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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 REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY RELIEF 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

By the Attorney General's own admission, she did not begin to aggressively collect the donor lists of charities operating in California until 2010. Ibanez Decl. at 3, ¶ 5. To this day, California remains one of only two states to demand that charities divulge unredacted Schedule Bs.[1]

Meanwhile, the additional information provided by the Attorney General in opposition to Plaintiff's motion, discussed *infra*, fails to demonstrate that Schedule B "information is necessary to determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices." *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1311 (9th Cir. 2015). Nor does the Attorney General properly assure this Court that she has an effective confidentiality policy. Finally, since this case was initially brought, the U.S. Supreme Court has clarified both the scope of the Free Speech Clause and the application of the Fourth Amendment to unreasonable governmental seizures. *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015); *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015). These cases fundamentally alter the constitutional landscape surrounding the Attorney General's demand.

Taken together, these changes show that the Constitution is flashing a red light against the Attorney General's disclosure regime. This counsels in favor of granting CCP's motion for preliminary relief, especially as the Attorney General has not demonstrated any need for this information, and will suffer no injury in continuing to enforce the law, as she did for many years,

[1] During the pendency of this case, one state—Florida—affirmatively revoked its government's ability to collect Schedule B information. Fla. Stat. § 496.407(2)(a) (effective July 1, 2014).

without violating the privacy of charitable donors. *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1103 n.4 (9th Cir. 2016) (Preliminary relief "appropriate when a plaintiff raises 'serious questions' as to the merits and 'the balance of hardships tips sharply in plaintiff's favor.'") (quoting *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)).

THE ATTORNEY GENERAL'S SCHEDULE B PROGRAM

CCP has been a member of the Registry of Charitable Trusts since 2008. First Amend. Cmplt. ¶ 7. Until 2014, it never provided its donor list to the Attorney General, and was never notified of any obligation to do so. Defendant suggests that CCP deliberately chose not to file "a copy of its IRS Form 990 Schedule B…as required by law," a "compliance failure" not caught until 2014 despite the Attorney General's alleged "implement[ation of] a comprehensive effort to identify and notify registered organizations of their filing deficiencies" in 2010. Def. Opp'n to Mot. for Prelim. Relief., ECF No. 49 at 5 ("Def. Opp'n"); Ibanez Decl. at 3, ¶ 5. But CCP's error, if any, was innocent—and likely a correct reading of the law. In 2014, California was the only state in the country seeking unredacted Schedule Bs without a statute or regulation to that effect. California law, like the law of many of the 48 states that do not require the filing of a Schedule B, simply asked for "Form 990." 11 Code of Calif. Regs. 301.[2] Moreover, CCP's understanding was buttressed by Federal law prohibiting the Attorney General from obtaining Schedule B "for the purpose of…the administration of State laws regulating…charitable funds or charitable assets." 26 U.S.C. § 6104(c)(3).

Regardless, the Attorney General has adequate information concerning CCP's charitable activities without Schedule B. Form 990 is a lengthy and comprehensive document that reports

[2] *See also* Pl. Br. on Mot. for Prelim. Relief, ECF No. 39-1, at 13, n.10 (noting a number of state statutes that are not interpreted to require unredacted Schedule B despite using similar language to California's).

virtually all of a charity's financial transactions. *Am. for Prosperity Found. v. Harris*, 2016 U.S. Dist. LEXIS 53679 at 7 (C.D. Cal. Apr. 21, 2016) ("*AFPF*") ("And even in instances where a Schedule B was relied on, the relevant information it contained could have been obtained from other sources").[3]

ARGUMENT

I. The Attorney General's Bulk Collection Of Donor Lists Likely Violates The First Amendment's Protection Of Freedom Of Association.

The Ninth Circuit has spoken plainly: courts must "apply exacting scrutiny in the context of First Amendment challenges to disclosure requirements." *Ctr. for Competitive Politics*, 784 F.3d at 1312. This requires the State to demonstrate that there is "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Id*. (citation and quotation marks omitted). As discussed in earlier briefing, the Attorney General has failed to demonstrate that there is a "substantial relation" between the disclosure requirement and her law enforcement interest. A "substantial relation" does not mean that the Attorney General occasionally or tangentially looks to an unredacted Schedule B already in her possession. It means that the schedule should be, as the Attorney General first declared to this court, "a critical law enforcement tool," and not merely a handy thing to have around the office.[4]

The Attorney General's only response here is that exacting scrutiny requires no scrutiny at all, relying on the Ninth Circuit's holding that "compelled disclosure, alone, does not constitute

[3] Plaintiff acknowledges that these facts are on appeal, where the Court of Appeals will "review the district court's findings of fact after a bench trial for clear error." *OneBeacon Ins. Co. v. Haas Indus.*, 634 F.3d 1092, 1096 (9th Cir. 2011).

