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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTER FOR COMPETITIVE POLITICS, *Plaintiff*, v. KAMALA HARRIS, in her official capacity as Attorney General of the State of California, *Defendant*.	Case No. 14-636 BRIEF IN OPPOSITION TO DEFANDANT'S MOTION TO DISMISS Date: October 6, 2016 Time: 2:00 p.m. Dept: 7, 14th Floor Judge: Morrison C. England, Jr. Trial Date: None Action Filed: March 7, 2014

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INTRODUCTION

The Attorney General operates an unbounded dragnet regime that collects the donor lists of § 501(c)(3) organizations as a precondition to engaging in constitutionally-protected speech. What she does with that information is unknown. But this Court must assume, for the purposes of the Attorney General's motion, that she does not use that information to enforce the laws of the State of California.

This regime, which the Attorney General justifies under her "general subpoena power," violates the First and Fourth Amendments to the United States Constitution.[1] But now that the Attorney General has lost a trial on this same issue before a different court, she seeks dismissal. Her attempts to bootstrap the preliminary injunction rulings of this Court and the Court of Appeals—both explicitly premised on sworn statements now known to have been false—are unavailing. Plaintiffs meet the low bar required to survive a motion to dismiss.

STANDARD OF REVIEW

For the purposes of a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and quotation marks omitted). In reviewing a motion to dismiss, this court must assume the truth of all factual allegations and construes all inferences therefrom in the light most favorable to Plaintiff. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010). This "standard is different" from the one applied to preliminary injunctions, and the denial of a motion for preliminary relief does not necessitate dismissal. *Cedar*

[1] Plaintiff also contends that her demand constitutes a violation of the Constitution's Supremacy Clause, but merely preserves that claim for review. Pla. Mot. for Prelim. Inj., ECF No. 39, at 2, n.3.

Point Nursery v. Gould, 2016 U.S. Dist. LEXIS 84780 at 10 (E.D. Cal. June 29, 2016). Instead, ruling on a motion to dismiss under Rule 12(b)(6) is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

"A complaint must not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Aguayo v. U.S. Bank*, 653 F.3d 912, 917 (9th Cir. 2011). Plaintiff Center for Competitive Politics' ("CCP") first amended complaint relies entirely upon its dealings with the Attorney General of California and facts found by a sister tribunal of this court after a six-day bench trial. Here, the court "must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss," including information available by judicial notice, and determine whether this "'plausibly suggest[s] an entitlement to relief.'" *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 302, 332 (2007); *Iqbal*, 556 U.S. at 681.

The Attorney General, however, asserts that dismissal remains necessary because in order for CCP "'to succeed on a facial challenge, plaintiff 'must establish that no set of circumstances exists'" where her policy "'would be valid.'" Def. Mot. at 8 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). This is the wrong test. In the very next sentence, *Salerno* itself contrasts this "no set of circumstances" analysis with the "overbreadth doctrine" used in "the limited context of the First Amendment." *Id.* (internal quotation marks omitted). "In the First Amendment context," the Supreme "Court recognizes a 'second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the…plainly legitimate sweep" of the government's action.[2] *United States v. Stevens*,

[2] While clearly applicable to the First Amendment context, the standard is familiar from other areas of the law implicating constitutional liberties. For example, laws are facially invalid if they

559 U.S. 460, 473 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). That is the relevant test, and Plaintiff has pled sufficient facts to meet that standard.

Moreover, to the extent the Attorney General is suggesting that no facial challenge is available because her policy may be constitutional in at least some applications, the argument fails. Even in the context of the *Second* Amendment, the Ninth Circuit has rejected this "misunderstanding of the Supreme Court's jurisprudence." *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 961-62 (9th Cir. 2014). In *Jackson*, the Court explained that such a threshold test was inappropriate where a challenge did not involve "complex and comprehensive legislation which may be constitutional in a broad swath of cases." *Id.* at 962 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 167-168 (2007)). The same is true here; the Attorney General's policy is a straightforward demand for specific information as a condition of engaging in constitutionally-protected speech. It is either "a permissible burden on [First Amendment rights] or it is not." *Id.* Similarly, the constitutionality of the Attorney General's policy, like the ordinance at issue in *Jackson*, "does not turn on how [Defendant] chooses to enforce it," and there is no "opportunity to construe the prohibition narrowly" or impose "a limiting construction to avoid constitutional questions." *Id.*

