No. 15-______

In the Supreme Court of the United States

Center for Competitive Politics,
Applicant,

v.

Kamala D. Harris,
in her official capacity as the Attorney General of California,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Ninth Circuit

EMERGENCY APPLICATION FOR INJUNCTION PENDING *CERTIORARI*

To the Honorable Anthony Kennedy
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Ninth Circuit

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Dated: May 13, 2015

Rule 29.6 Statement

Pursuant to Supreme Court Rule 29.6, Applicant represents that it does not have a parent entity nor does it issue stock.

Respectfully submitted,

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EMERGENCY APPLICATION FOR INJUNCTION PENDING *CERTIORARI*

To the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit:

California's Attorney General is demanding, immediately and without cause, that charitable and educational nonprofit organizations hand over the identities of their principal donors. This demand is unrelated to any investigation. The Attorney General simply wishes to have these sensitive records on hand, even though their confidentiality is guaranteed by the Internal Revenue Code and, more critically, the First Amendment. Groups are expected to either comply or lose their ability to raise money in the Nation's most populous state.

This is the first of several cases challenging the Attorney General's demand to reach the Ninth Circuit. That court did not require the Attorney General to meaningfully justify her demand. Instead, it declared that nonprofits must prove that they and their donors will suffer an "actual burden" from the compelled disclosure. Consequently, the decision below shifts the burden of persuasion and establishes a presumption of government entitlement to bulk collection of private information unless an organization can demonstrate particularized harm.

This Court's foundational First Amendment precedent confirms the right to associate free from unchecked intrusion by political officeholders, a principle gravely wounded by the Ninth Circuit's ruling. Absent emergency relief, the Center for Competitive Politics—a Section 501(c)(3) educational organization that engages in no political activity—will be required to either violate the privacy of its donors or self-censor. Either option will inflict significant constitutional harm. Once this

information is revealed, it cannot be clawed back—the privacy of the Center and its donors will be permanently violated. Considering that even momentary deprivations of First Amendment rights cause irreparable injury, the centrality of the rights at issue here, and the Attorney General's lack of an immediate need for Applicant's donor list, the *status quo* should be preserved pending this Court's consideration.

Introduction

The forthcoming petition for a writ of *certiorari* raises substantial issues. For more than a half century, Americans have been assured that they enjoy a right to "pursue their lawful private interests privately and to associate freely with others in so doing." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 466 (1958). Consequently, to compel disclosure of membership and donor lists, states must carry a heavy burden and specifically justify the intrusion. It is not enough for a state to merely assert an interest. Its demand must pass the judiciary's "exacting scrutiny," which evaluates whether the governmental interest justifying compelled disclosure is sufficiently important, and whether a particular disclosure requirement closely fits that interest.

But this is no longer the law in the Ninth Circuit, which specifically held that compelled disclosure of an organization's donors is not itself a First Amendment injury. Rather, such a demand simply triggers exacting scrutiny, which the panel described as a mere "balancing test." Under that test, a state may compel donor

disclosure unless an organization can show an "actual burden," and so long as the State's asserted interest is not "wholly without rationality."

This ruling is deeply flawed for two reasons.

First, this approach to "exacting scrutiny" is in no way exacting. Instead, it shifts the burden of proof, and, as the Ninth Circuit's "wholly without rationality" standard makes clear, resembles rational basis review far more than the exacting scrutiny traditionally required in civil rights cases. *See Elrod v. Burns,* 427 U.S. 347, 362-63 (1976) ("[t]he interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest…it is not enough that the means chosen in furtherance of the interest be rationally related to that end…") (punctuation altered, citations omitted). By requiring organizations challenging state demands for donor lists to prove an "actual burden," and specifically denying that "compelled disclosure *itself*" constitutes such an injury, the Ninth Circuit has, in practice, switched the burden of persuasion in compelled disclosure cases. Op. at 12 (emphasis in opinion). In fact, the panel did not find that the Attorney General's disclosure regime passed exacting scrutiny, but rather that "*CCP's* First Amendment facial challenge…fail[ed]" that test. Op. at 20.

Second, the State was permitted to carry its burden on a remarkably thin record. While the Attorney General claimed that having immediate access to nonprofits' donors "increase[d] her investigative efficiency, and that reviewing significant donor information can flag suspicious activity," these were mere

assertions. Op. at 19. It was not until oral argument that the Attorney General provided a single example of *how* donor information assisted these ends: it "allows the Attorney General to determine when an organization has inflated its revenue by overestimating the value of 'in kind' contributions." Op. at 6. Because this example was offered for the first time at argument on appeal, it was not susceptible to any probing and may be mere speculation. But whether actual or not, this sort of claim (it cannot be called evidence) is certainly insufficient to carry a State's burden under exacting scrutiny.

Consequently, this case directly asks this Court to revisit the nature of private association. Is it a fundamental liberty, the invasion of which can only be permitted where the State carries its burden and specifically justifies the intrusion? Or is it merely contingent, available to groups that have been concretely harmed in the past, or who have been specifically targeted by state action, with the burden falling on the group to justify its donors' privacy?

While the Ninth Circuit issued an injunction pending appeal for its own deliberations, it declined to provide one for purposes of Applicant's petition to this Court. Consequently, the Center faces the imminent need to either censor its charitable solicitation activities in California—speech that this Court ruled mere weeks ago is fully-protected under the First Amendment, *Williams-Yulee v. The Florida Bar*, No. 13-1499, 2015 U.S. LEXIS 2983 (Apr. 29, 2015)—or provide its confidential donor information to the Attorney General.

JURISDICTION

Applicant filed its complaint in the Eastern District of California on March 7, 2014. On March 20, 2014, CCP filed a motion for preliminary injunction. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 42 U.S.C. § 1983 and venue pursuant to 28 U.S.C. § 1391(b). The district court had authority to issue an injunction under 28 U.S.C. §§ 2201 and 2202. The district court denied this motion on May 14, 2014, which Applicant timely appealed. The Ninth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a). The Ninth Circuit denied Applicant's appeal on May 1, 2015 (attached as Appendix B), and denied CCP the protections of an injunction pending its petition for a writ of *certiorari* on May 11, 2015 (attached as Appendix A).

This Court has jurisdiction over this application pursuant to 28 U.S.C. § 1254(1) and authority to grant the relief that Applicant requests under the All Writs Act, 28 U.S.C. § 1651.

BACKGROUND AND PROCEDURAL HISTORY

Applicant Center for Competitive Politics ("CCP") is a nonprofit corporation organized under § 501(c)(3) of the Internal Revenue Code. CCP's mission is to promote and defend the First Amendment rights of free political speech, assembly, association, and petition through research, education, and strategic litigation. CCP is financially supported in these efforts by contributors from across the United States, including California.

In order to solicit funds from California residents, the state requires that CCP become a member of its Registry of Charitable Trusts ("Registry"). CAL. GOV'T CODE § 12585. Pursuant to state law, Attorney General Kamala D. Harris administers the Registry. *See, e.g.* CAL. GOV'T CODE § 12584. CCP has been a member of the Registry since 2008, and as part of the registration process, annually provides the Attorney General with a public copy of its IRS Form 990, including its Schedule B. CAL. CODE REGS. tit. 11, § 301 (2015) ("…as well as the Internal Revenue Service Form 990, which must be filed on an annual basis with the Registry"). The public copy provided to the Attorney General is completely identical to the Form 990 that CCP files with the IRS, with one exception. On the copy the Attorney General receives, the names and addresses of CCP's donors are redacted. 26 U.S.C. § 6104(d)(3)(A) (protecting § 501(c)(3) organizations from having to disclose "the name or address of any contributor to the organization" on its public copies of the Form 990). CCP has never provided an unredacted Schedule B to the Attorney General.

On February 6, 2014, CCP received a letter from Registry employee "A.B." stating that CCP's registration form was incomplete and that its continued membership in the Registry, and ability to request financial support in California, was dependent upon submission of an unredacted copy of its Schedule B. *See* CAL. GOV'T CODE § 12591.1(b)(3) (granting the Attorney General power to block registration with the 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”). This was the first letter of this kind that CCP had ever received from the Registry.[1]

On March 7, 2014, CCP filed suit in the United States District Court for the Eastern District of California. CCP argued that both the constitutional right to free association and the doctrine of federal preemption prohibited the Attorney General from obtaining the names and addresses of its substantial donors.

Although not mentioned in A.B.’s original letter, the Attorney General subsequently justified this demand by asserting that the unredacted Schedule B information “allows her to determine ‘whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices.’” *Ctr. for Competitive Politics v. Harris*, 2014 U.S. Dist. LEXIS 66512 at *20 (E.D. Cal. May 14, 2014) (quoting Attorney General’s briefing). Before the district court, however, she failed to explain any mechanism by which knowing the names and addresses of CCP’s donors would further that end.