[4] One can easily think of all kinds of documents that law enforcement would undoubtedly love to keep on file, such as the contents of private emails. It does not follow that government may simply demand them as a precondition of becoming, for example, a professional fundraiser.

First Amendment injury"[5] and that, therefore, there is no "'actual burden'" on CCP's, or its donors', rights. Def. Opp'n at 9 (citing *Ctr. for Competitive Politics*, 784 F.3d at 1314) (emphasis removed). But the Ninth Circuit merely stated that exacting scrutiny—which again, *must be applied*—is a "balancing test." 784 F.3d at 1314. And CCP has amply demonstrated the improper fit between the government's demand and its interest. Pl. Br. for Prelim. Relief, at 6-8.[6]

Moreover, additional burdens have arisen since the Ninth Circuit's decision. Plaintiff has introduced evidence indicating that the Attorney General's confidentiality policy is completely unreliable.[7] While the Attorney General once again professes her intention to keep Schedule B confidential, these suppositions have yet to be tested. But we do know that she has failed to adequately protect donor data in the past—including the identities of hundreds of donors to Planned Parenthood—and even left the Registry open for eight days after becoming aware of a backdoor vulnerability into the system. Declaration of Zac Morgan ("Morgan Decl."), Exh. 2 at 46:14-16. Nor is inadvertent disclosure the only danger; the Ninth Circuit has suggested that Schedule B information could be vulnerable to a Public Records Act request. *Am. for Prosperity Found. v. Harris*, 809 F.3d 536, 542 (9th Cir. 2015) ("*AFPF II*").

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[5] Plaintiff continues to preserve its challenge to this understanding of First Amendment injury.

[6] 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. Def. Opp'n at 10. 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, and in any event, federal courts do strike down compulsory disclosure laws even when no such evidence of threats or harassment is available. Br. in Opp. to Mot. to Dismiss, ECF No. 50 at 11-12 (collecting cases).

[7] The Attorney General's citation to the Ninth Circuit's opinion *before* the conclusion of the *AFPF* bench trial is unavailing for the reasons given at footnote 3, page 7 of CCP's opposition to Defendant's Motion to Dismiss.

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Finally, CCP has ceased engaging in charitable solicitation in California. *Va. v. Am. Booksellers Ass'n*, 484 U.S. 383, 392 (1988) ("self-censorship" is "a harm that can be realized even without an actual prosecution"); *also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 739 (2011) ("And forcing that choice…trigger matching funds, change your message, or do not speak—certainly contravenes 'the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message'") (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995)). Even if the Attorney General is correct that these are slim proffers of burden, and they are not, they outweigh her failure to demonstrate that a charity's Schedule B is a necessary and vital weapon in her mission to protect Californians from charitable fraud.

Which takes us to the core of this matter: the application of exacting scrutiny. The Attorney General, for the first time before this court, has made an effort to meet part of that standard by seeking to explain how her staff uses collected donor lists. To that end, she relies principally upon a declaration from Tania Ibanez, senior assistant attorney general for the Charitable Trusts Section.[8] Def. Opp'n at 12-15. However, the Attorney General's proffer only further demonstrates that donor lists are not "a critical enforcement tool." Def. Opp'n to Pl. Mot. for Prelim. Inj., ECF No. 10 at 1. Indeed, in her declaration, Ms. Ibanez specifically swore that her office "do[es] not track what evidence is used in our investigations so it is not possible for me to catalogue all the times that Schedule B has been significant or of use in my investigations." Ibanez Decl. at 5, ¶ 15.

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[8] As evidence, Ms. Ibanez attached truncated excerpts of her testimony before the *AFPF* court, as well as testimony in a related case where the trial has not concluded. Notably, the Attorney General appears to no longer rely on a declaration from Kevis Foley, former Registrar, who testified at some length at the *AFPF* trial and was Defendant's initial declarant. ECF No. 10-8.