Quite aside from her improper attempt to impose a threshold test on First Amendment facial challenges, the Attorney General fundamentally misunderstands both the general standard for a motion to dismiss and the specific standard in First Amendment cases. The question is merely

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impose undue burdens on abortion access, not in *all* cases, but "in a large fraction of relevant cases." *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007) (citation omitted).

whether or not, taking all facts in the light most advantageous to CCP, Plaintiff has demonstrated "plausible" claims for relief. Plaintiff passes that low bar.

FACTS THIS COURT MUST ACCEPT AS TRUE

The facts in this case, which this "court must accept as true," are straightforward and counsel against dismissal. *Iqbal*, 556 U.S. at 678. CCP "has been a member of the Registry" of Charitable Trusts "since 2008." First Amend. Cmpt. ("FAC") ¶ 7. It has never provided its donor list, via an unredacted copy of the Internal Revenue Service ("IRS") Form 990, to the Attorney General. FAC ¶ 10. The Attorney General surreptitiously, and without announcement, began seeking these forms, and threatened to prevent any uncooperative groups from successfully registering with her office, meaning that they "may not solicit contributions in California." FAC ¶ 9, 11-14. Moreover, "[a]lthough the Attorney General" demands this "private information upon pain of administrative action, there is no process for precompliance review of that demand." *Id.* ¶ 15.

Furthermore, while the Attorney General has claimed that she uses unredacted Schedule B information in order to "enforc[e] California laws prohibiting self-dealing, improper loans, interested persons, or illegal or unfair business practices," she in fact does not and has never used that information "as the basis for initiating an investigation" into such wrongdoing, or "in any enforcement action." FAC ¶¶ 18-20 (citing facts found in *Am. for Prosperity Found. v. Harris*, 2016 U.S. Dist. LEXIS 53679 (C.D. Cal. Apr. 21, 2016) ("*AFPF*")). And while the Attorney General has protested that donor information "'has always been treated as a confidential document,'" FAC at ¶ 24, this is also untrue. *Id.* at ¶ 26-28 (detailing numerous examples of released donor information). Rather than punish those officials responsible, *id.* at ¶ 29, or hire staff

capable of preventing such harms, *id.* at ¶ 30, the Attorney General has chosen to ignore these repeated violations of donor privacy.

Instead, the Attorney General has promulgated a regulation, codified at 11 Code of Calif. Regs. § 310(b), which simply states that she will not intentionally divulge donor information, but does not address the inadvertent release of such data that has occurred many times under her watch, or that this information is likely available to others through the State's public records laws. *Id.* at ¶ 34-39.

Accordingly, CCP "has ceased soliciting contributions within the state of California." *Id.* at ¶ 51.

ARGUMENT

The factual basis upon which this Court and the Ninth Circuit denied preliminary relief has been proven false, and Plaintiff's allegations must be accepted as true in any event. Additionally, intervening Supreme Court precedent regarding both the Fourth Amendment and content-based discrimination against speech, when applied to Plaintiff's factual allegations, more than plausibly entitle CCP to relief.

I. Factual Findings Of A Federal District Court Plausibly Entitle CCP To A Favorable Ruling On Its Freedom Of Association Claim.

When CCP first filed this action, in March of 2014, little was known about the Attorney General's Schedule B disclosure regime. When the Attorney General responded to Plaintiff's suit by claiming that this donor information was essential to the fight against fraud and was kept nonpublic, and provided statements to that effect purportedly based upon personal knowledge, both this court and the Court of Appeals relied upon those representations. *Ctr. for Competitive Politics v. Harris*, 2014 U.S. Dist. LEXIS 66512 at 20-21 (E.D. Cal. 2014) ("Defendant points out the requested information allows her to determine whether an organization has violated the

