No. 14-15978

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR COMPETITIVE POLITICS,
Plaintiff-Appellant,

v.

KAMALA D. HARRIS,
in her official capacity as the Attorney General of California,
Defendant-Appellee.

BRIEF OF *AMICUS CURIA* CHARLES M. WATKINS IN SUPPORT OF APPELLANT CENTER FOR COMPETITIVE POLITICS, INC, SUPPORTING REVERSAL OF THE DISTRICT COURT'S REFUSAL TO GRANT THE REQUESTED INJUNCTION

Appeal from the Judgment of the United States District Court for the Eastern District of California, No. 14-cv-00636-MCE-DAD
(Hon. Morrison C. England)

BENBROOK LAW GROUP, PC
Bradley A. Benbrook
Stephen M. Duvernay
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
Telephone: (916) 447-4900
Facsimile: (916) 447-4904

Attorneys for *Amicus Curia*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

STATUTES

California Business and Professions Code

California Corporations Code

Other Authorities

STATEMENT OF INTEREST

Amicus curia Charles M. Watkins is a lawyer with the firm of Webster, Chamberlain & Bean, LLP, in Washington, D.C. Prior to joining the firm in 1986, Mr. Watkins worked in the Office of the Chief Counsel for the Internal Revenue Service from 1981 through 1985, focusing on employee benefits and exempt organizations issues. The firm manages charitable solicitation registration filings for more than 100 charities, and files registrations for more than 75 of those charities in California and the 37 other states and the District of Columbia that generally require charities to register or be licensed before being permitted to solicit contributions from residents of those jurisdictions. Mr. Watkins is responsible for overseeing the registration process (much of the work is actually performed by paralegals), and addresses legal issues that arise in connection with registrations. He also reviews between 10 and 20 draft Forms 990 each year, before they are filed with the IRS and states by the reporting organization.

This brief argues from the perspective of a practitioner who is familiar with the practice of California and other states regarding the filing of Form 990, Schedule B with charitable solicitation registration filings.

All parties have consented to the filing of this brief.

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

No party's counsel authored the brief in whole or in part; and no party or party's counsel contributed money that was intended to fund preparing or submitting the brief. Other than the amicus curia, the following organization contributed money that was intended to fund preparing or submitting the brief: The United States Constitutional Rights Legal Defense Fund, Inc.

ARGUMENT

The Attorney General has failed to demonstrate that the required disclosure of all large donors—those who give, in any year, at least 2 percent of the total support received by a charity—is the least restrictive means of assuring that California can properly oversee charities soliciting contributions from residents of California.

The Attorney General's argument to the District Court on this point is limited:

> Of particular relevance here, the information contained in the IRS Form 990 and Schedule B filed with the IRS allows the Attorney General to determine, often without conducting an audit, whether an organization has violated the law, including laws against self dealing, Cal. Corp. Code §5233; improper loans, *id.* §5236; interested persons, *id.* §5227; or illegal or unfair business practices, Cal. Bus. & Prof. Code §17200. In order to reduce the burden on filers and insure [sic] that the organization is reporting the same information to the state and federal government, the Attorney General uses the Form 990 and related schedules as a proxy, which relieves charitable organizations of the burden of providing the same information on a different, state form.

Defendant's Opposition to Motion for Preliminary Injunction, pages 13-14 (footnote omitted).

The information at issue in this case is limited to the name and address of each person or business who, during the taxable year for which the Form 990, including Schedule B, is being filed, gave the charity at least 2% of the total support received by the charity during that year. The State's failure to receive that information with a charity's annual report to the Registry of Charitable Trusts does not adversely affect the Attorney General's ability to oversee charities to any significant degree.

The burden on the charities is *not* the filing of a different or additional piece of paper, but the disclosure to the State of their most significant donors, and the potential inadvertent or intentional disclosure or misuse of those donors' information by state employees (and potential harm to donors if their information is disclosed).[1]

[1] The potential for harm from disclosure is not insignificant. "Prop 8 Donor Web Site Shows Disclosure Law Is 2-Edged Sword," *California Times* (Feb. 7, 2009), available athttp://www.nytimes.com/2009/02/08/business/08stream.html?_r=0, on June 16, 2014; The Heritage Foundation, "The Price of Prop 8" (Oct. 22, 2009), available athttp://www.heritage.org/research/reports/2009/10/the-price-of-prop-8.