Some of her examples, moreover, were litigated during the *AFPF* trial. Her example of the L.B. Research and Education Foundation ignores a fundamental fact, which Ms. Ibanez has already admitted under oath in the *AFPF* case: "the Schedule B that [she] relied on in that investigation…was a Schedule B for a private foundation." Morgan Decl., Exh. 3 at 64:4-14. By law, donors to private foundations are public, *precisely* because, compared to groups like CCP, private foundations pose a greater threat of fraud. 26 U.S.C. § 6104(d)(3)(A). Defendant will have access to Schedule Bs for private foundations regardless of the outcome of this litigation.[9]

Ms. Ibanez's only other specific example is the 50-state lawsuit brought against the Cancer Fund of America and three other cancer charities, for what can only be described as a massive fraud. But, as might be guessed from the fact that 48 states do not collect Schedule B information, the form at issue here was not vital to that case. Indeed, one of the Attorney General's staffers did not even consider looking at any "relevant Schedule B" for "over three years." Morgan Decl., Exh. 3 at 120:16-18. In fact, three of the states involved in that lawsuit—Arizona, South Carolina, and Michigan—actually used that suit against "sham cancer charities" as evidence that donor disclosure requirements were *unnecessary* to "effectively exercise oversight over non-profits actively soliciting donations within their jurisdiction and investigate, prosecute and deter fraudulent activities." Br. of *Amici Curiae* States of Ariz., Mich., and S.C. at 8, *Ctr. for Competitive Politics v. Harris*, No. 15-152 (U.S. 2015).

The remaining examples in the declaration are equally unavailing, vague, and untested. *See 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

[9] This omission compels the question: How many of Ms. Ibanez's current examples involve the Schedule B of private foundations?

governmental purpose by mere assertion"). They also do not indicate regular, everyday use of the document. *Cf. AFPF* at 7 ("Steven Bauman, a supervising investigative auditor for the Attorney General, testified that out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section, only five instances involved the use of a Schedule B").

Instead, for most of those examples, one of the other schedules already available to the Attorney General as part of Form 990—such as those listing in-kind contributions,[10] or the reporting of donations by interested persons[11]—would likely suffice. And none of Ms. Ibanez's examples suggests that review of the Schedule B by itself initiated any investigation. Morgan Decl., Exh. 3 at 68-69:19-3 (Testimony of Sr. Assistant Att'y Gen. Ibanez) ("Q. A Schedule B has never precipitated an investigation of a charity in that same sense has it?…A. You're correct…I would not undertake an investigation solely because of a Schedule B").

Accordingly, the Attorney General now relies on rationales often makes in the context of First and Fourth Amendment challenges to a government's dragnet collection of data: it is nice to

[10] Schedule M requires the reporting of noncash contributions. *See* Ibanez Decl. at 6, ¶ 16 ("Gift-in-kind is a non-case donation, often pharmaceuticals"). Schedule M lists a number of examples of noncash contributions, including "[d]rugs and medical supplies." Morgan Decl., Exh. 1 (Sch. M at 1). The number of items contributed, their value, and the method of determining that valuation must also be provided. *Id*. Comparing the Schedules M of charities named in a complaint alleging the daisy-chain gift-in-kind scam Ms. Ibanez describes would show the same type and value of noncash contributions, suggesting grounds for opening an investigation. Ibanez Decl. at 6, ¶ 18.

[11] Schedule L reports transactions with "interested persons," including loans or business transactions given to such persons. Morgan Decl, Exh. 1 (Sch. L). Interested persons include a contributor otherwise reported on Schedule B, "[a] family member of [that donor]," and in certain circumstances even "an employee (or child of any employee) of a substantial contributor." *Id.* (Instructions for Sch. L at 1). Plaintiff does not object to the listing of donors by name on Schedule L, which requires all named persons to list the "[r]elationship between the interested person and the organization." Presumably then, Schedule L could also help determine whether "a donor is controlling a charity." Ibanez Decl. at 6, ¶ 19. Likewise, if a charity were misrepresenting donations from an interested person as loans reportable on Schedule L, a comparison of the loan amount attributed to the interested person and the value of contributions listed on the redacted Schedule B would provide grounds to open an investigation.

have on hand, and providing additional process might be "time-consuming" or tip off the governed that the government thinks they are up to no good.[12] Def. Opp'n at 14. These are arguments that the government usually makes in the context of national security and similarly urgent matters. *E.g.* James Risen and Eric Lictblau, "Bush Lets U.S. Spy on Callers Without Courts", N. Y. TIMES, Dec. 11, 2005 ("Those involved in the program also said…that it would be impractical to seek permission from the Foreign Intelligence Surveillance Court first…"). Such assertions are unconvincing here given the lack of any concrete government need. They are certainly insufficient under heightened constitutional scrutiny.