law…[and] the Registry is kept confidential and Plaintiff's Schedule B would not be disclosed publically") (quotation marks omitted); *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1311 (9th Cir. 2015). But this Court is not bound by the Court of Appeals' decision to give the Attorney General the benefit of the doubt. Decisions by the Ninth Circuit "'at the preliminary injunction phase do not constitute the law of the case'" as to either questions of fact or "mixed question[s] of law and fact." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 n.5 (9th Cir. 2015) (quoting *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007)). This is the case even when "the facial challenge presented to the district court…involved primarily issues of law." *S. Or. Barter Fair v. Jackson Cnty.*, 372 F.3d 1128, 1136 (9th Cir. 2004). As both the Supreme Court and the Ninth Circuit have held, "preliminary injunction decisions 'are often made hastily and on less than a full record'" and may well "'provide little guidance as the appropriate disposition on the merits.'" *Rodriguez v. Robbins*, 804 F.3d 1060, 1080-1081 (9th Cir. 2015) (quoting *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013)); *also Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Here, the Attorney General has provided "no reason why the court should deviate[] from the general rule that decisions on preliminary injunctions are not binding at trial on the merits." *S. Or. Barter Fair*, 372 F.3d at 1136 (internal quotation marks and citation omitted).

Thus, in denying preliminary relief on the basis of the Attorney General's factual representations, the Court of Appeals did not—and could not—foreclose CCP's challenge to the Schedule B regime. Indeed, a sister court has already granted as-applied relief to another nonprofit organization after a bench trial, and the Ninth Circuit itself has granted preliminary relief as to the public disclosure, inadvertent or otherwise, of Schedule B information. *AFPF*, 2016 U.S. Dist.

LEXIS 53679 at 21-22; *Am. for Prosperity Found. v. Harris*, 809 F.3d 536, 542-543 (9th Cir. 2015) ("*AFPF II*").

Accordingly, this court is not bound by its, or the Ninth Circuit's, previous reliance on the Attorney General's now-controverted assertions as to the privacy of her collected donor lists or her claim that unredacted Schedule B information is essential to combat fraud. *Camenisch*, 451 U.S. at 395. Nevertheless, the Attorney General talismanically invokes the Ninth Circuit's decision—concerning a motion for preliminary injunction without the benefit of discovery or trial, and based entirely on her now-disproven sworn statements of staff and assertions of legal counsel—that "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." Def. Mot. at 10. But whether the Attorney General keeps Schedule Bs private, and whether she actually uses Schedule B to enforce the law, are factual questions—or at best mixed questions of fact and law—that are left to this Court to answer. *Stormans*, 794 F.3d at 1076. The Court of Appeals did not hold a trial, and the Court of Appeals did not find facts—but a trial court has, and found the Attorney General's confidentiality policy and her assertions as to Schedule B's usefulness in fighting fraud to be quite wanting.[3]

[3] The Attorney General's suggestion that "[t]he Ninth Circuit considered most of the evidence regarding inadvertent disclosures" ignores that when the Ninth Circuit ruled on motions for preliminary relief or her motion to stay the proceedings in *AFPF*, the evidence was a mere collection of assertions. Def. Mot. at 14. It had not been subjected to the rigors of trial, and did not constitute the findings of a court of law reviewable only for clear error. Nor did the Ninth Circuit rely on those assertions. *AFPF II*, 809 F.3d at 541 ("The plaintiffs' 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").

The *AFPF* court made the factual finding that "[i]t is clear that the Attorney General's purported Schedule B submission requirement demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years." *AFPF*, 2016 U.S. Dist. LEXIS 53679 at 10. It also found, as was "made abundantly clear during trial," that "the Attorney General systematically failed to maintain the confidentiality of Schedule B forms." *Id*. at 15. In turn, before this court, the Attorney General says that it is "immaterial" that Schedule B does not advance her law enforcement interest, and offers Plaintiff the cold comfort that she never claimed that her confidentiality policy was "executed perfectly." Def. Mot. at 13, n.6, 14.

