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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CENTER FOR COMPETITIVE POLITICS,

Plaintiff,

v.

KAMALA D. HARRIS, IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Defendant.

2:14-CV-00636-MCE-DAD

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Courtroom: 7, 14th Floor
Judge: Hon. Morrison C. England, Jr.
Trial Date: None Set
Action Filed: March 7, 2014

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INTRODUCTION

Plaintiff Center for Competitive Politics ("CCP") is an educational nonprofit organized under § 501(c)(3) of the Internal Revenue Code ("IRC"). CCP's mission is to promote and defend the First Amendment rights to free political speech, assembly and petition through strategic litigation, communication, activism, training, research and education. To support its activities, CCP solicits charitable contributions nationwide, including in California. Consequently, CCP registers with the State, and submits its publicly available IRS Form 990 to the Attorney General. This year, for the first time since CCP began soliciting contributions in California in 2008, the Attorney General has also requested an unredacted copy of CCP's Schedule B.

Schedule B is an addendum to Form 990 which lists the names and addresses of CCP's contributors. While a redacted version of this form is publicly available, per the disclosure and privacy provisions of the IRC, the Schedule B contributor information of § 501(c)(3) organizations is exempt not only from public disclosure, 26 U.S.C. § 6104(d)(3), but also from disclosure to state officials. The IRC creates a specific means for state officials to seek confidential tax return information by direct request to the Secretary of the Treasury. 26 U.S.C. § 6104(c)(3). But § 501(c)(3) organizations are explicitly exempted from this provision.[1]

The California Attorney General's request for CCP's Schedule B consequently violates the clear terms of the IRC, and ignores the Supremacy Clause of the United States Constitution, which forbids state action that conflicts with federal law. U.S. CONST. art. VI, cl. 2. Worse still,

[1] The law provides:

> Disclosure with respect to certain other exempt organizations. Upon written request by an appropriate State officer, the Secretary may make available for inspection or disclosure returns and return information of any organization described in section 501(c) [26 USCS § 501(c)] (other than organizations described in paragraph (1) or (3) thereof).

the Attorney General cites no authority whatsoever to substantiate her demand for the Schedule B.

The Attorney General's demand creates a stark choice for CCP. Either of its potential courses of action would result in constitutional harm actionable under 42 U.S.C. § 1983. CCP may refuse to comply with the Attorney General's Letter and risk losing its ability to solicit charitable contributions in California, despite Ninth Circuit and U.S. Supreme Court precedent holding that fundraising for charitable organizations is fully protected speech. *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1991) (citing *Bd. of Trs. v. Fox*, 492 U.S. 469 (1989)). On the other hand, if CCP does give the Attorney General its confidential Schedule B as a precondition of engaging in protected fundraising speech, its First Amendment right to associate with its contributors, many of whom would rather not be disclosed, and their right to freely associate with each other, will be chilled.

As the United States Supreme Court first recognized in the civil rights cases of the 1950s, the anonymity of contributors to nonprofit educational organizations is generally protected, lest an individual be subject to retaliation for supporting an organization that educates the public on an unpopular topic. The State may only demand disclosure of an organization's funders if necessary to advance a sufficiently important governmental interest. Defendant has not even attempted to make such a showing.

Should CCP act in the interest of its contributors and forgo fundraising efforts in the State to protect its donors' names and addresses, it and its donors will be irreparably harmed. This will include not only lost contributions (and a corresponding loss of funding to advance CCP's mission) during the pendency of this litigation (which CCP will not be able to recover as damages from the state at a later time), but also the silencing of CCP's speech directed at potential donors in California.

STATEMENT OF FACTS

CCP filed for registration with the Registry of Charitable Trusts on November 4, 2008, and has been registered to solicit charitable contributions in California since that time. Keating Decl. at 1. CCP solicits contributions in California, and wishes to continue doing so. *Id.* However, CCP received a letter from Defendant dated February 6, 2014 which conditions continued registration with the Registry of Charitable Trusts upon providing Defendant with an unredacted version of CCP's Schedule B. Complaint, Ex. 1.