Nonetheless, the district court, relying upon *Brock v. Local 375, Plumbers Int’l Union*, 860 F.2d 346 (9th Cir. 1988) and its companion cases, all of which involved administrative subpoenas or discovery disputes and not dragnet demands for donor identity, found that under the First Amendment CCP was first “required to demonstrate that the” Attorney General’s action would “‘result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other

[1] *Amici* before the Ninth Circuit Court of Appeals noted that they, similarly, began receiving demand letters in a staggered fashion throughout the period 2010-2013.

consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights.'" *Harris*, 2014 U.S. Dist. LEXIS 66512 at 15 (quoting *Brock*, 860 F.2d at 350). The district court explicitly placed the burden of persuasion on CCP, holding that only if a plaintiff "can make the necessary prima facie showing, [would] the evidentiary burden… shift to" the defendant, and only then would the court apply exacting scrutiny to the State's demand. *Id.* (quoting *Brock*, 860 F.2d at 350)). As to CCP's preemption claim, the district court relied on *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987), a case decided nearly two decades before the statute giving rise to CCP's preemption argument was enacted, and denied CCP's claim. *Harris*, 2014 U.S. Dist. LEXIS 66512 at 9-12. CCP timely appealed, and on May 29, 2014, the district court stayed its proceedings.

The case was fully briefed before the Ninth Circuit, which heard oral argument on December 8, 2014. Three days after argument, the Attorney General sent a letter demanding that CCP turn over its donors within 30 days or face significant sanctions. These penalties included holding CCP's officers personally liable for late fees, a direction to the California Franchise Tax Board to repeal CCP's tax-exempt status, and suspension of CCP's membership in the Registry, which would effectively ban CCP from soliciting money within the borders of California. On December 18, 2014, citing the irreparable harm this demand posed, CCP requested an injunction pending appeal. The Ninth Circuit granted that injunction on January 6, 2015.

On May 1, 2015, the Ninth Circuit affirmed the district court's denial of a preliminary injunction. It began by rejecting the view "that the Attorney General's disclosure requirement is, in and of itself, injurious to CCP's and its supporters' exercise of their First Amendment rights to freedom of association." Op. at 9. In making this assertion, the panel distinguished *Buckley v. Valeo*'s facial ruling limiting donor disclosure in the campaign finance context, ("we have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment", 424 U.S. 1, 64 (1976)), arguing that *Buckley* "cited a series of Civil Rights Era as-applied cases in which the NAACP challenged compelled donor disclosure of its members' identities at a time when many NAACP members experienced violence or serious threats of violence based on their membership in that organization." Op. at 10. Thus, the panel consigned the major litigation victories of the civil rights era—*Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963)*, NAACP v. Button,* 371 U.S. 415 (1963), *Bates v. City of Little Rock,* 361 U.S. 516 (1960), and *NAACP v. Alabama*—to a footnote, and limited them to the specific facts of a specific organization. Op. at 10 n. 3.

Having found that there is no general First Amendment right to privacy in one's associations, the circuit court nonetheless held that "the chilling *risk* inherent in compelled disclosure triggers exacting scrutiny—'the strict test established by *NAACP v. Alabama*.'" Op. at 12 (emphasis in original) (quoting *Buckley*, 424 U.S. at 66). It articulated this standard as requiring courts to "balance the plaintiff's First

Amendment injury against the government's interest," not counting the compelled disclosure itself, but rather requiring evidence of an "actual burden" on a specific group's association. Op. at 12.

The Court went on to apply this standard in the context of a facial challenge. Op. at 12-14. In looking to the harm CCP would suffer if it surrendered its donors on the basis of an unsubstantiated state demand, the Ninth Circuit stated that "no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury." Op. at 17. It then balanced CCP's lack of particularized evidence of harm against the Attorney General's unparticularized "interest in enforcing the laws of California." Op. at 18. Rejecting CCP's argument "that the disclosure requirement does not bear a substantial enough relationship to the interest that the Attorney General has asserted in the disclosure," the Court devoted a single paragraph to the issue of tailoring. Op. at 19.

It concluded that "CCP's First Amendment facial challenge to the Attorney General's disclosure requirement fails exacting scrutiny." Op. at 20.

On May 5, CCP asked the Ninth Circuit to stay the mandate and renew its injunction pending appeal. Two days ago, the Ninth Circuit agreed to stay the mandate, but declined to issue an injunction protecting CCP while it seeks this Court's review.

Standard

The All Writs Act, 28 U.S.C. § 1651(a), authorizes an individual Justice to issue an injunction when (1) the circumstances are "critical and exigent", (2) "the

legal rights at issue are indisputably clear", and (3) injunctive relief is "necessary or appropriate in aid of [this Court's] jurisdiction[]." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (internal quotation marks and citation omitted); 28 U.S.C. § 1651(a) (brackets supplied). Additionally, "[i]n appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers) (citing *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1304 (1974) (Powell J., in chambers).

Here, CCP seeks an injunction not against "the enforcement of a presumptively valid state statute," but rather against an unwritten policy of the Attorney General of California with imminent and irreparable implications for the First Amendment rights of CCP and its financial supporters. *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J. in chambers) (rejecting enjoinment of Virginia's mandatory "minute of silence" for public schools). While "obtain[ing] injunctive relief from a Circuit Justice" is "extraordinary relief", the Attorney General's demand for the donor lists of, as a practical matter, every active § 501(c)(3) organization operating nationally is at least equally "extraordinary." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2001) (C.J. Roberts, in chambers); *Turner Broadcasting Sys. v. Fed. Communications Comm'n*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J.). Granting this relief, pending CCP's petition for a writ of

certiorari, will not alter the *status quo*, but merely maintain the state of affairs that has existed since 2008 between CCP and the Attorney General. Absent relief, the right of CCP's financial supporters "to pursue their lawful private interests privately and to associate freely with others in so doing" will be imminently damaged by the Attorney General. *NAACP*, 357 U.S. at 466; *id.* ("immunity from state scrutiny of membership lists….come[s] within the protection of the Fourteenth Amendment").

ARGUMENT

I. APPLICANTS FACE CRITICAL AND EXIGENT CIRCUMSTANCES.

The Attorney General's demand has placed CCP in an impossible position. On one hand, and as this Court reiterated just two weeks ago, the solicitation of charitable contributions is speech fully protected by the First Amendment. *Williams-Yulee v. The Florida Bar*, No. 13-1499, 2015 U.S. LEXIS 2983 at *15-16 (Roberts, C.J., controlling opinion) ("demanding" review is required because "restricting the solicitation of contributions to charity…threatens the exercise of rights so vital to the maintenance of democratic institutions") (citations omitted); *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781, 798 (1988); *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1991) ("the Supreme Court has held that fund-raising for charitable organizations is fully protected speech").

It is uncontested that the Attorney General will ban this speech unless CCP accedes to her unprecedented demand that it turn over its significant donors.

A. The threat to CCP's First Amendment freedoms is imminent, not conjectural.

On December 11, 2014—three days after oral argument before the Ninth Circuit—the Attorney General, through her Registry of Charitable Trusts, sent a new demand letter to CCP, which is set forth as Appendix B to this Motion. That letter requires CCP to submit its unredacted Schedule B to the Attorney General by January 10, 2015 or face three consequences. App. B 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]." App. B 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." *Id.* (bold in original). Third, "the Attorney General **will suspend the registration** of [CCP]." App. B at 2 (bold in original).

After being apprised of the contents of this letter, the Ninth Circuit enjoined the Attorney General from seeking an unredacted copy of CCP's Schedule B on January 6, 2015. That injunction stayed in place during the pendency of the Ninth Circuit's consideration of CCP's case, but was lifted on May 1, 2015 when the panel affirmed the district court. Now faced, once again, with the substantial harms threatened by the Attorney General's December 10th letter, CCP requests that this Court provide the same protections that the Ninth Circuit's January 6th injunction granted.

CCP is left with no options that do not imminently threaten its rights, and those of its supporters, under the First Amendment. CCP may either provide the Attorney General with the names and addresses of its contributors—the very constitutional injury at issue—or lose its tax status, expose its officers to sanction, and be banned from engaging in constitutionally protected speech within the borders of California. Sans injunctive relief, these injuries are nearly immediate. In short, CCP finds itself in "the most critical and exigent circumstances." *Fishman v. Schaeffer*, 429 U.S. 1325, 1326 (Marshall, J., in chambers) (citation and quotation marks omitted).

II. Applicants Have an Indisputably Clear Right to Relief.

A. The Ninth Circuit gravely erred in holding that the Attorney General's compelled disclosure regime imposes no First Amendment harm.

The Ninth Circuit determined that the existence of the Attorney General's unwritten disclosure policy—under which, beginning in 2014, she demanded CCP's list of substantial donors for the first time—imposed no "actual burden" upon the First Amendment rights of CCP or its supporters. Op. at 16. In doing so, the court below stated that "no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury." Op. at 17; *cf. Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2010) (quoting *Buckley v. Valeo*, 424 U.S. at 64) ("We have repeatedly found that compelled disclosure, *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment") (punctuation altered, emphasis supplied).