The Attorney General nevertheless argues that Plaintiff's claims are foreclosed, and none of these new facts and allegations may be reviewed, because the Ninth Circuit ruled "as a matter of law that the requirement is substantially related to the Attorney General's compelling interest in enforcing the law and protecting the public from fraud and illegality, and thus constitutional." Def. Mot. at 13, n.6. This misrepresents the actual holdings of the Ninth Circuit, and is not dispositive. *Camenisch*, 451 U.S. at 395 ("It is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits").

First, the Ninth Circuit has never held, in this case or any other, that compelled disclosure does not "trigger[] exacting scrutiny." *Ctr. for Competitive Politics*, 784 F.3d at 1313. Rather, it has held precisely the opposite, as a matter of law: that exacting scrutiny *must* be applied. *Id*. ("[C]ompelled disclosure triggers exacting scrutiny"). Exacting scrutiny is inherently a fact-based analysis—an application of facts to the law and a balancing of interests, precisely the sort of specific matter that cannot be generally foreclosed. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny…will vary up or down with the novelty and plausibility of the justification raised").

Indeed, a sister court has specifically found that the Attorney General's Schedule B disclosure program is completely divorced from her actual efforts to enforce the law. *Shrink Mo. Gov't PAC*, 528 U.S. at 392 (the Supreme Court "ha[s] never accepted mere conjecture as adequate to carry a First Amendment burden"); *Bates v. City of Little Rock*, 361 U.S. 517, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion").

While the Ninth Circuit did declare that the mere existence of "a disclosure requirement" does not necessarily "in and of itself constitute[] First Amendment injury,"[4] it nevertheless applied exacting scrutiny. *Ctr. for Competitive Politics*, 784 F.3d at 1316. That decision reflects the fact that *any* compelled disclosure regime implicates the First Amendment and must be evaluated under that test. The Ninth Circuit did not suggest that Plaintiff had failed to state a claim, instead evaluating the State's interest and whether the Attorney General's policy in fact fit that interest.

Because exacting scrutiny is a fact-based inquiry, the Ninth Circuit upheld this court's denial of CCP's motion for preliminary relief by explicitly relying upon the Attorney General's representations before this Court. *Ctr. for Competitive Politics*, 784 F.3d at 1311. First, the Circuit considered CCP's argument "that the Attorney General's systems for preserving confidentiality are not secure" and called them "speculative." *Ctr. for Competitive Politics*, 784 F.3d at 1316; *see also AFPF II*, 809 F.3d at 541 ("The plaintiffs' 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").

[4] In addition, despite the Attorney General's protestations to the contrary, CCP has ceased engaging in constitutionally protected speech, and has also been denied the ability to raise funds for its mission from Californians—facts that did not exist at the preliminary injunction stage and which go toward establishing the "actual burden" the Attorney General's program imposes on Plaintiff's First Amendment rights.

Consequently, that issue did not factor into the Ninth Circuit's analysis. But we now know, certainly for present purposes, "that the Attorney General's systems for preserving confidentiality are not secure," and now constitute a cognizable threat of First Amendment injury. *Ctr. for Competitive Politics*, 784 F.3d at 1316. Secondly, the Court of Appeals relied upon the Attorney General's argument that "having immediate access to Form 990 Schedule B increases her investigative efficiency, and that reviewing significant donor information can flag suspicious activity." *Id*. at 1317. But we now know that she does not, in any meaningful way, use Form 990 Schedule B to enforce the law. *AFPF*, 2016 U.S. Dist. LEXIS 53679 at 10 ("It is clear that the Attorney General's purported Schedule B submission requirement demonstrably played no role in advancing the Attorney General's law enforcement goals for the past ten years"). Thus, only by relying on sparse factual assertions that has since been disproven, and only under a standard of review that did not require Plaintiff's allegations to be taken as true, did the Ninth Circuit "conclude that the disclosure requirement bears a substantial relation to a sufficiently important government interest." *Ctr. for Competitive Politics*, 784 F.3d at 1317 (internal citation and quotation marks omitted).

Assuming Plaintiff's factual allegations are true, the Schedule B program does not further any governmental interest whatsoever.[5] This fact is fatal under exacting scrutiny. "In the First Amendment context, fit matters." *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1456 (2014). And, as the *en banc* D.C. Circuit has properly observed, "'[s]omething…outweighs nothing every time.'" *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 695 (D.C. Cir.