STANDARD FOR PROSPECTIVE RELIEF

CCP seeks a preliminary injunction preventing the Attorney General from obtaining its Schedule B as a precondition to CCP engaging in lawful activity in California.

The United States Supreme Court has set out, and the Ninth Circuit Court of Appeals has applied, a four-factor test for an injunction to issue. A plaintiff "seeking a preliminary injunction must demonstrate '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.'" *National Meat Ass'n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Beardslee v. Woodford*, 395 F.3d 1064, 1067 (9th Cir. 2005)).

ARGUMENT

I. There is a high likelihood that CCP will succeed on the merits of its case.

a. Federal law shields the very information the Attorney General seeks.

i. Federal Law

Under the IRC (26 U.S.C. § 1, *et seq.*), Congress created nonprofit entities, including the well-known § 501(c)(3) organization. 26 U.S.C. § 501(c)(3). Like most incorporated entities, § 501(c)(3) organizations must file tax returns. Educational nonprofits organized under this

provision of the code—like most § 501(c) organizations—must file tax information on Form 990. 26 U.S.C. § 6033(b); 26 C.F.R. § 1.6033-1(a)(2)(i). Much of the information on Form 990 is public, including the organization's general budget and information about its projects. 26 U.S.C. § 6104(b) s*ee also* IRS Form 990 *available at* http://www.irs.gov/pub/irs-pdf/f990.pdf (warning filers not to include personal information such as Social Security Numbers because the Form may be made public).

Form 990 has a supplement, Schedule B, which lists the names and addresses of an organization's contributors. While a public, redacted version of the Schedule is made available for public review, a § 501(c)(3) organization's unredacted Schedule B is not disclosed to the states or to the public, per the disclosure and privacy provisions of the IRC. The privacy provisions are comprehensive, including a general exemption for contributor privacy. 26 U.S.C. § 6104(b) ("The information required to be furnished…together with the names and addresses of such organizations and trusts, shall be made available to the public.…*Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust*") (emphasis supplied). Congress has also specifically provided that § 501(c)(3) donors should not be subject to public disclosure. 26 U.S.C. § 6104(d)(3) (stating that the public inspection copy of a § 501(c)(3) Form 990 "shall not require the disclosure of the name or address of any contributor to the organization").

Most important for this case is that Congress banned *state agencies* from seeking the donor lists of a § 501(c)(3) non-profit's Schedule B. The statutory language is clear:

> Upon written request by an appropriate State officer, the Secretary [of the Treasury] may make available for inspection or disclosure returns and return information of any organization described in section 501(c) *(other than organizations described in paragraph (1) or (3) thereof)* for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations.

26 U.S.C. § 6104(c)(3) (emphasis supplied). Through this language, Congress specifically exempted § 501(c)(3) organizations from donor disclosure to state agencies, including in the precise context (charitable solicitations) at issue here.

This case involves California's compelled disclosure of tax returns and return information reported to the Internal Revenue Service on Schedule B. "Return" and "return information" are terms of art in the IRC. A "return" is

> any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

26 U.S.C. ("IRC") § 6103(b)(1). This would include an IRC § 501(c)(3) organization's Schedule B. Likewise, "return information" includes the detailed data of the person's income, standing before the IRS on tax liability (paid, under review, assessment for a penalty, etc.), and attendant documents (memoranda, letters to the taxpayer, etc.). *See* 26 U.S.C. § 6103(b)(2) (enumerating data that defines "return information"). Anonymous data unconnected to any taxpayer is not "return information." 26 U.S.C. § 6103(b)(2)(D).