This is a grave misreading of fundamental legal precedents. "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*, 357 U.S. at 460. "[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" strongly disfavored. *NAACP*, 357 U.S. at 460-461. 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 also not guaranteed." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

The First Amendment's protection of free association "need[s] breathing space to survive", and is accordingly "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Button*, 371 U.S. at 433; *Bates*, 361 U.S. at 523. Therefore, six decades ago, this Court explicitly held that "the immunity from *state scrutiny* of membership [and contribution] lists…is here so related to the right of members [and donors] to pursue their lawful private interests privately and to associate freely with others in so doing as to come within the protection" of the First Amendment, as incorporated against state governments by the Fourteenth Amendment. *NAACP*, 357 U.S. at 466 (emphasis supplied); *Buckley*, 424 U.S. at 66 ("Our past decisions have not drawn fine lines between contributors and members

but have treated them interchangeably"). This Court did so because there is a "strong associational interest in maintaining the privacy of [donor] lists of groups engaged in the constitutionally protected free trade in ideas and beliefs." *Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 539, 555 (1963); *see also Am. Civil Liberties Union, Inc. v. Jennings*, 366 F. Supp. 1041, 1055 (D.D.C. 1973) ("It is well established that the requirements of… reporting of membership lists cast a chilling effect upon an individual's right to associate freely and to voice personal views through organizational ties").

The Ninth Circuit's opinion relegates the major cases of the civil rights era to a footnote—number 3—and limits their holdings to the specific experience of a single organization, the NAACP itself. This approach undoes the right to associate in private by permitting any government official proffering a non-irrational reason for obtaining donor lists to do so. Op. at 19 ("The reasons that the Attorney General has asserted for the disclosure requirement…are not 'wholly without rationality'") (citing *Buckley*, 424 U.S. at 83); *but see Buckley*, 424 U.S. at 25 ("In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny'") (quoting *NAACP*, 357 U.S. at 460-461).

Compelled disclosure is not reviewed under a balancing test, or a "wholly without rationality" standard. Instead, because "compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights", disclosure regimes must be reviewed under "[t]he strict test established by *NAACP*

v. Alabama." *Buckley*, 424 U.S. at 66. Under that analysis, this Court has *facially* struck down disclosure laws even when "[t]he record is barren of any claim, much less proof…that [a plaintiff] or any group sponsoring him would suffer 'economic reprisal, loss of employment, threat of physical coercion [or] other manifestations of public hostility.'" *Talley v. California*, 362 U.S. 60, 69 (Clark, J., dissenting) (citing *NAACP*, 357 U.S. at 462, brackets in *Talley*).

But that is the very sort of proof that the Ninth Circuit demanded that CCP proffer to demonstrate that the government's invasion of its privacy creates an actual injury. Op. 9-12 (noting that the court would find that that the Attorney General has exceeded her authority where (1) there is a record of harassment against the organization threatened with disclosure, or (2) when the disclosure regime is pretextual and intended only to harass).

The Ninth Circuit's approach would require individual charities opposing demands for their donor information to demonstrate that they will face particularized harm from turning the data over to the government. This creates a Catch-22 in which organizations and their donors can claim an exemption to harm only after they have already suffered harm or threats, but organizations and donors would have no protection against unforeseeable future harms.

This approach was in error and conflicts with foundational cases from the civil rights era. Compelled disclosure itself impinges upon the First Amendment, and must be justified by a government actor under the "strict test" identified in *Buckley* and *NAACP*.

B. The Ninth Circuit erred by applying rational basis review to the Attorney General's disclosure regime.

Some confusion exists as to how precisely "the strict test" established by *NAACP v. Alabama*—typically referred to as "exacting scrutiny"—functions. *Libertarian Party of Ohio v. Husted*, 751 F.3d 403, 413 (6th Cir. 2014) ("'Exacting scrutiny,' despite the name, does not necessarily require that kind of searching analysis that is normally called strict judicial scrutiny; although it may"). While this ambiguity ought to be clarified, particularly as exacting scrutiny arises only in cases implicating the First Amendment, it *is* clear that while "'possibly less rigorous than strict scrutiny, exacting scrutiny is more than a rubber stamp.'" *Worley v. Cruz-Bustillo*, 717 F.3d 1238, 1249 (11th Cir. 2013) (quoting *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) ("*Minn. Citizens*"). Moreover, "[t]he Supreme Court has not hesitated to hold laws unconstitutional under this standard." *Minn. Citizens*, 692 F.3d at 876. In any event, circuit confusion on this question relates to whether or not exacting scrutiny is really a form of strict scrutiny or a form of intermediate review—not whether it is a euphemism for rational basis review. *See e.g. Williams-Yulee*, No. 13-1499, 2015 U.S. LEXIS 2983 at *16 (Roberts, C.J., controlling opinion) (describing exacting scrutiny as requiring governments to show laws "are narrowly tailored to serve a compelling interest"); *McCutcheon v. FEC*, 572 U.S. ___, 134 S. Ct. 1434, 1444 (2014) (same); *Citizens United v. FEC*, 558 U.S. 310, 366-367 ("[E]xacting scrutiny…requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest") (citation omitted, punctuation

altered). What is clear is that if laws are "no more than tenuously related to the substantial interests disclosure serves…[they] fail exacting scrutiny." *Id.* (citation omitted, punctuation altered).

"In the First Amendment context, fit matters." *McCutcheon*, 134 S. Ct. at 1456 (Roberts, C.J., controlling op.). Certainly, there are cases where compelled disclosure of donor information can withstand exacting scrutiny. *Citizens United*, 558 U.S. at 367 (campaign finance donor disclosure sufficiently fit "governmental interest in providing the electorate with information about the sources of election-related spending…[which will] help citizens make informed choices in the political marketplace"). But such regimes only survive when the government (1) demonstrates that it is acting in furtherance of a "sufficiently important" governmental interest and (2) that the government's actions are "substantially" tailored toward that interest. These burdens are the government's to bear. Indeed, only in circumstances under which a disclosure regime has already survived this rigorous scrutiny does the burden shift to a plaintiff to demonstrate further, additional, First Amendment injury. *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 102 (1982) (finding exception from compelled disclosure requirements for political committees when a group demonstrated reasonable probability of suffering threats, harassments, and reprisals due to compliance with the reporting regime).

This is not a radical position—it was the law in the Ninth Circuit until last month. *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671,

684 (9th Cir. 2014); *rev'd* 782 F.3d 520 (9th Cir. Apr. 3, 2015, *en banc*) ("Moreover, it is the *government's* burden to show that its interests are substantial, that those interests are furthered by the disclosure requirement, and that those interests outweigh the First Amendment burden the disclosure requirement imposes on political speech") (emphasis in original, other punctuation altered, citations omitted).

Nevertheless, here, the Ninth Circuit found not that the government had proven that it had properly tailored its demand for CCP's donors to a proper government interest, but rather that, absent specific evidence that CCP and its donors would be harmed, the Attorney General need only assert a rational basis for its demand. Thus, essentially, the Ninth Circuit has held that any and all compelled disclosure regimes are appropriately tailored, so long as the government offers a plausible excuse for compelling private information from an organization. *But see Baird v. State Bar of Arizona*, 401 U.S. 1, 27 (1971) (plurality op.) ("[W]hen a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas…discourage citizens from exercising rights protected by the Constitution").

This was error, and a stunning reversal of how heightened judicial review ought to operate.

1. The Ninth Circuit has shifted the burden under exacting scrutiny to plaintiffs, not government defendants.

Once the Attorney General sought "state scrutiny" of CCP's donor information, this act, alone, triggered the need for exacting judicial review. Under exacting scrutiny, "[t]he interest advanced must be paramount, one of vital importance, *and the burden is on the government* to show the existence of such an interest." *Elrod*, 427 U.S. at 362 (citations omitted) (emphasis supplied). Below, the Ninth Circuit inverted this requirement, instead requiring CCP to justify why it need not disclose sensitive information to the government. But exacting scrutiny is premised upon the belief that governments must justify their demands for disclosure, not force the governed to explain why the State's accumulation of a vast database of private, constitutionally-protected information is harmless.

2. The Ninth Circuit failed to require that the government demonstrate that its proffered interest was substantially tailored to its demand for CCP donors.

But the burden upon the Attorney General does not end merely upon the invocation of a legitimate governmental interest. *Buckley*, 424 U.S. at 64 ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest"). CCP "asserts no right to absolute immunity from state investigation, and no right to disregard [California]'s laws." *NAACP*, 357 U.S. at 463. CCP concedes, as it has at every stage of this litigation,

that the enforcement of laws against fraud, self-dealing, interested persons, and the like are vital and paramount interests for the government to pursue.[2]

CCP does not, however, concede that the Attorney General has *ever* provided *any* evidence of the mechanism by which CCP's donor information would vindicate that interest. CCP Mot. to Stay the Mandate and Mot. for Prelim. Inj. Relief at 7-8, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. May 5, 2015) Dkt. No. 37, (summarizing the Attorney General's repeated invocation of her governmental interest, without providing an explanation as to how CCP donor information would support that interest). At most, she provided "*an* example", for the first time, at oral argument on appeal, "of how the Attorney General uses Form 990 Schedule B in order to enforce these laws." Op. at 6 (emphasis supplied).