[5] Accordingly, the Attorney General's reliance almost entirely on campaign finance or lobbyist registration cases for its harassment point, cases sounding in the *public's* interest in knowing who is conducting paid campaign activity or hiring lobbyists to support legislation, is simply misplaced. The public "informational interest" in those matters is a completely different state interest from the "law enforcement" interest asserted here. Def. Mot. at 12-13 (listing cases).

2010) (*en banc*) (quoting *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)); *also* Pl. Mot. for Prelim. Inj. at 6-8.

It would be odd were this not the rule. Otherwise, governments could defeat motions for preliminary relief by brazenly misrepresenting the scope and reach of a program, then avoid any scrutiny of those representations by bootstrapping an appellate decision, premised upon those same representations, into a motion to dismiss. That is precisely what has happened here, and constitutes a dangerous recipe for avoiding the judiciary's proper role as a check on governmental abuse of authority.

The Attorney General further argues that, as a matter of law, only a demonstration by CCP of a level of threats, harassment, and reprisals "such as" those experienced by "the NAACP in the pre-Civil Rights Era and the Socialist Party during the Cold War" would suffice to state a claim. This position ignores both that an exacting scrutiny analysis is inherently fact based—and has been required by the Ninth Circuit in this very case—and that the outcome of this "balancing test" will change with the addition of new facts, such as those already found in the *AFPF* litigation and now pled here. *Ctr. for Competitive Politics*, 784 F.3d at 1312. The Ninth Circuit did not limit relief to only groups raising such claims, but rather said that while the Attorney General's assertion that she keeps donor lists private and uses them often to enforce the law defeated Plaintiff's claims for preliminary relief, an as-applied injunction could be appropriate *even when* the "facts" demonstrate that her disclosure program passes exacting scrutiny. In any event, federal courts do strike down compulsory disclosure laws even when no such evidence of threats or harassment is available. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1366-1367 (11th Cir. 1999) (striking down law requiring only disclosure to the government on theory that such compelled disclosure itself is the harm when it does not serve a "substantial" governmental interest); *Talley v. Calif.*,

362 U.S. 60 (1960) (striking down local public disclosure law); *Coal. for Secular Gov't v. Williams*, 815 F.3d 1267 (10th Cir. 2010) (striking down disclosure and state registration requirements as-applied to organization publishing philosophy paper about abortion rights); *N.M. Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010), *Minn. Citizens Concerned for Life v. Swanson*, 692 F.3d 864 (8th Cir. 2012) (striking down public disclosure regime requiring repeated filings triggered by a solitary expenditure).

Finally, the Attorney General's parting assertion that even if she did make Schedule B information public, she would consider that a constitutional act, only compounds Plaintiff's reasonable fears concerning her policy. None of her cited cases suggest that *donors* to a charity unconnected to electoral activism may be disclosed, and none of those cases stand for the proposition that she could compel disclosure without demonstrating that the publication of donor information would advance a sufficiently important governmental interest. *AFPF II*, 809 F.3d at 538 ("The Attorney General does not assert any state interest in *public* disclosure of Schedule B forms") (emphasis in original). Even *Doe v. Reed*, upon which the Attorney General relies, found that the public disclosure of home and address information imposed "burdens…on First Amendment rights." 561 U.S. 186, 197 (2010).

Consequently, at the very least, CCP has pled facts that plausibly state that it is entitled to the same relief granted by the Ninth Circuit in *AFPF II*—injunctive relief against the public revelation of its donor list, whether inadvertently or in response to a California Public Records Act request.[6] *AFPF II*, 809 F.3d at 538 ("The Attorney General does not assert any state interest in

[6] The Attorney General also claims that that promulgation of 11 Code Calif. Regs. § 310(b) protects Schedule B information from being disclosed in response to an otherwise valid public records request. But this assertion has yet to be tested in the judicial system. *See Haynie v. Superior Court*, 26 Cal. 4th 1061, 1068 (Cal. 2001) (noting that California generally grants valid Public Records Act requests "unless the Legislature," not necessarily an executive agency, "'has

public disclosure of Schedule B forms") (emphasis in original). The Attorney General has, at least for the purposes of this motion, taken no steps that could prevent future inadvertent disclosures, such as the thousands of Schedule B documents that the Registry had unwittingly posted on the Internet—including hundreds of Schedule Bs found online during the course of the *AFPF* bench trial. Moreover, there is simply no articulable state interest in making § 501(c)(3) donor lists public when doing so contravenes the Attorney General's stated policy of confidentiality.