A focus of the IRC is on privacy and undue disclosure of tax returns, particularly the contributors to § 501(c)(3) organizations. CCP is a non-profit organized under IRC § 501(c)(3). Therefore, CCP files a Form 990 with the IRS, and knows that certain portions of the Form are made public. What is at issue is the possibility of disclosing CCP's confidential Schedule B as filed with the Internal Revenue Service —listing the names and addresses of its contributors—as a condition to soliciting contributions in California. CCP has in previous years provided the State with its publicly-available version of Schedule B, which redacts the names and addresses of its contributors, but lists the amount donated by each contributor. It does not object to continuing to file this version of Schedule B.

ii. California's Action

The California Attorney General is vested with the power to supervise compliance with the state's regulation of charitable corporations and solicitations. *See, e.g.*, CAL GOV. CODE § 12584. Charities are required to register with the state if they wish to solicit contributions from California citizens. CAL GOV. CODE § 12585. Generally, the filings are available for public inspection. CAL GOV. CODE § 12590. The Attorney General has the power to block such registry if she "finds that any entity…has committed an act that would constitute violation of…an order issued by the Attorney General, including, but not limited to… fail[ure] to file a financial report, or [filing] an incomplete financial report." CAL GOV. CODE § 12591.1(b)(3).

In a February 6, 2014 letter ("Letter"), the California Attorney General demanded that CCP produce a copy of its confidential Schedule B as filed with the Internal Revenue Service. *See* Complaint, Ex. 1. The Letter claims that failure to provide this information will make CCP's financial report incomplete, potentially rendering the organization ineligible to solicit charitable contributions. The three-paragraph demand contains no citation to authority—federal or state—authorizing such disclosure. Under CAL GOV. CODE § 12591.1(b)(3), however, failure to comply with the Letter's demand gives the Attorney General the power to impose substantial fines and block CCP's fundraising efforts in California.

Although it is infrequent (and often inadvertent), state officials occasionally act beyond the bounds of federal law. In these circumstances, even if the underlying state law is not null and void via preemption, the actions of a state official may constitute a Supremacy Clause violation. *See, e.g.*, *Duke Energy Trading & Mktg.*, 267 F.3d 1042, 1058-1059 (9th Cir. 2001) (overturning California governor's executive order as pre-empted by Congressional grant of jurisdiction to the Federal Energy Regulatory Commission); *Abraham v. Hodges*, 255 F. Supp. 2d 539, 553-54 (D.S.C. 2002) (blocking South Carolina governor's executive order as pre-empted by the Atomic

Energy Act). Thus, a state executive officer's acts are reviewable for compliance with federal statutory law under the doctrine of federal preemption.

b. The Attorney General's demand is preempted by federal statute.

Article VI, cl. 2, of the U.S. Constitution provides that the laws of the United States "shall be the supreme Law of the Land…any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Upon this clause rests the "familiar rule" of federal preemption, the fact that "[b]ecause the Constitution and federal laws are supreme, conflicting state laws are without legal effect." *Rice v. Board of Trade*, 331 U.S. 247, 253 (1947); *Am. Trucking Ass'ns v. City of Los Angeles*, 133 S. Ct. 2096, 2106 (2013) (Thomas, J., concurring). Naturally, federal preemption "presents a federal question which the federal courts have jurisdiction to resolve." *Shaw v. Delta Air Lines*, 463 U.S. 85, 96 n. 14 (1983).

Federal preemption is guided by two "touchstones:" the Congress's intent in acting, and that, "unless [it is]…the clear and manifest purpose of Congress," a state's "historic police powers" are presumed not to have been "superseded." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). However, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* (quoting and citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (internal quotation marks and brackets omitted). The intent of Congress may be perceived in a number of ways, which are commonly broken out into three broad categories of preemption: express, field, and conflict. *Altria Group, Inc. v. Good*, 555 U.S. 70, 76-77 (2008). While "the categories of preemption are not rigidly distinct," we will discuss each of these in turn. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n. 6 (2000).

i. Express Preemption

Express preemption, as its name suggests, occurs when the federal government uses

express language to preempt a state action. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 542 (2001). In the instant case, Congress made its purpose manifestly clear.