Specifically, counsel suggested a scenario involving a lightly capitalized charity disclosing over $2 million in donations, the vast majority of which came from inflating the value of a worthless painting to a substantial value. Oral Argument at 28:25, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. Dec. 8, 2014).[3] Whether that was an actual or hypothetical example remains unknown, as does what California law enforcement (as opposed to federal tax enforcement) interest would be served by knowing the names of donors to such an

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[2] Furthermore, CCP has no objection to the Attorney General conducting compliance audits, or subpoenaing certain donor information as part of an investigation if a charity's annual filing demonstrates a particularized suspicion of wrongdoing. *See* CAL GOV'T CODE § 12588 ("[t]he Attorney General may investigate transactions and relationships of corporations and trustees subject to this article").

[3] *Available at:* http://cdn.ca9.uscourts.gov/datastore/media/2014/12/08/14-15978.mp3.

organization. Form 990 would already provide the Attorney General with reason to be suspicious: the public form would show extremely low outlays and an extremely high professed income. Moreover, the public inspection copy of Form 990 would list the *amount* of the painting donation, and that it was a non-cash contribution, but not the name and address of the donor herself. Similarly, a separate schedule of the Form, open to public inspection, would also list a "description of noncash property given," in this case that the donation was a painting, and its "FMV" (fair market value). At that point, the Attorney General would be within her rights to subpoena additional information concerning the circumstances of that particular donation. The Attorney General's latest example—whether reality or speculation—cannot justify, under exacting scrutiny, obtaining *all* donors to *all* charities. *Buckley v Am. Constititional Law Found.*, 525 U.S. 182, 201; 204 (1999) (when demanded disclosure is only "tenuously related" to the state's interest in "compelled disclosure of the names and addresses" of individuals, this "fail[s] exacting scrutiny"). This scenario was not briefed in the Ninth Circuit or provided to the district court in any form. *Gibson*, 372 U.S. at 556 (associational freedom "may not be substantially infringed upon such a slender showing as here made by the respondent").

Perhaps more troubling, it was upon this scintilla of argument that the court of appeals declared that dragnet donor lists assisted "investigative efficiency" when compared to the difficulties of issuing subpoenas where audits or other information available on Form 990 (a highly-detailed view of an organization's finances, including the amounts of contributions, whether each was a non-cash contribution,

and a description of the property contributed, if not the names of contributors) suggested donor information would be useful. Op. at 7; *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 ("[W]e have never accepted mere conjecture as adequate to carry a First Amendment burden"); *McCullen v. Coakley*, 573 U.S. __, 134 S. Ct. 2518, 2534 (2014) ("[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency") (citation and quotation marks omitted).

But the Ninth Circuit conducted no analysis as to whether these assertions proved that the Attorney General's demand was properly tailored. *McCutcheon*, 134 S. Ct at 1456 ("Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but…narrowly tailored to achieve the desired outcome") (citations and quotation marks omitted). Indeed, the Ninth Circuit did not even ask, as this Court did in *Shrink Missouri Government PAC*, whether "the novelty and plausibility of the justification raised" by the Attorney General could be justified by such a low, essentially non-existent, "quantum of empirical evidence." *Shrink Missouri*, 528 U.S. at 391.

Instead, the Ninth Circuit engaged in a very basic balancing test: having found that there was no First Amendment injury in compelled disclosure, the Court of Appeals required the Attorney General to place only a featherweight, if that, on her side of the scales.

If this is the law, then *NAACP v. Alabama*, its progeny, and those cases' defense of associational privacy against state review of membership information

must have been overruled or dramatically narrowed. *Bates*, 361 U.S. at 525 ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion").

Had the Ninth Circuit properly conducted an exacting scrutiny analysis, it ought to have ruled for Applicant. The Attorney General never demonstrated that "[t]he gain to the subordinating interest provided by the means" used to further that interest—in this case, a universal disclosure regime specifically targeting First Amendment sensitive data—was even remotely "narrowly tailored" to vindicate that interest. *Elrod*, 427 U.S. at 362 (citations omitted); *McCutcheon*, 134 S. Ct. at 1456 (citations omitted).

III. Injunctive Relief Would Aid This Court's Jurisdiction

Issuance of an injunction under the All Writs Act would be "in aid of" this Court's *certiorari* jurisdiction. 28 U.S.C. § 1651(a). This Court has held that granting an injunction under 28 U.S.C. § 1651 is appropriate when "an effective remedial order…would otherwise be virtually impossible." *Fed. Trade Comm'n v. Dean Foods Co.*, 384 U.S. 597, 605 (1966). Such is the case here.

As discussed *supra*, "the disclosure itself" to state officials poses First Amendment injury. *Perry*, 591 F.3d at 1137. Such injury is not "remediable." *Id.* Even if the Attorney General were able to purge all knowledge of CCP's donor list, disclosure of its donors during the pendency of this Court's consideration of CCP's petition for *certiorari* is nonetheless irreparable. This is axiomatic. All First

Amendment injuries, even those which exist for "minimal periods of time, unquestionably constitute[] irreparable injury." *Elrod*, 427 U.S. at 373.

In certain respects, the situation forced upon CCP is akin to those of religious believers who received injunctive relief to prevent the Hobson's choice between violating their beliefs and state punishment. *See Little Sisters of the Poor Home for the Aged, Denver, Col. v. Sebelius*, 134 S. Ct. 1022 (2014); *Holt v. Hobbs*, 134 S. Ct. 635 (2013). In *Little Sisters*, the Department of Health and Human Services was enjoined from requiring applicants to sign a document which violated their religious beliefs. And in *Holt*, the government was prohibited from requiring an inmate to shave his beard, which the inmate maintained for religious reasons. In both cases, had injunctive relief not issued, but this Court granted *certiorari* and reversed, the Applicants could have resumed the free exercise of their religious faith. The Little Sisters could have abandoned their compliance with the federal government's contraception mandate, and Mr. Holt could have simply grown back his beard. However, this Court considered the fact that in both cases Applicants would have irretrievably lost their First Amendment rights to be of great import.

Here, CCP is forced to choose between asserting its right of associational privacy and its right to ask Californians to support its mission. The First Amendment is implicated either way. Consequently, relief that preserves all of Applicant's First Amendment rights ought to issue pending the Court's consideration of CCP's timely petition for a writ of *certiorari*.

IV. ON BALANCE, THE HARDSHIPS FACING APPLICANT ARE FAR GREATER THAN THOSE FACING THE ATTORNEY GENERAL.

"In appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Townsend*, 486 U.S. at 1304. Here, the equities tip sharply in favor of an injunction.

Privacy of association, once breached, is gone forever. Once the Attorney General and her agents have reviewed and scrutinized CCP's donor list, they cannot be forced to unlearn that information. Nor is it clear that such information, despite the Ninth Circuit's suggestion to the contrary, would be safe from public records requests once it has been received by state officials. Op. at 18, n. 9 ("Thus, it appears *doubtful* that the Attorney General would ever be required to make Form 990 Schedule B publicly available) (emphasis supplied). Furthermore, there is always significant risk that CCP's private donor information could, inadvertently or by design, be made public. *Nat'l Org. for Marriage, Inc. v. United States,* et al, 24 F. Supp. 3d 518, 532 (E.D. Va. 2014) ("In light of this ruling and the Government's admission that it improperly released the Schedule B…the only issues remaining for trial concern [Plaintiff's] damages from this single disclosure"); *Nat'l Org. for Marriage, Inc. v. United States*, et al., 114 A.F.T.R.2d 6370 at 2 (E.D. Va. Oct. 16, 2014) ("On June 23, 2014, the Court entered the consent judgment, which ordered that [Plaintiff] shall recover judgment against the Government in the amount of $50,000…").

By contrast, the hardship to the Attorney General in being denied access to CCP's donor list while CCP's pending petition is considered by the full Court is negligible. By the Attorney General's own admissions below, her office *did not even notice* that CCP's donor information was being left off of its annual filings until 2014.