II. The Attorney General's Content-Based Restriction On Charitable Solicitation Likely Violates The First Amendment's Protection Of Free Speech.

The Attorney General's claim that her information dragnet does not restrict "communicative speech" because it merely demands "after the fact" reporting elides the crux of the matter: the Attorney General restricts communicative charitable solicitations while leaving other categories of speech unburdened. *Vill. of Schaumburg v. Citizens for a Better Env't,* 444 U.S. 620, 632 (1980); *Reed,* 135 S. Ct. at 2224.

She also ignores that donor disclosure reports inherently have a communicative element in themselves, as the Supreme Court has determined in the context of campaign finance reports. The Court has held that disclosure of "financial support" may "alert" recipients of disclosed information "to the interests to which a [group] is most likely to be responsive." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (*per curiam*). Clearly, the Attorney General would not be seeking Schedule Bs if she did not believe they could communicate *something* to her.

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[12] For the proposition that charities will tamper with evidence, the government relies entirely on vague and unsupported assertions provided by Ms. Ibanez. *See* Morgan Decl., Exh. 3 at 70:23-25 (Ms. Ibanez testifying that, because she always had a charity's Schedule B when conducting an investigation, she "know[s] of no instance where a request for a Schedule B tipped anyone off").

Fundamentally, the Supreme Court's recent opinion in *Reed* signaled that seeking to regulate different "buckets" of speech by regulation or through a permitting process, both of which are at issue here, is subject to strict scrutiny. *See United States v. Swisher*, 811 F.3d 299, 313 (9th Cir. 2016). Given the Attorney General's weak demonstration of need under exacting scrutiny, she is unlikely to meet that higher test, and preliminary relief ought to issue.[13]

III. The Attorney General's Collection Of Donor Lists With "The Same Force As A Subpoena" Is Unreasonable Under The Fourth Amendment.

The Attorney General spends no time, save a footnote, on the proposition that Plaintiff is entitled to precompliance review of her request for its donor list, a demand made with "the same force as a subpoena." Def. Opp'n at 19, n.11; *id*. at 1; *also AFPF II*, 809 F.3d at 539. Rather, she simply asserts, as she did in her motion to dismiss, that her policy carries no Fourth Amendment implications whatsoever. But courts have determined that one has a reasonable expectation of privacy within the meaning of the Fourth Amendment for information disclosed under the protection of federal privacy statutes, including in the very context of tax returns. *Doe v. Broderick*, 225 F.3d 440, 450-451 (4th Cir. 2000); *People v. Gutierrez*, 222 P.3d 925, 935 (Colo. 2009); *United States v. Basey*, 816 F.2d 980, 993 n.21 (5th Cir. 1987) (noting that "specific statutory protections" can create a "reasonable expectation of privacy in broadcasts over the public airwaves"), *also* Br. in Opp. to Mot. to Dismiss at 18-19. Even in *Stokwitz v. United States*, which the Ninth Circuit relied upon to defeat Plaintiff's federal preemption claim, the Ninth Circuit noted that the appropriate remedy for the "seiz[ure]…of [Stokwitz's] federal and state tax returns" without "civil discovery or a search warrant" would be an action against the Navy employees who

[13] Furthermore, as CCP discussed at some length in its motion to dismiss, Justice Breyer's concurrence indicates that the Court believed *Reed*'s application could extend to registration statements filed by entities with the government. Br. in Opp'n to Mot. to Dismiss at 15.

seized those records "under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971)"—that is, under the Fourth Amendment. 831 F.2d 893, 893-894 (9th Cir. 1987).

The Attorney General also argues that "the requirement to produce information on a government form in exchange for a privilege," does not "fall[] within the scope of the Fourth Amendment." Def Opp'n at 18; *United States v. Scott*, 450 F.3d 863, 866 (9th Cir. 2006) ("It may be tempting to say that such transactions—where a citizen waives certain rights in exchange for a valuable benefit the government is under no duty to grant—are always permissible"). This is simply another way of claiming that the unconstitutional conditions doctrine does not apply to the Fourth Amendment. But it does. *Scott*, 450 F.3d at 867 ("The doctrine is especially important in the Fourth Amendment context"). The Attorney General's reliance on cases involving challenges to the United States census—an inherent constitutional power of the federal government—are therefore inapposite.

As a result, this Court is left with Plaintiff's unrebutted claim that *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) controls, and preliminary relief accordingly ought to issue.

Conclusion

For the foregoing reasons, CCP's motion for a preliminary injunction ought to be granted.

Dated: September 29, 2016

Respectfully submitted,

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