First, Congress provided that the tax returns of certain tax-exempt organizations would generally be public, including an organization's Schedule B form. Second, Congress expressly protected § 501(c)(3) and § 501(c)(4) organizations from mandatory public disclosure of the donor information contained on their Schedule B forms. 26 U.S.C. § 6104(d)(3)(A). Third, Congress limited the ability of state officers, such as a state attorney general, to obtain the unredacted Schedule B from those entities. Under the law, a state attorney general may only obtain a Schedule B form of a §501(c) "for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations." 26 U.S.C. § 6104(c)(3).

Thus, even at this juncture in our analysis, the state attorney general could only demand Plaintiff's unredacted Schedule B by first requesting it from—and explaining the purpose for the request to—the Secretary of the Treasury. But Congress went even further, and explicitly prohibited state officials from requesting the Schedule B forms of § 501(c)(3) organizations. 26 U.S.C. § 6104(d)(3) ("the [Treasury] Secretary may make available for inspection or disclosure returns and return information of any organization described in section 501(c) (*other than organizations described in paragraph (1) or (3) thereof*) for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations." (emphasis supplied).

Thus, the IRC expressly preempts a state attorney general from compelling Plaintiff to hand over its Schedule B as filed.

ii. Field Preemption

Field preemption occurs when Congress and federal agencies put together a framework

"so pervasive" that it "occupie[s] the field" demonstrating that the federal government "left no room for the States to supplement it." *Arizona v. United States*, 132 S. Ct. 2492, 2501, 2502 (2012) (internal quotation marks and citations omitted).

In this case, Congress has well occupied the field regarding the disclosure of federal tax returns.[2] The IRC comprehensively regulates how confidential tax return information must be treated—and assesses significant sanctions for violations.

Such provisions include 26 U.S.C. §§ 6103 (general confidentially of tax returns); 6104 (controlling disclosure by nonprofit organizations organized under IRC §§ 501 and 527); 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). Thus, Congress created multiple sanctions for the numerous ways tax returns and return information may be inappropriately disclosed. These provisions "provide a full set of standards governing [federal tax disclosure]…including the punishment for noncompliance. It was designed as a harmonious whole." *Arizona*, 132 S. Ct. at 2502 (internal quotation marks and citations omitted). The privacy of returns and return information is thus comprehensively regulated by federal law. In this context, that includes a § 501(c)(3) organization's unredacted Schedule B. 26 U.S.C. §§ 6104(c)(3) and (d)(3).

The Attorney General's action, if fully implemented, would interfere with Congress's occupation of the field. "When Congress occupies an entire field…even *complementary* state regulation is impermissible." *Arizona*, 132 S. Ct. at 2502 (emphasis supplied). Permitting state

[2] *Federal* tax returns, of course, generally not being subject to the historic police power of a *state*.

officials to contravene the federal government's comprehensive scheme regulating the disclosure of *federal* tax returns would absolutely "ignore[] the basic premise of field preemption—that States may not enter…an area the Federal Government has reserved for itself." *Id.* (capitalization in original).

iii. Conflict Preemption

Conflict preemption occurs when "federal law…[is] in irreconcilable conflict with state" action. *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (internal quotation marks and citations omitted). This occurs when there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963). In this case, the Attorney General's actions "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 372-373 (internal quotation marks and citations omitted).