As briefing by *amicus curiae* Charles Watkins before the Ninth Circuit demonstrates, it was potentially not until 2010 that the Attorney General's staff even began to demand that charities file public copies of Form 990. Brief of *Amicus Curiae* Charles Watkins at 8, *Ctr. for Competitive Politics v. Harris*, No. 14-15978 (9th Cir. 2015), Dkt No. 11 (quoting correspondence with Assistant Attorney General Belinda Johns). CCP also requests that this Court take judicial notice of similar proceedings brought against the Attorney General by an additional organization on December 9th, 2014 in the United States District Court for the Central District of California. The Plaintiff in that matter had been a regular member of the Registry since 2001, but was informed of a demand for its donors by letter in 2013. Complaint (ECF No. 1) at 1, ¶¶ 3-4, *Am. for Prosperity Found. v. Harris*, No. 14-9448 (C.D. Cal. 2014), *notice of appeal filed* No-55446 (9th Cir. Mar. 24, 2015). All of these examples accord with CCP's own experience.

Taken together, these instances demonstrate that the Attorney General has no pressing need for this information. She has successfully operated the Registry for many years without the donor information of an as-yet unknown, but clearly substantial, number of filers. Put simply, the Attorney General's ability to combat

fraud in California will not be substantially harmed by a continuance of the State's previous approach to Schedule B—an approach followed by the overwhelming majority of her sister states without apparent ill-effect.[4]

Conversely, compliance with the Attorney General's demand would significantly infringe upon the First Amendment rights of CCP and its donors. Given the substantial mismatch of the equities here, an injunction ought to issue, preserving the *status quo* as it has existed since 2008, during which period the Attorney General has demonstrated no incapacity to enforce the laws of the State of California.

Conclusion

Given the important liberties at risk, the irreparability of these injuries, and the time-sensitive nature of the Attorney General's demand, this Court should grant an injunction pending the timely filing of a petition for *certiorari*.

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[4] The overwhelming weight of state practice suggests an unredacted Schedule B is not necessary for the effective enforcement of laws regulating charitable giving. Many states join California in requiring Form 990 as part of their annual charitable-solicitation reports. Some explicitly exclude Schedule B, but others use language similar to Cal. Code. Regs., tit. 11, § 301. But contrary to the Ninth Circuit's implication at Op.6 n. 1, to the best of Applicant's knowledge, the overwhelming majority of these states do not interpret these provisions to require unredacted Schedule B information. *See, e.g.* Ga. Code § 43-17-5(b)(4) ("a copy of the Form 990… which the organization filed for the previous taxable year pursuant to the United States Internal Revenue Code"); Haw. Stat. § 467B-6.5(a) ("the annual report shall be a copy of that Form 990 or 990-EZ"); Kan. Stat. § 17-1763(b)(15) ("a copy of the federal income tax return of the charitable organization").

Respectfully submitted,

/s/ Allen Dickerson

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Dated: May 13, 2015

Certificate of Service

I, Allen Dickerson, a member of the bar of this Court, certify that I caused a copy of the Emergency Application for Injunction Pending *Certiorari* on the listed counsel of record via U.S. Mail, that a courtesy .pdf copy was sent to the listed email addresses, and that all persons required to be served have been served.

Kamala D. Harris
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Appendix A

FILED

MAY 11 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTER FOR COMPETITIVE POLITICS, Plaintiff - Appellant, v. KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California, Defendant - Appellee.	No. 14-15978 D.C. No. 2:14-cv-00636-MCE-DAD Eastern District of California, Sacramento ORDER

Before: TASHIMA and PAEZ, Circuit Judges and QUIST,* Senior District Judge.

Appellant's unopposed motion to stay the mandate is GRANTED. Fed. R. App. P. 41(d)(2)(B). Appellant's motion for preliminary injunctive relief pending filing of a petition for a writ of certiorari is DENIED.

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* The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

Appendix B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR COMPETITIVE POLITICS, *Plaintiff-Appellant*, v. KAMALA D. HARRIS, in her official capacity as Attorney General of the State of California, *Defendant-Appellee*.	No. 14-15978 D.C. No. 2:14-cv-00636-MCE-DAD OPINION

Appeal from the United States District Court
for the Eastern District of California
Morrison C. England, Jr., Chief District Judge, Presiding

Argued and Submitted
December 8, 2014—San Francisco California

Filed May 1, 2015

Before: A. Wallace Tashima and Richard A. Paez, Circuit Judges, and Gordon J. Quist, Senior District Judge.*

Opinion by Judge Paez

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* The Honorable Gordon J. Quist, Senior District Judge for the U.S. District Court for the Western District of Michigan, sitting by designation.

SUMMARY[**]

Civil Rights

The panel affirmed the district court's denial of a preliminary injunction in an action brought by the Center for Competitive Politics under 42 U.S.C. § 1983 seeking to enjoin the California Attorney General from requiring it to disclose the names and contributions of the Center's "significant donors" on Internal Revenue Form 990 Schedule B, which the Center must file with the state in order to maintain its registered status with the state's Registry of Charitable Trusts.

The panel first rejected the Center's contention that the disclosure requirement was, in and of itself, injurious to the Center and its supporters' exercise of their First Amendment rights to freedom of association. The panel held that the chilling *risk* inherent in compelled disclosure triggered exacting scrutiny. Under the exacting scrutiny's balancing test, the strength of the governmental interest must reflect the seriousness of the *actual* burden on First Amendment right. The panel held that the Center had not shown any "actual burden" to itself or to its supporters. The panel determined that the Center did not claim or produce evidence to suggest that its significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirement. On the other side of the scale, the panel held that the Attorney General has a compelling interest in enforcing the laws of California and

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

that the disclosure requirement bore a "substantial relation" to the "sufficiently important" government interest of law enforcement.

The panel also rejected the Center's contention that the disclosure requirement was preempted because Congress intended to protect the privacy of the donor information of non-profit organizations from all public disclosure when it added 26 U.S.C. § 6104, part of the Pension Protection Act of 2006. The panel held that Section 6104 does not so clearly manifest the purpose of Congress that the panel could infer from it that Congress intended to bar state attorneys general from requesting the information contained in Form 990, Schedule B.

COUNSEL

Allen J. Dickerson (argued), Center for Competitive Politics, Alexandria, Virginia; Alan Gura, Gura & Possessky, PLLC, Alexandria, Virginia for Plaintiff-Appellant.

Kamala Harris, California Attorney General, Alexandra Robert Gordon (argued), Deputy Attorney General, San Francisco, California for Defendant-Appellee.

Joseph Vanderhulst, ActRight Legal Foundation, Plainfield, Indiana, for Amici Curiae National Organization for Marriage, Inc., and National Organization for Marriage Educational Trust Fund.

Bradley Benbrook and Stephen Duvernay, Benbrook Law Group, PC, Sacramento, California, for Amicus Curiae Charles M. Watkins.

OPINION

PAEZ, Circuit Judge:

In order to solicit tax deductible contributions in California, a non-profit corporation or other organization must be registered with the state's Registry of Charitable Trusts. Cal. Gov. Code § 12585. To maintain its registered status, an entity must file an annual report with the California Attorney General's Office, and must include IRS Form 990 Schedule B. The Internal Revenue Service (IRS) requires non-profit educational or charitable organizations registered under 24 U.S.C. § 501(c)(3) to disclose the names and contributions of their "significant donors" (donors who have contributed more than $5,000 in a single year) on Form 990 Schedule B. The Center for Competitive Politics (CCP), a non-profit educational organization under § 501(c)(3), brings this lawsuit under 42 U.S.C. § 1983, seeking to enjoin the Attorney General from requiring it to file an unredacted Form 990 Schedule B. CCP argues that disclosure of its major donors' names violates the right of free association guaranteed to CCP and its supporters by the First Amendment.

CCP appeals the district court's denial of CCP's motion for a preliminary injunction to prevent the Attorney General from enforcing the disclosure requirement. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

I.

A.

CCP is a Virginia non-profit corporation, recognized by the IRS as an educational organization under § 501(c)(3). CCP's "mission is to promote and defend the First Amendment rights of free political speech, assembly, association, and petition through research, education, and strategic litigation." CCP supports itself through financial donations from contributors across the United States, including California. CCP argues that the disclosure requirement infringes its and its supporters' First Amendment right to freedom of association. CCP also argues that federal law preempts California's disclosure requirement.

Defendant Kamala Harris, the Attorney General of California, is the chief law enforcement officer of the State of California. *See* Cal. Const. art. 5, § 13. Furthermore, under the Supervision of Trustees and Fundraisers for Charitable Purposes Act (the Act), Cal. Gov't Code § 12580 et seq., the Attorney General also has primary responsibility to supervise charitable trusts and public benefit corporations incorporated in or conducting business in California, and to protect charitable assets for their intended use. Cal. Gov't Code §§ 12598(a), 12581. The Act requires the Attorney General to maintain a registry of charitable corporations and their trustees and trusts, and authorizes the Attorney General to obtain "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register." Cal. Gov't Code § 12584.

An organization must maintain membership in the registry in order to solicit funds from California residents.