II. CCP Has Demonstrated That It Is Plausibly Entitled To Relief On The Grounds That The Attorney General's Demand Is A Content-Based Restriction On Speech.

The Attorney General next claims that CCP has not properly pled its First Amendment speech claim because her disclosure program is not a restriction on "communicative" speech. Instead, she claims that it merely constitutes "after-the-fact" reporting of donor information, unconnected to communicative speech. She also posits that CCP's amended complaint "does not identifiy any speech that is impacted by the reporting requirement."

As a preliminary matter, CCP's complaint has identified the impacted speech—charitable solicitations that Plaintiff has ceased making, thereby silencing itself, foregoing financial support, and denying the citizens of California speech that is "'vital to the maintenance of democratic institutions.'" *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (quoting *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 161 (1939)). That speech, which is directly affected by her disclosure regime, is patently communicative. *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("[C]haritable appeals for funds . . . involve a variety of speech interests

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expressly provided to the contrary.'" (quoting *Williams v. Superior Court*, 5 Cal 4th 337, 346 (Cal. 1993)). Moreover, legislative exemptions against disclosure "can be waived" in the Public Records Act context., if a record is "disclose[d]…to any member of the public." *Cnty. of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301, 1321 (Cal. Ct. App. 2009); Cal. Gov. Code § 6254.5. If nothing else, relief on this point "would further the state's public policy as well as allay the concerns of the plaintiffs." *AFPF II*, 809 F.3d at 542.

-- communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes -- that are within the protection of the First Amendment.").

The Attorney General's argument—heavily reliant on campaign finance jurisprudence—that her disclosure requirement is a mere "after action" report suffers from two significant flaws. First, it ignores the sea change in the law wrought by *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which makes plain that *any* restriction on speech on the basis of content is subject to strict scrutiny. No case cited by the Attorney General limits the reach of *Reed* to exclude regulatory regimes that *ban speech* unless a particular disclosure requirement is met.

In *Reed*, a town in Arizona sought to "prohibit[] the display of outdoor signs anywhere within the Town without a permit," with sundry exemptions for different categories of signs. *Id*. at 2224. The Petitioner, a local pastor who posted signs that did not qualify for one of the exemptions, was told that he would have to comply with the law going forward and that "there would be 'no leniency under the Code.'" *Id*. 2225-26. The Supreme Court held that the sign code was content-based on its face and subject to strict scrutiny, even though the various categorical options for posting a sign without a permit did "not mention any idea or viewpoint, let alone single one out for differential treatment." *Id*. at 2229 (internal quotation marks omitted). That is to say, one could not engage in certain categories of speech without first obtaining a permit. But one could engage in *other* forms of speech without a permit—as long as the sign complied with additional content-based restrictions. Ultimately, the Court struck the sign code as unconstitutional under the strict scrutiny standard. *Id*. at 2236.

Here, the Attorney General requires that charities obtain a permit—membership in the Registry—and turn over constitutionally-protected information, before they can speak to Californians. For any other category of speech, aside from charitable solicitation, the Attorney

General does not impose a similar licensing regime. This sort of distinction is improper, and subject to strict scrutiny. Given that Plaintiff has pled sufficient facts to demonstrate that the Attorney General's Schedule B program cannot survive exacting scrutiny, it follows that it has pled sufficient facts to demonstrate the policy plausibly flunks strict scrutiny.