As discussed in the examination of field preemption, *supra*, the intent of Congress is clear. *See Crosby*, 530 U.S. at 373 n. 6 ("field pre-emption may be understood as a species of conflict pre-emption" (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79-80 n. 5 (1990))). Here, Congress acted to regulate the disclosure of tax return information and to prevent state officials from obtaining the names and addresses of contributors to § 501(c)(3) organizations. Technically, Plaintiff could *sua sponte* voluntarily mail a copy of its Schedule B to the Attorney General without running afoul of federal law or state action—"compliance with both the federal and state regulations is [not] a physical impossibility"—but doing so only because the Attorney General has threatened to cut Plaintiff off from soliciting contributions in California is obviously contrary to Congress's intention. *Arizona*, 132 S. Ct. at 2501 (internal quotation marks and citations omitted). Congress wanted to prevent state attorneys general from seeking, willy-nilly, the unredacted Schedule B forms of § 501(c) organizations—and expressly blocked them from

obtaining the Schedule B of Plaintiff and its fellow § 501(c)(3) entities. Permitting the Attorney General to obtain Plaintiff's Schedule B would frustrate Congress's intent that § 501(c)(3) organizations operate in the states without having to provide sensitive information regarding their contributors.

c. **The Attorney General's demand unconstitutionally infringes upon the freedom of association**.

Duly enacted federal law shielding contributor information coincides with and complements seven decades of Supreme Court jurisprudence concerning associational liberty. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *see also Perry v. Schwarzenegger*, 591 F.3d 1126, 1132 (9th Cir. 2010) ("The freedom to associate with others for the common advancement of…beliefs and ideas lies at the heart of the First Amendment"). After all, "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

Certainly, a government may compel certain disclosures in certain circumstances. Like all freedoms, associational freedom may be limited, so long as the state does so narrowly and specifically, in pursuit of an obvious and compelling government interest. *See Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). But states may only do so with great care. *Id.* It has been long recognized that "[c]ompelled disclosure[]" of the type the Attorney General seeks "ha[s] a deterrent effect on the exercise of First Amendment rights and…[is] therefore subject to…exacting scrutiny." *Perry*, 591 F.3d at 1139-1140. "[I]t is immaterial whether the beliefs

sought to be advanced by association pertain to political, economic, religious[,] or cultural matters…state action which may have the effect of curtailing the freedom to associate is subject to" this heightened standard of review. *NAACP*, 357 U.S. at 460-61. It falls to the Attorney General to justify her act, to describe the compelling government interest involved, and to demonstrate that her demand is specifically tailored toward that interest.

Financial support is the lifeblood of organizations engaged in public debate. *See, e.g. Buckley v. Valeo*, 424 U.S. 1, 22 (1976). But the Attorney General's effort to obtain the names and addresses of financial supporters of (presumably) all § 501(c)(3) organizations electing to do business in California threatens to curtail that necessary supply of resources. It is altogether well-established that "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs," much of which is no business of the state Attorney General's office. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring). The First Amendment's protection of free association "need[s] breathing space to survive," and associational liberty is "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Bates*, 361 U.S. at 523. This is precisely why the IRC statutes listed *supra* stringently regulate the disclosure and use of confidential tax records: they are designed to prevent our federal tax laws from deterring the freedom of association. *See* p. 9-10, citing to 26 U.S.C. § 6103, etc. The Attorney General's demand, if fulfilled, will work the opposite result.

There is analogous precedent which works against the Attorney General's untailored demand for contributor names and addresses. In *NAACP v. Alabama ex rel. Patterson*, the state sought the names and addresses of registered supporters of the National Association for the Advancement of Colored People ("NAACP") "to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute." *NAACP*,

357 U.S. at 464. The Supreme Court found that "the effect of compelled disclosure of the membership lists…[would] abridge the rights of" NAACP members "to engage in lawful association in support of their common beliefs." *Id*. at 460. Moreover, the government could find no interest to overwhelm the constitutional presumption against disclosure. *Id*. at 466. Indeed, the *NAACP* Court was "unable to perceive" how the names and addresses of the NAACP's registered supporters were relevant to the state's proffered interest in regulating intrastate business. *Id*. at 464. Without such a nexus between the mandated disclosure and the state's interest, Alabama's efforts to obtain the names and addresses of NAACP supporters failed. *Id*. at 466.

