IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 14-15978

CENTER FOR COMPETITIVE POLITICS,
Plaintiff-Appellant,

v.

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

URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
MOTION TO SUPPLEMENT THE RECORD ON APPEAL

NECESSARY ACTION ON OR BEFORE JANUARY 10, 2015

Appeal from the Judgment of the United States District Court
for the Eastern District of California
D.C. No. 14-cv-00636-MCE-DAD

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INTRODUCTION

By this motion, Plaintiff-Appellee Center for Competitive Politics ("CCP") seeks to supplement the appellate record with a letter sent to CCP on December 11, 2014 by the Registry of Charitable Trusts on behalf of California's Attorney General, the Defendant-Appellee. This document was sent just three days after oral argument, and consequently could not have been considered by the district court. Moreover, it is directly relevant to the irreparable harm CCP will suffer absent this Court's protection. The Attorney General's new letter sets a date certain—January 10, 2015—by which time CCP must comply with her demand, or else it and its officers will face significant sanctions. Accordingly, CCP respectfully designates this as an urgent motion under Circuit Rule 27-3(b), and asks for this Court's protection before that date.[1]

I. Factual and Procedural Summary

As counsel for the Attorney General acknowledged at oral argument, this case is subject to a stay in district court pending the outcome of this appeal. ER 64 (ECF No. 24); *Center for Competitive Politics v. Harris*, Case No. 14-15978, Tr. Recording at 30:16 (9th Cir. Dec. 8, 2014).[2]

[1] Opposing counsel has been notified of CCP's intention to file this urgent motion, pursuant to Circuit Rule 27-3(b)(1).

[2] *Available at*: http://www.ca9.uscourts.gov/media/view.php?pk_id=0000013683.

On December 11, 2014—three days after argument—the Attorney General, through her Registry of Charitable Trusts, sent a new demand letter to CCP, which is set forth as Appendix A to this Motion. CCP received this letter on December 15th, 2014. The letter demands that CCP submit its unredacted Schedule B to the Attorney General by January 10, 2015, or face three consequences. Ex. A at 1 (Schedule B must be "filed with the Registry of Charitable Trusts within thirty (30) days of this letter") (emphasis removed).

First, "the California Franchise Tax Board will be notified to disallow the tax exemption of [CCP]." Ex. A at 1. Second, late fees will be imposed, and "[d]irectors, trustees, officers[,] and return preparers responsible for failure to timely file these reports [will also be]…**personally liable** for payment of all late fees." Ex. A at 1 (bold in original). Third, "the Attorney General **will suspend the registration** of [CCP]." Ex. A at 2 (bold in original).

II. Argument

CCP acknowledges the "basic tenant of appellate jurisprudence…that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below." *Tonry v. Security Experts*, 20 F.3d 967, 974 (9th Cir. 1994) (citing *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982) (italics removed)). But appellate courts may "exercise the inherent authority to supplement the record…proceed[ing] by motion…so that the court and opposing counsel are

properly apprised of the status of the documents in question." *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003) (citing *Dickerson*, 667 F.2d at 1366-68 & n. 5); *Dickerson*, 667 F.2d at 1367 ("it is clear that the authority to do so exists…[and] is a matter left to discretion of the federal courts of appeals"). In short, appellate courts have "inherent equitable powers to supplement the record as justice requires." *Dickerson*, 667 F.2d at 1368, n. 5 (citations omitted).

The *Dickerson* Court explained why that authority might be exercised.[3] For instance, remand "for the sole purpose of allowing district court to review [] several additional facts" may, at times, "be contrary to both the interest of justice and the efficient use of judicial resources." *Dickerson*, 667 F.2d at 1367. Such is the case here, where a remand after briefing and argument, for the sole purpose of reviewing a two-page letter, would squander the resources of this Court. Moreover, the additional delay inherent in such a remand would likely push the resolution of this issue past the Attorney General's new deadline of January 10, 2015, effectively depriving CCP of appellate review. That outcome is contrary to the interest of justice.

[3] The *Dickerson* Court also noted that it "believe[d] that the proper resolution of the substantive issues in this case, when viewed in the context of all of the relevant historical facts, is beyond any doubt." 667 F.2d at 1367. It also observed that it was "reviewing the district court's review of the habeas corpus claim of a state prisoner…[and] Federal appellate judges have been granted unique powers in the context of habeas corpus actions." *Id*. at 1368 & n. 7.

The *Dickerson* Court also noted that "[c]ounsel for the State…cannot in good faith contend that they were without notice of the existence" of the supplemental evidence. *Id*. at 1368. The same is plainly true here. CCP merely seeks to supplement the record with a document the Attorney General's office itself created.

The Court's "inherent equitable powers to supplement the record as justice requires" should also be exercised so that this Court may apprise itself of pending harm to CCP. *Dickerson*, 667 F.2d at 1368, n. 5. In *Perry v. Schwarzenegger*, this Court determined that "compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 591 F.3d 1126, 1139 (9th Cir. 2014) (emphasis supplied, quotation marks and citation omitted). Thus, the Attorney General's new demand letter—setting a date certain by which CCP must disclose its donors or face significant and concrete consequences—goes directly to the irreparable harm prong of the preliminary injunction analysis.[4]

[4] This is particularly the case if this Court chooses to consider CCP's motion for a preliminary injunction under the sliding scale approach of *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-36 (9th Cir. 2011); *see also* ER 6-7 (district court citing *Cottrell* as one of "two alternatives" for deciding a preliminary injunction motion, along with *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008)). Under the sliding scale, "as long as the Plaintiffs demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in

CONCLUSION

Given the interests of justice at stake in this unusual situation, CCP requests that this Court grant its motion to supplement the record. Moreover, having reviewed the document in question, CCP asks this court for the protections of an injunction before January 10, 2015, the date on which the Attorney General has threatened action against CCP and its officers.

Respectfully Submitted,

s/ Allen Dickerson

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Date: December 18, 2014.

Plaintiffs' favor." ER 6; *also id.* ("Under either formulation…the moving party must demonstrate a significant threat of irreparable injury").