But even if one adopts the Attorney General's position that her ban on a single category of speech is justifiable because she requires a mere after-action report, *Reed* still plausibly applies and a motion to dismiss at this stage is improper. Justice Breyer, concurring only in the judgment, listed a number of statutes that would now be subject to strict scrutiny under the *Reed* Court's reasoning. Specifically, he believed that strict scrutiny would now apply to "requirements for content that must be included in a [Securities and Exchange Commission] registration statement" or "requir[ements that] taxpayers . . . furnish information about foreign gifts received if the aggregate amount exceeds $10,000." 135 S. Ct. at 2235 (Breyer, J., concurring in the judgment). Pointedly, both of these requirements are just as "communicative" as the filing of the Form 990 Schedule B. *See id.* at 2231 (majority op.) ("[A] clear and firm rule governing content neutrality is an essential means of protecting the freedom of speech, even if laws that might seem 'entirely reasonable' will sometimes be 'struck down because of their content-based nature.'") (quoting *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

Secondly, the Attorney General's remaining case citations—all of which precede *Reed*—regarding the "reporting of funds that may be used to finance speech," are inapplicable here. The disclosure of contributors was not at issue in either *Doe v. Reed*, 561 U.S. 186 (2010) or *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), which concerned the gathering of petition signatures. Likewise, donor lists were not at issue in *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988).

And while contributions *were* at issue in *Citizens United v. FEC*, 558 U.S. 310 (2010), disclosure there was limited to the publication of the direct funders of commercial and political speech broadcast in certain media in the weeks right before an election. Conversely, the Attorney General flatly prohibits speech at all times, about the "particular subject matter" of charitable solicitation, unless a confidential tax document is given to her on demand as part of a licensing regime. *Reed*, 135 S. Ct. at 2227.[7]

III. The Attorney General's Demand For CCP's Donor List Constitutes Fourth Amendment Injury.

The Attorney General argues that CCP's Fourth Amendment claim is "not sufficiently well-plead, and is legally baseless." Def. Mot. at 18 (citation omitted). She does not argue that she offers an opportunity for precompliance review of an administrative subpoena. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2447 (2015). Instead, she flatly denies that her collection of donor lists under "her general subpoena power," *AFPF II*, 809 F.3d at 539 (internal quotation marks omitted), implicates the Fourth Amendment in any way whatsoever, Def. Mot. at 19. In one paragraph, the Attorney General simply declares her dragnet regime is neither a search nor a seizure, and that is that. *But see Grand Jury Subpoena v. Kitzhaber*, 2016 U.S. App. LEXIS 12860 at 3 (9th Cir. July 13, 2016) ("But a wide net is susceptible to snags.").

"[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the 4th Amendment." *Kitzhaber*, 2016 U.S App. LEXIS 12860 at 8 (quoting *Hale v. Henkel*, 201 U.S. 43, 76 (1906), *abrogated in part on other grounds*, *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 68 (1964)). The Attorney General's demand, which even

[7] Indeed, the Attorney General's one attempt—in a footnote—to grapple with the *Reed* decision is insufficient. The cited case was an unlikely First Amendment challenge to Seattle's imposition of a $15 minimum wage on certain franchisees. *Int'l Franchise Ass'n v. City of Seattle*, 803 F.3d 389, 408-409 (9th Cir. 2016), *cert. denied* 136 S. Ct. 1838 (2016).

she believes to be a form of non-judicial subpoena, Def. Opp'n at 4, ECF No. 10, is unquestionably just such "[a]n order for the production of books and papers," and it therefore implicates the Fourth Amendment. *Kitzhaber*, 2016 U.S. App. LEXIS 12860 at 8 (internal quotation marks omitted); *see also* FAC ¶ 66.

The government "conducts a 'search' within the meaning of the Fourth Amendment when [its] agent infringes 'an expectation of privacy that society is prepared to consider reasonable.'" *United States v. Lundin*, 817 F.3d 1151, 1158 (9th Cir. 2016). Plaintiff's amended complaint avers the general privacy of donor information a number of times, and expressly contrasts the Attorney General's demand with her actual statutory power to conduct an investigation and issue administrative subpoenas. FAC ¶ 66 ("The Attorney General's disclosure mandate seeks private donor information from all charities operating in California without the judicial oversight that would exist if she, instead, issued individual administrative subpoenas for select donor information"); *id*. at ¶¶ 63-65 ("The Fourth Amendment requires a role for the judiciary in supervising subpoenas and warrants").