Other cases from the same era rebuffed similar justifications for a state's obtaining the names and addresses of members or financial contributors to organizations. For example, municipalities in Arkansas argued for the right to obtain names and addresses of NAACP supporters as "an adjunct of their power to impose occupational license taxes." *Bates*, 361 U.S. at 525. Although the municipalities also intended to publish these names and addresses, the Court noted that "[n]o power is more basic to the ultimate purpose and function of government than is the power to tax." *Id.* at 524. Even against such a weighty interest, the Court could find "no relevant correlation between the power of the municipalities to impose occupational license taxes and the compulsory disclosure and publication of the membership lists." *Id*. at 525; *see also Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557-58 (1963) (order compelling organization president to bring names and addresses of contributors and members to a state investigation into alleged Communist infiltration of outside organizations unconstitutional where the state had no indication the targeted organization was under Communist influence).

Here, the Attorney General seeks to compel the disclosure of names and addresses of Plaintiff's financial contributors—without tailoring her demand to a government interest. Just as the *NAACP* Court was "unable to perceive" how the names and addresses of the NAACP's

registered supporters would permit the state "to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute," it is not readily apparent what compelling state interest would be served by the Attorney General obtaining Plaintiff's contributor list. The names, addresses, and total contribution amounts of Plaintiff's contributors will provide the state with *zero* relevant information as to Plaintiff's corporate purpose or educational activities. *See* Form 990, Schedule B.

In these circumstances, the Constitution does not permit the Attorney General's action. Plaintiff has a First Amendment interest in keeping the identities of its financial supporters out of the Attorney General's hands, and the Attorney General has not shown a compelling governmental interest to support her demand. "[S]omething…outweighs nothing every time." *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) (internal citation and quotation omitted) (ellipsis in original).

II. Absent the requested relief, CCP will suffer irreparable harm.

"'The loss of First Amendment freedoms, for even minimal amounts of time, unquestionably constitutes irreparable injury.'" *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) ("*Valle Del Sol I*") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). And as the Ninth Circuit Court of Appeals reiterated, "the Supreme Court has held that fund-raising for charitable organizations is fully protected speech." *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1991) (citing *Bd. of Trs. v. Fox*, 492 U.S. 469 (1989)); *see also Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988) (striking down North Carolina law compelling speech of professional fundraisers on First Amendment grounds). Nevertheless, absent injunctive relief, CCP jeopardizes its ability to engage in "fully protected" fundraising speech unless it discloses information about its contributors—information which the federal government has *explicitly* acknowledged both CCP and its contributors have an interest in

keeping private. 26 U.S.C. §§ 6104(c)(3) and (d)(3). Thus, CCP is faced with a stark choice: refuse to turn over its Schedule B and risk heavy fines, loss of protected speech rights, and diminished resources with which to further its charitable mission; or turn over its Schedule B, thereby violating the confidentiality of CCP's contributors. Either option would result in irreparable harm. Thus, action in this Court is essential to vindicate the protections of federal law and the First Amendment.

a. Irreparable harm will result if CCP does not turn over its Schedule B to the Defendant.

California is one of the wealthiest and most populous states in the nation. Given CCP's status as a relatively small nonprofit organization with a lean financial structure, loss of the ability to fundraise there would certainly cause CCP financial harm and would retard CCP's ability to further its mission. The Ninth Circuit has found that where "organizational plaintiffs have shown ongoing harms to their organizational missions as a result of" challenged statutes, "the plaintiffs have established a likelihood of irreparable harm." *Valle Del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("*Valle Del Sol II*") (citations omitted). *See also Arizona v. United States*, 641 F.3d 339, 366 (2011) *aff'd in part, rev'd in part on other grounds* 567 U.S. ___, 132 S. Ct. 2492 (2012) ("We have 'stated that an alleged constitutional infringement will often alone constitute irreparable harm.'") (quoting *Assoc. Gen. Contractors v. Coal. For Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991).