Cal. Gov't Code § 12585. The Act requires that corporations file periodic written reports, and requires the Attorney General to promulgate rules and regulations specifying both the filing procedures and the contents of the reports. Cal. Gov't Code § 12586(b), Cal. Code Regs. tit. 11, § 300 et seq. (2014). One of the regulations adopted by the Attorney General requires that the periodic written reports include Form 990.[1] Cal. Code Regs. tit. 11, § 301 (2014). Although many documents filed in the registry are open to public inspection, *see* Cal. Code Regs. tit. 11, § 310, Form 990 Schedule B is confidential, accessible only to in-house staff and handled separately from non-confidential documents.

The Attorney General argues that there is a compelling law enforcement interest in the disclosure of the names of significant donors. She argues that such 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. *See* Cal. Corp. Code §§ 5233, 5236, 5227. At oral argument, counsel elaborated and provided an example of how the Attorney General uses Form 990 Schedule B in order to enforce these laws: having significant donor information allows the Attorney General to determine when an organization has inflated its revenue by overestimating the value of "in kind" donations. Knowing the significant donor's identity allows her to determine what

[1] California is not alone in requiring charitable organizations to file an unredacted Form 990 Schedule B. At least Hawaii, Mississippi, and Kentucky share the same requirement. Haw. Rev. Stat. Ann. § 467B-6.5 (2014); Ky. Rev. Stat. Ann. §§ 367.650-.670 (2014); Miss. Code Ann. § 79-11-507 (2014). According to Amicus Charles Watkins, Florida and New York also require unredacted versions of Form 990 Schedule B.

the "in kind" donation actually was, as well as its real value. Thus, having the donor's information immediately available allows her to identify suspicious behavior. She also argues that requiring unredacted versions of Form 990 Schedule B increases her investigative efficiency and obviates the need for expensive and burdensome audits.

B.

CCP has been a member of the registry since 2008. Since its initial registration, CCP has filed redacted versions of Form 990 Schedule B, omitting the names and addresses of its donors. In 2014, for the first time, the Attorney General required CCP to submit an unredacted Form 990 Schedule B. In response to this demand, CCP filed suit, alleging that the Attorney General's requirement that CCP file an unredacted Form 990 Schedule B amounted to a compelled disclosure of its supporters' identities that infringed CCP's and its supporters' First Amendment rights to freedom of association. CCP also alleged that a section of the Internal Revenue Code, 26 U.S.C. § 6104, which restricts disclosure of the information contained in Schedule B, preempted the Attorney General's requirement.

As noted above, the district court denied CCP's motion for a preliminary injunction, ruling that CCP was unlikely to succeed on the merits of either of its claims, and that, therefore, CCP could not show that it would suffer irreparable harm or that the public interest weighed in favor of granting the relief it requested. *Ctr. for Competitive Politics v. Harris*, No. 2:14–cv–00636–MCE–DAD, 2014 WL 2002244 (E.D. Cal. May 14, 2014).

II.

We review a district court's ruling on a motion for preliminary injunctive relief for abuse of discretion. *See FTC v. Enforma Natural Prods.*, 362 F.3d 1204, 1211-12 (9th Cir. 2004); *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 760 (9th Cir. 2004). We review findings of fact for clear error and conclusions of law de novo. *See Indep. Living Ctr. of S. Cal., Inc. v. Shewry*, 543 F.3d 1050, 1055 (9th Cir. 2008). Our review of a denial of preliminary injunctive relief must be "limited and deferential." *Harris*, 366 F.3d at 760.

"A plaintiff seeking a preliminary injunction must establish 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." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). Thus, CCP bears the heavy burden of making a "clear showing" that it was entitled to a preliminary injunction.

We apply exacting scrutiny in the context of First Amendment challenges to disclosure requirements. "Disclaimer and disclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking." *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (internal citations and quotation marks omitted). Therefore, courts have "subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 366–67 (quoting *Buckley v.*

Valeo, 424 U.S. 1 (1976)).[2] Exacting scrutiny encompasses a balancing test. In order for a government action to survive exacting scrutiny, "the strength of the governmental interest must reflect the seriousness of the *actual* burden on First Amendment rights." *John Doe No. 1*, 561 U.S. at 196 (quoting *Davis v. FEC*, 554 U.S. 724, 744 (2008)) (emphasis added).

III.

A.

CCP argues that the Attorney General's disclosure requirement is, in and of itself, injurious to CCP's and its supporters' exercise of their First Amendment rights to freedom of association. CCP further argues that the Attorney General must have a compelling interest in the disclosure requirement, and that the requirement must be narrowly tailored in order to justify the First Amendment harm it causes. This is a novel theory, but it is not supported by our case law or by Supreme Court precedent.

In arguing that the disclosure requirement alone constitutes significant First Amendment injury, CCP relies

[2] Although most of the cases in which we and the Supreme Court have applied exacting scrutiny arise in the electoral context, *see John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (referring to long line of such precedent), we have also applied the exacting scrutiny standard in the context of a licensing regime. *See Acorn Invs., Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989). Moreover, the foundational compelled disclosure case, *NAACP v. Ala. ex. rel. Patterson*, arose outside the electoral context. In that case, the NAACP challenged a discovery order (arising out of a contempt proceeding) that would have forced it to reveal its membership lists. 357 U.S. 449 (1958).

heavily on dicta in *Buckley v. Valeo*, in which the Supreme Court stated that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. Notably, the Court said "can" and not "always does." Furthermore, in making that statement, the Court cited a series of Civil Rights Era as-applied cases in which the NAACP challenged compelled disclosure of its members' identities at a time when many NAACP members experienced violence or serious threats of violence based on their membership in that organization.[3] *Id.* The Court went on to explain that "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the *potential* for substantially infringing the exercise of First

[3] CCP also cites extensively to these cases; however, because all of them are as-applied challenges involving the NAACP (which had demonstrated that disclosure would harm its members), these cases are all inapposite: *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539 (1963) (holding that the NAACP was not required to comply with a subpoena and disclose membership lists to a Florida state legislative committee investigating communist activity); *NAACP v. Button*, 371 U.S. 415 (1963) (upholding NAACP's challenge to a Virginia statute barring the improper solicitation of legal business, which the state had attempted to use to prohibit the organization's operation); *Shelton v. Tucker*, 364 U.S. 479 (1960) (striking down on First Amendment grounds an Arkansas statute requiring public school teachers to disclose all organizations to which they had belonged or contributed in the past five years); *Bates v. Little Rock*, 361 U.S. 516 (1960) (invalidating an Arkansas local ordinance requiring disclosure of membership lists on First Amendment grounds as applied to the NAACP, given the substantial record of the threats and harassment that members of the organization would experience as a result of disclosure); *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding that the NAACP was not required to comply with a discovery order requiring disclosure of its membership lists). In *Shelton*, while the NAACP was not a party, the primary plaintiff, Shelton, was a member of the NAACP. 364 U.S. at 484.

Amendment rights." *Id.* at 66 (emphasis added). The most logical conclusion to draw from these statements and their context is that compelled disclosure, without any additional harmful *state action*, can infringe First Amendment rights when that disclosure leads to private discrimination against those whose identities may be disclosed.

Of course, compelled disclosure can also infringe First Amendment rights when the disclosure requirement is itself a form of harassment intended to chill protected expression. Such was the case in *Acorn Investments, Inc. v. City of Seattle*, another opinion upon which CCP bases its theory that compelled disclosure alone constitutes First Amendment injury. In *Acorn*, the plaintiff brought a First Amendment challenge to Seattle's licensing fee scheme and its concomitant requirement that panoram businesses disclose the names and addresses of their shareholders. 887 F.2d at 220. Panorams, or "peep shows," were a form of adult entertainment business strongly associated with criminal activity. *Id.* at 222–24. Seattle's disclosure requirement exclusively targeted the shareholders of panoram businesses, and the only justification that the city advanced was "accountability." *Id.* at 226. The plaintiff argued that the disclosure requirement was intended to chill its protected expression, and, given the absence of any reasonable justification for the ordinance, we held that it violated the First Amendment. *Id.* In so holding, we found especially instructive and cited as indistinguishable a Seventh Circuit case, *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), in which "the court concluded that there could be 'no purpose other than harassment in requiring the individual . . . stockholders to file separate statements or applications.'" *Id.* (quoting *Genusa*, 619 F.3d at 1217). However, here, there is no indication in the record that the Attorney General's

disclosure requirement was adopted or is enforced in order to harass members of the registry in general or CCP in particular. Thus, the concern animating the holdings of *Acorn* and *Genusa* does not apply here.

CCP is correct that the chilling *risk* inherent in compelled disclosure triggers exacting scrutiny—"the strict test established by *NAACP v. Alabama*," *Buckley*, 424 U.S. at 66—and that, presented with a challenge to a disclosure requirement, we must examine and balance the plaintiff's First Amendment injury against the government's interest. However, CCP is incorrect when it argues that the compelled disclosure *itself* constitutes such an injury, and when it suggests that we must weigh that injury when applying exacting scrutiny. Instead, the Supreme Court has made it clear that we must balance the "seriousness of the *actual* burden" on a plaintiff's First Amendment rights. *John Doe No. 1*, 561 U.S. at 196 (emphasis added); *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, No. 12–55726, — F.3d —, 2015 WL 1499334, at *13 (9th Cir. Apr. 3, 2015) (en banc) (applying this standard in evaluating a First Amendment challenge to a disclosure requirement under exacting scrutiny). Here, CCP has not shown any "actual burden" on its freedom of association.

