search regimes" where hotel operators could be "arrested on the spot" if they refused to turn over records containing specified information about guests to law enforcement on demand, without a chance for review, and without a warrant. *See City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2452 (2015). Unlike these cases, the Schedule B requirement does not involve a concrete intrusion by law enforcement on the privacy of people or businesses and/or the seizure by government of property. Instead, it requires charities to submit a complete copy of a form to the Registry for confidential (continued…)

350 ("[T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"); *Morales v. Daley*, 116 F. Supp. 2d 801, 820 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (rejecting Fourth Amendment challenge to questions asked by United States Census form); *United States v. Steele*, 461 F.2d 1148, 1150 n.3 (9th Cir. 1972) ("Steele's Fourth Amendment challenge to the census is without merit.").

Even if the Schedule B requirement were a search or seizure, and it is not, and even assuming that plaintiff has a privacy interest in the names of its donors, whatever minimal intrusion into plaintiff's reasonable expectations of privacy the Schedule B requirement might involve is more than outweighed by the Attorney General's interest in enforcing the law and protecting the public from fraud. *See United States v. Place*, 462 U.S. 696, 703 (1983); *cf. CCP*, 784 F.3d at 1316-17. Any search or seizure of donor information by the Attorney General would thus be reasonable and plaintiff's Fourth Amendment claim must fail.[11]

III. PLAINTIFFS HAVE FAILED TO DEMONSTRATE EITHER IRREPARABLE INJURY OR THAT THE BALANCE OF HARMS AND THE PUBLIC INTEREST WEIGH IN FAVOR OF AN INJUNCTION

Plaintiff also has not met its burden to demonstrate irreparable injury. As shown above, plaintiff has not established that it has suffered or would suffer a cognizable injury, and certainly not one that is irreparable. Although plaintiff asserts that the loss of its First Amendment and other constitutional rights constitutes irreparable injury, *see* Brief 17, where, as here, a constitutional claim is unsupported and fails as a matter of law, it is "too tenuous" to support the requested relief. *Goldie's Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also ProtectMarriage.com*, 599 F. Supp. 2d at 1226 (no risk of irreparable injury where no serious First Amendment claims are raised); *Dex Media West, Inc. v. City of Seattle*, 790 F. Supp. 2d 1276, 1289 (W.D. Wash. 2011).

(…continued)
use.

[11] Given that the Schedule B requirement is not a search, administrative or otherwise, it is not necessary to determine whether there is adequate "precompliance review" and/or whether the administrative search exception to the warrant requirement is satisfied.

Plaintiff's remaining assertions of injury are also unfounded. Although plaintiff notes that it has decided to forego fundraising in California rather than comply with the law, this is not injury. *See Caplan*, 68 F.3d at 839 ("Because defendants have acted to permit the outcome that they deem unacceptable, we must conclude that such an outcome is not an irreparable injury. If the harm complained of is self-inflicted, it does not qualify as irreparable."); 11A Wright & Miller, *Federal Practice & Procedure* § 2948.1 (3d ed. 2014) ("[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."). Ultimately, plaintiff has not established, and cannot establish harm sufficient to outweigh the fact that "[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (quotation and citation omitted).

Injury to the State aside, as this Court has held, it is not in the public interest to interfere with the Attorney General's authority to supervise and regulate charitable organizations and to enforce the law by limiting her ability to request and receive highly relevant information. *See* ECF No. 17 at 12. ("[I]t is in the public interest that [the Attorney General] continues to serve chief regulator of charitable organizations in the state in the manner sought.") Accordingly, the law, the balance of harms, and the public interest all weigh decisively against a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully requests that the Court deny plaintiff's motion for preliminary relief.

Dated: September 22, 2016

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General
JOSE A. ZELIDON-ZEPEDA
KEVIN A. CALIA
Deputy Attorneys General

/s/ Alexandra Robert Gordon
ALEXANDRA ROBERT GORDON
Deputy Attorney General
Attorneys for Defendant
Attorney General Kamala D. Harris