Moreover, absent the requested relief, CCP faces more than the loss of fundraising ability in a large and prosperous state. Under California law, "[t]he Attorney General may issue a cease and desist order whenever the Attorney General finds that any entity…has committed an act that would constitute a violation of…an order issued by the Attorney General, including, but not limited to…fail[ure] to file a financial report, or [filing] an incomplete financial report." CAL.

GOV. CODE § 12591.1(b)(3). After making such a finding, in addition to suspending membership in the Registry, the Attorney General

> may impose a penalty on any person or entity, not to exceed one thousand dollars ($1,000) per act or omission. Penalties shall accrue, commencing on the fifth day after notice [of the violation] is given, at a rate of one hundred dollars ($100) per day for each day until that person or entity corrects that violation."

CAL. GOV. CODE. § 12591.1(c). These fines would be significant for an organization of CCP's size and resources, and would further harm CCP and its mission. This is particularly so because, once such fines begin to accrue, a nonprofit's suspension from the Registry continues until it has paid them off. CAL. GOV. CODE § 12591.1(d).

b. Irreparable harm will result if CCP produces its Schedule B in response to the Attorney General's demand.

If CCP does produce its Schedule B, it may avoid suspension from the Registry, fines, and loss of fundraising rights, but this action too will work irreparable harm. CCP's right to associate with its donors will be chilled by this disclosure. Worse still, irreparable harm will come to CCP's donors, whose private information will be disclosed to the Attorney General in violation of federal law. Respectfully, CCP and its supporters do not wish to entrust their confidences to Defendant, and enjoy a First Amendment right not to do so absent some compelling, properly tailored authority.

Perhaps most concerning, even if CCP does turn over its Schedule B, there is nothing to stop the Attorney General from demanding further information from CCP (or another nonprofit), and conditioning the permission to fundraise upon compliance with that demand. Thus, even assuming the good faith of California government officials, if this Court does not grant preliminary relief, it will set a dangerous precedent. Indeed, it will confirm that an elected, partisan official may demand whatever information he or she desires from an organization, and condition the organization's solicitation of charitable contributions (and thus, its very existence in

some cases) upon compliance with that demand.

III. The balance of equities favors CCP, and the requested injunction serves the public interest.

The final considerations before this Court in considering CCP's request for injunctive relief—the balance of equities and the public interest—are closely related in cases where First Amendment rights are at stake. Indeed, "[i]n First Amendment cases, the Ninth Circuit generally examines these two prongs of the *Winter* [555 U.S. at 20] inquiry in tandem, recognizing that when a regulation restricts First Amendment rights, the equities tip in the plaintiffs' favor and advance the public interest in upholding free speech principles." *Cuiviello v. Cal. Expo*, 2013 U.S. LEXIS 106058 at *34 (E.D. Cal. 2013) (citing *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128-29 (9th Cir. 2011); *Kline v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009)).

The case at bar presents a clear-cut illustration of why these two factors reinforce one another in the context of protected speech. If CCP discloses its Schedule B, this will tread upon the First Amendment association rights of CCP and its donors. If CCP does not disclose its Schedule B, it must give up its First Amendment right to the "fully protected speech" that is charitable solicitation. The Attorney General, on the other hand, has asserted no interest whatsoever in CCP's Schedule B, has never before requested this information in all of the years CCP has solicited charitable contributions in the state, and is already in receipt of CCP's publicly available Form 990. Thus, the balance of equities clearly favors CCP in this case.

Moreover, "[i]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially when there are no adequate remedies available." *Valle Del Sol II*, 732 F.3d at 1029 (internal citations, quotations, and ellipses

omitted). Here, any outcome other than preliminary relief would result in a violation of federal law. Thus, the public interest also favors the grant of the relief requested. Finally, as regards to the bond requirement for an injunction, CCP is not creating any financial harm to Defendant, "and the bond amount may be zero if there is no evidence the party will suffer damages from the injunction." *Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003).

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for a Preliminary Injunction should be granted.

Dated this 20th day of March, 2014.

Respectfully Submitted,

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