B.

CCP's creative formulation, however, does affect the scope of its challenge. In *John Doe No. 1*, signatories of a referendum petition challenged the Washington Public Records Act (PRA),[4] which permitted public inspection of such petitions. 561 U.S. at 191. The plaintiffs sought to

[4] Wash. Rev. Code § 42.56001 et seq.

prevent the disclosure of the names of those who had signed a referendum petition to challenge and put to a popular vote a Washington state law that had extended benefits to same-sex couples. *Id.* The complaint charged both that the PRA was unconstitutional as to the referendum petition to overturn the same-sex benefits law and as to referendum petitions generally. *Id*. at 194. Thus, there was some dispute as to whether their challenge was best construed as an as-applied or as a facial challenge. *Id*. The Court explained that "[t]he label is not what matters." *Id*. Rather, because the "plaintiffs' claim and the relief that would follow . . . reach[ed] beyond the particular circumstances of these plaintiffs," they were required to "satisfy our standards for a facial challenge to the extent of that reach." *Id.*

In formulating its claim such that the disclosure requirement itself is the source of its alleged First Amendment injury, CCP's claim "is not limited to [its] particular case, but challenges application of the law more broadly to all [registry submissions]." *Id*. Were we to hold that the disclosure requirement at issue here itself infringes CCP's First Amendment rights, then it would necessarily also infringe the rights of all organizations subject to it. Even though CCP only seeks to enjoin the Attorney General from enforcing the disclosure requirement against itself, the Attorney General would be hard-pressed to continue to enforce an unconstitutional requirement against any other member of the registry.[5] Therefore, because "the relief that would follow . . . reach[es] beyond the particular circumstances of th[is] plaintif[f,] [CCP's claim] must . . . satisfy our standards for a facial challenge to the extent of

[5] CCP conceded at oral argument that its challenge is best understood as a facial challenge.

that reach." *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 472–73 (2010)).

"Which standard applies in a typical [facial challenge] is a matter of dispute that we need not and do not address . . . ." *Stevens*, 559 U.S. at 472. The Supreme Court has at different times required plaintiffs bringing facial challenges to show "that no set of circumstances exists under which [the challenged law] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that it lacks any "plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring) (internal quotation marks omitted). Alternatively, in the First Amendment context, the Court has sometimes employed a different standard to evaluate facial overbreadth challenges, "whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *Stevens*, 559 U.S. at 473 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)).

The least demanding of these standards is that of the First Amendment facial overbreadth challenge. Because CCP cannot show that the regulation fails exacting scrutiny in a "substantial" number of cases, "judged in relation to [the disclosure requirement's] plainly legitimate sweep," we need not decide whether it could meet the more demanding standards of *Salerno* and *Glucksberg*.

C.

Although not for the reasons that CCP posits, *Buckley v. Valeo* is instructive for assessing CCP's facial challenge. In *Buckley*, the plaintiffs challenged the disclosure requirements

of the Federal Election Campaign Act[6] as overbroad on two grounds. 424 U.S. at 60–61. The first ground was that the disclosure requirement applied to minor party members, such as members of the Socialist Labor Party, who might face harassment or threats as a result of the disclosure of their names. *Id.* The plaintiffs sought a blanket exemption for minor parties. The second ground of the *Buckley* plaintiffs' challenge was that the thresholds triggering disclosure were too low, because the requirement attached to any donation of $100 or more (with additional reporting requirements to a Committee, though not to the public, for donations over $10). *Id.*

After applying exacting scrutiny, the *Buckley* Court rejected the plaintiffs' minor party challenge because "no appellant [had] tendered record evidence of the sort proffered in *NAACP v. Alabama*," and so had failed to make the "[r]equisite [f]actual [s]howing." *Id.* at 69–71. Where the record evidence constituted "[a]t best . . . the testimony of several minor-party officials that one or two persons refused to make contributions because of the possibility of disclosure . . . the substantial public interest in disclosure identified by the legislative history of this Act outweighs the harm generally alleged." *Id.* at 71–72. The Court, however, left open the possibility that if a minor party plaintiff could show "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties," then it could succeed on an as-applied challenge. *Id.* at 74. Thus, even where, unlike here, the plaintiffs adduced some evidence that their participation

[6] Then codified at 2 U.S.C. § 431 et seq., now at 52 U.S.C. § 30101 et seq.

would be chilled, the *Buckley* Court rejected a facial challenge.

Further undermining CCP's argument, the *Buckley* Court also rejected the plaintiffs' "contention, based on alleged overbreadth, . . . that the monetary thresholds in the record-keeping and reporting provisions lack[ed] a substantial nexus with the claimed governmental interests, for the amounts involved [were] too low." *Id.* at 82. The Court noted that they were "indeed low," but concluded that it "[could not] say, on this bare record, that the limits designated [were] wholly without rationality," because they "serve[d] informational functions," and "facilitate[d] enforcement" of the contribution limits and disclosure requirements. *Id.* at 83. Thus, the *Buckley* Court rejected the plaintiffs' overbreadth challenge both with respect to minor parties and the donation thresholds.

Engaging in the same balancing that the *Buckley* Court undertook, we examine the claims and interests the parties assert here. In contrast to the *Buckley* plaintiffs, CCP does not claim and produces no evidence to suggest that their significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirement.[7] CCP has not demonstrated any "actual burden," *John Doe No. 1*, 561 U.S. at 196, on its or its supporters' First Amendment rights. As

[7] The minor parties in *Buckley* feared harassment because they advocated unpopular positions. CCP has not alleged that its supporters would face a similar backlash. However, amicus National Organization for Marriage contends that, like the minor party donors and members in *Buckley*, its significant donors could face retaliatory action if their names were ever released to the public.

discussed *supra*, contrary to CCP's contentions, no case has ever held or implied that a disclosure requirement in and of itself constitutes First Amendment injury.[8]

Furthermore, unlike in *John Doe No. 1* or in other cases requiring the disclosure of the names of petition signatories, in this case, the disclosure would not be public. The Attorney General keeps Form 990 Schedule B confidential. Although it is certainly true that non-public disclosures can still chill protected activity where a plaintiff fears the reprisals of a government entity, CCP has not alleged any such fear here. CCP instead argues that the Attorney General's systems for preserving confidentiality are not secure, and that its significant donors' names might be inadvertently accessed or released. Such arguments are speculative, and do not constitute evidence that would support CCP's claim that disclosing its donors to the Attorney General for her

[8] Contrary to CCP's contention, *Talley v. California*, 362 U.S. 60 (1960), is not such a case. In *Talley*, the Supreme Court struck down a law that outlawed the distribution of hand-bills that did not identify their authors. *Id.* at 64. In so doing, the Court did not explicitly apply exacting scrutiny, though it cited *NAACP v. Alabama* and *Bates*. *Id.* at 65. The basis for the Court's holding was the historic, important role that anonymous pamphleteering has had in furthering democratic ideals. *Id.* at 64 ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression . . . Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."). Thus, in that case, the Court was certain of the First Amendment harm that the ordinance imposed.

confidential use would chill its donors' participation.[9] *See United States v. Harriss*, 347 U.S. 612, 626 (1954).[10]

On the other side of the scale, as CCP concedes, the Attorney General has a compelling interest in enforcing the laws of California. CCP does not contest that the Attorney General has the power to require disclosure of significant donor information as a part of her general subpoena power. Thus, the disclosure regulation has a "plainly legitimate

[9] CCP also argues that only an informal policy prevents the Attorney General from publishing the forms and requires her to take appropriate measures to ensure the forms stay confidential. However, where a record is exempt from public disclosure under federal law, as is Form 990 Schedule B, it is also exempt from public inspection under the California Public Records Act. Cal. Gov't Code § 6254(k) (2015). Thus, it appears doubtful that the Attorney General would ever be required to make Form 990 Schedule B publicly available. Moreover, while the exemption under § 6254(k) is permissive, and not mandatory, *Marken v. Santa Monica Malibu Unified Sch. Dist.*, 136 Cal. Rptr. 3d 395, 405 (Ct. App. 2012), where public disclosure is *prohibited* under state or federal law, the responsible California agency is also prohibited from public disclosure. *See* Cal. Gov't Code § 6254(f) ("This section shall not prevent any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."). As public disclosure (distinct from disclosure to the Attorney General) of significant donor information is not authorized by federal law, it is likely not authorized by California law, either. However, because CCP has not provided any evidence that even public disclosure would chill the First Amendment activities of its significant donors, the potential for a future change in the Attorney General's disclosure policy does not aid CCP in making its facial challenge.