The names and addresses of large donors, by itself or in combination with other information in IRS Form 990 and its other schedules, does not enable the Attorney General to ascertain, "often without conducting an audit" or otherwise, whether a charity has violated any of the cited laws, or any other laws. The donor information may provide a clue, but, with respect to officers, directors, or key employees, more important clues are openly reported elsewhere on Form 990—in Part VII and Schedule J, where compensation of officers, directors, and key employees is reported; and in Schedule L, where non-employment transactions with officers, directors, and other key employees are reported. Transactions with donors (as opposed to officers, directors, or key employees) would not be reported in Part VII, or in Schedule J or Schedule L. Thus, the donor information on Schedule B doesn't help California ensure that charities are operating in compliance with its laws.

And if the Attorney General believes, on the sole basis of a review of Form 990, that a charity violated the law, she would be derelict in her duty if she failed to conduct an audit to determine whether that or any other violation actually occurred.

The Attorney General's position is also not the least restrictive means of serving its interest in the oversight of charities because it imposes a heavy burden—the disclosure of their most significant donors—on *all* charities, regardless of whether there is even a hint of wrongdoing. Instead, the burden of disclosing donor information should be focused on charities where other evidence already points to wrongdoing, and where disclosure of donor information would be useful to an audit or other investigation. See *Dole v. Local Union 375, Plumbers Int'l Union of America*, 921 F.2d 969 (9th Cir. 1990); *Brock v. Local 373, Plumbers Int'l Union of America*, 860 F.2d 346 (9th Cir. 1988).

The fact that 35 other states and the District of Columbia do not request Schedule B, and some affirmatively instruct charities *not* to file Schedule B because it will become a public record, indicates that they have found less restrictive means of exercising their charity oversight responsibilities.[2]

[2] To the best of Mr. Watkins' knowledge, only California, Florida, and New York have requested unredacted copies of Schedule B from charities. The regulations under the Kansas Charitable Solicitation Act instruct charities: "Each charitable organization that provides copies of its income tax returns to the secretary of state shall include only those sections of the returns that are open for public inspection **and shall not include any list of contributor names**." K.A.R. §7-42-1(b)(emphasis added).

Finally, that the Attorney General's position is not the least restrictive means of administering its responsibility for the oversight of charities is demonstrated by the fact that it did not begin to expressly require an unredacted Schedule B (one showing the donors' names and addresses) until 2010. As noted in the Statement of Interest, Webster, Chamberlain & Bean files charitable solicitation registrations with the Registry of Charitable Trusts for more than 75 charities. Normally, its clients forward to it any correspondence from a state that requests additional information. To the best of Mr. Watkins' knowledge, no client notified the firm that California was requesting an unredacted Schedule B until 2010. Given the sensitivity of the donor information requested, he believes it is very likely that the firm would have heard from more than one client had California previously requested an unredacted Schedule B.

This is corroborated by the attached e-mail correspondence in 2010 between Mr. Watkins and Belinda Johns, then an Assistant Attorney General responsible for oversight of charities.[3] In the correspondence, Ms. Johns states:

> We have always required the same Sched B as filed with IRS and that is what is filed by most charities and only recently became aware that we were receiving the public version - hence the letter to charities that filed that version this year.

[3] Ms. Johns retired in 2013.

This statement can only mean one of two things: Either (1) Ms. Johns' statement about always requiring the unredacted Schedule B ("as filed with the IRS") is false, because no charity that failed to file an unredacted Schedule B before 2010 was ever asked for it; or (2) no one in the Registry of Charitable Trusts office was reviewing the Forms 990 that were filed to ensure that the unredacted Schedule B was filed. **In either case this proves that the donor information in Schedule B is not nearly as important as the Attorney General suggests**, and that a less burdensome means of discharging the Attorney General's charity oversight responsibilities would be to ask for donor information only from particular charities that are already under investigation, and only when it would be relevant to the potential violations under investigation.

CONCLUSION

Because the Attorney General has failed to establish that requiring all registered charities to file the names and addresses of their largest donors with the Registry of Charitable Trusts is the least restrictive means of carrying out her oversight of charities, the Court should reverse the District Court, and remand the case with instructions to reconsider the case in that light.

Respectfully submitted,

Dated: June 19, 2014

Benbrook Law Group, PC
Bradley A. Benbrook
Stephen M. Duvernay

By: s/Bradley A. Benbrook
Bradley A. Benbrook
Attorneys for *Amicus Curia*

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 1,389 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

Dated: June 19, 2014 By: s/Bradley A. Benbrook

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 19, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 19, 2014 By: s/Bradley A. Benbrook