Society has demonstrated that it is prepared to consider privacy in charitable donations to be reasonable. Forty-eight states have opted to permit charities to keep their donor lists private, even from state review. The federal tax code prohibits the Attorney General from obtaining CCP's donor list from the IRS. 26 U.S.C. § 6104(c)(3). These are facts, requiring no discovery. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice"); *Harris v. Amgen, Inc.*, 788 F.3d 916, 934 (9th Cir. 2015), *remanded on other grounds Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016) (citing same).

The Attorney General's argument that CCP forfeits this expectation of privacy when it complies with federal tax law is a red herring. While it is true that there is "no legitimate expectation of privacy in information . . . voluntarily turn[ed] over to third parties," *United States v. Forrester*, 512 F.3d 500, 509 (9th Cir. 2008) (internal quotation marks omitted), an organization is not voluntarily handing over that information when complying with the federal tax laws under threat of state sanction. *See, e.g.*, *Smith v. Md.*, 442 U.S. 735, 740 n.5 (1979) (noting that expectation of privacy could exist even in situations where the government conditioned people to believe that no expectation of privacy existed).

Moreover, the third-party doctrine upon which the Attorney General relies may be vitiated by Congressional action that ensures the privacy of records. The Fourth Circuit found a reasonable expectation of privacy in the records of an individual receiving care at a methadone clinic, even though in the course of his treatment the patient had *voluntarily* disclosed information relating his history of substance abuse. *Doe v. Broderick*, 225 F.3d 440, 450-451 (4th Cir. 2000). In doing so, the Court explicitly looked to the existence of a federal law which generally prohibited "the disclosure of 'records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research.'" *Id*. at 446 (quoting 42 U.S.C. § 290dd-2(a)). Likewise, here, federal law flatly prohibits the Attorney General from obtaining Plaintiff's Form 990 Schedule B in order to regulate charitable solicitation. 26 U.S.C. § 6104(c)(3). "Under these circumstances . . . the statute is a fitting indication that society is willing to recognize [CCP's] expectation of privacy as objectively reasonable." *Broderick*, 225 F.3d at 450.

Similarly, the Colorado Supreme Court has found that statutes that "protect the privacy of tax return information even when it is in the custody of the IRS . . . reflect[] a broad societal understanding that, when an individual prepares and files a tax return, he does so for the IRS *and no one else*." *People v. Gutierrez*, 222 P.3d 925, 935 (Colo. 2009) (emphasis supplied). Accordingly, the state supreme court concluded that there is a "reasonable expectation of privacy in information disclosed to the IRS." *Id*. at 936.

This makes sense, given that the IRS, unlike the Attorney General, has demonstrated that it can competently keep donor information private, and is uniquely positioned to amass an enormous range of information that no American provides to anyone else. Consequently, extensive criminal and civil penalties attach to the IRS's divulgence of donor lists from the IRS—and the Service is prohibited by law from giving that list to Defendant. 26 U.S.C. §§ 6104(c)(3); 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) (criminal sanctions for disclosure of returns or return information by 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); *see also U.S. Dep't of Justice v. Reporters' Comm. for Freedom of the Press*, 489 U.S. 749, 763 n.15 (1989) ("[I]f the record is one not open to public inspection, as in the case of income tax returns, it is not public and there is an invasion of privacy when it is made so" (quoting Restatement (Second) of Torts § 652D (1977) at 385-386)). Such statutory protections are nonexistent here.

The Attorney General's brief entirely fails to mention or grapple with the Supreme Court's reasoning in *Patel* and Plaintiff's reliance upon that case in its pleadings. Instead, in a footnote,

she dispatches with any pretense that the judiciary ought to have a role in checking her demand for the donor list of every charity seeking to fund itself from Californians. Def. Mot. at 19, n.10.

CONCLUSION

For the foregoing reasons, the motion to dismiss ought to be denied.

Dated: September 22, 2016

Respectfully submitted,

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*Admitted *pro hac vice*.
**Application for admission *pro hac vice* pending