[10] In *Harriss*, the Supreme Court rejected a First Amendment challenge to an act imposing disclosure requirements on lobbyists, where plaintiffs presented "[h]ypothetical borderline situations" where speech might be chilled, because "[t]he hazard of such restraint is too remote" to require striking down an otherwise valid statute.

sweep." *Stevens*, 559 U.S. at 473. CCP argues instead that the disclosure requirement does not bear a substantial enough relationship to the interest that the Attorney General has asserted in the disclosure, and that the Attorney General should be permitted only to demand the names of significant donors if she issues a subpoena. CCP's argument that the disclosure requirement exceeds the scope of the Attorney General's subpoena power is similar to the *Buckley* plaintiffs' argument that the low monetary thresholds exceeded the scope of Congress's legitimate regulation.

Like the *Buckley* Court, we reject this argument, especially in the context of a facial challenge. The Attorney General has provided justifications for employing a disclosure requirement instead of issuing subpoenas. She argues that having immediate access to Form 990 Schedule B increases her investigative efficiency, and that reviewing significant donor information can flag suspicious activity. The reasons that the Attorney General has asserted for the disclosure requirement, unlike those the City of Seattle put forth in *Acorn*, are not "wholly without rationality." *See Buckley*, 424 U.S. at 83. Faced with the Attorney General's "unrebutted arguments that only modest burdens attend the disclosure of a typical [Form 990 Schedule B]," we reject CCP's "broad challenge," *John Doe No. 1*, 561 U.S. at 201. We conclude that the disclosure requirement bears a "substantial relation" to a "sufficiently important" government interest. *See Citizens United*, 558 U.S. at 366 (internal citations omitted).

However, as the Supreme Court did in *Buckley* and *John Doe No. 1*, we leave open the possibility that CCP could show "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats,

harassment, or reprisals from either Government officials or private parties" that would warrant relief on an as-applied challenge. *See McConnell v. FEC*, 540 U.S. 93, 199 (2003) (rejecting a facial challenge, but leaving open the possibility of a future as-applied challenge).

In sum, CCP's First Amendment facial challenge to the Attorney General's disclosure requirement fails exacting scrutiny.

IV.

CCP also contends that federal tax law preempts the Attorney General's disclosure requirement. CCP argues that Congress intended to protect the privacy of the donor information of non-profit organizations from all public disclosure when it added 26 U.S.C. § 6104, part of the Pension Protection Act of 2006, and that, therefore, permitting state attorneys general to require this information from non-profit organizations registered under § 501(c)(3) would conflict with that purpose. CCP's argument is unavailing.

Federal law is supreme and Congress can certainly preempt a state's authority. However, principles of federalism dictate that we employ a strong presumption against preemption. *Arizona v. United States*, 132 S. Ct. 2492, 2500 (2012). Therefore, federal law will only preempt state law if such preemption was "the clear and manifest purpose of Congress." *Id.* at 2501. Congress can express that intent explicitly, or the intent can be inferred when a state law irreconcilably conflicts with a federal law. *Id.* Alternatively, "the intent to displace state law altogether can be inferred" when the federal government has established a legislative

framework "so pervasive that Congress left no room for states to supplement it." *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). A state law can be in conflict with a federal law when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*; *see also Barnett Bank of Marion Cnty. N.A. v. Nelson*, 517 U.S. 25, 31 (1996) (holding that such an obstacle can arise even where the two laws are not directly in conflict).

CCP argues that 26 U.S.C. § 6104(c)(3) expressly preempts the Attorney General's disclosure requirement. That section provides:

> 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) (*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 added). CCP reads this language to ban the Secretary from sharing the tax information of § 501(c)(3) organizations with state attorneys general. The language is better construed as a limited grant of authority than as a prohibition. However, even if CCP's reading were accurate, a statute restricting the disclosures that the Commissioner of the IRS may make does not expressly preempt the authority of state attorneys general to require such disclosures directly

from the non-profit organizations they are tasked with regulating.

CCP further argues that the Attorney General's disclosure requirement conflicts with the purpose of § 6104, but neither of the two subsections of § 6104 upon which CCP relies can support its argument. Neither subsection indicates that Congress sought to regulate states' access to this information for the purposes of enforcing their laws, or that Congress sought to regulate the actions of any entity other than the IRS. The first subsection allows for the public availability of the tax returns of certain organizations and trusts, but goes on to qualify that "[n]othing in this subsection shall *authorize the Secretary* to disclose the name or address of any contributor to any organization or trust." 26 U.S.C. § 6104(b) (emphasis added). The second subsection lays out disclosure requirements for § 501(c)(3) organizations generally, and then provides an exception to those requirements, such that they "shall not require the disclosure of the name or address of any contributor to the organization." *Id.* § 6104(d)(3)(A).

These subsections may support an argument that Congress sought to regulate the disclosures that the IRS may make, but they do not broadly prohibit other government entities from seeking that information directly from the organization. Nor do they create a pervasive scheme of privacy protections. Rather, these subsections represent exceptions to a general rule of disclosure. Thus, these subsections do not so clearly manifest the purpose of Congress that we could infer from them that Congress intended to bar state attorneys general from requesting the information contained in Form 990 Schedule B from entities like CCP.

The district court relied on our opinion in *Stokwitz v. United States*, 831 F.2d 893 (9th Cir. 1987), in holding that CCP was unlikely to succeed on its preemption argument. In that case, an attorney for the U.S. Navy was charged with misconduct and his personal tax returns were seized. *Id.* at 893. He argued that 26 U.S.C. § 6103, regulating public disclosure of such documents, forbade their use in the proceedings against him. *Id.* at 894. We disagreed: "[c]ontrary to appellant's contention, there is no indication in either the language of section 6103 or its legislative history that Congress intended to enact a general prohibition against public disclosure of tax information." *Id.* at 896. Instead, the legislative history of the section revealed that "Congress's overriding purpose was to curtail loose disclosure practices by the IRS." *Id.* at 894. Here, since nothing in the legislative history of § 6104 suggested that its purpose was in any way different from that of § 6103, the district court concluded that the Attorney General's disclosure requirement was likewise not preempted.

While CCP is correct that Congress added § 6104 thirty years after § 6103, and that, therefore, Congress's intent may have differed, our opinion in *Stokwitz* is nevertheless instructive. The very legislative history to which CCP directs us describes the operation of sections 6103 and 6104 in tandem. *See* Staff of the Joint Committtee on Taxation, 109th Cong., Technical Explanation of H.R. 4, the "Pension Protection Act of 2006" at 327–29 (Comm. Print 2006). Nothing in the legislative history suggests that Congress sought to extend the regulatory scheme it imposed on the IRS with § 6103 to other entities when it added § 6104. Moreover, when two sections operate together, and when Congress clearly sought to regulate the actions of a particular entity with one section, it is not unreasonable to infer that

Congress sought to regulate the same entity with the other. Therefore, *Stokwitz* supports our conclusion that § 6104, like § 6103, is intended to regulate the IRS, and not to ban all means of accessing donor information.

Section 6104 does not so clearly manifest the purpose of Congress that we could infer from it that Congress intended to bar state attorneys general from requesting the information contained in Form 990 Schedule B. *See Arizona*, 132 S.Ct. at 2501. CCP's preemption claim must fail.

V.

In order to prevail on a motion for a preliminary injunction, a plaintiff must show a likelihood of success on the merits and that irreparable harm is not only possible, but likely, in the absence of injunctive relief. *Winter*, 555 U.S. at 20. CCP has not shown a likelihood of success on the merits. Because it is not likely that the Attorney General's disclosure requirement injures CCP's First Amendment rights, or that it is preempted by federal law, it is not likely that CCP will suffer irreparable harm from enforcement of the requirement. Thus, CCP cannot meet the standard established by *Winter*.

For the foregoing reasons, the district court's denial of CCP's motion for a preliminary injunction is **AFFIRMED**.

Appendix C

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DEPARTMENT OF JUSTICE

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December 11, 2014

CENTER FOR COMPETITIVE POLITICS
124 S. WEST STREET, #201
ALEXANDRIA VA 22314

CT FILE NUMBER: CT0149998

RE: **WARNING OF ASSESSMENT OF PENALTIES AND LATE FEES, AND SUSPENSION OR REVOCATION OF REGISTERED STATUS**

The Registry of Charitable Trusts has not received annual report(s) for the captioned organization, as follows:

1. The IRS Form 990, 990-EZ or 990-PF submitted for the fiscal year ending **12/31/12** does not contain a copy of the Schedule B, Schedule of Contributors, with the names and adddresses of the contributors as required. The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service. The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Failure to timely file required reports violates Government Code section 12586.

Unless the above-described report(s) are filed with the Registry of Charitable Trusts within thirty (30) days of the date of this letter, the following will occur:

1. The California Franchise Tax Board will be notified to disallow the tax exemption of the above-named entity. The Franchise Tax Board may revoke the organization's tax exempt status at which point the organization will be treated as a taxable corporation (See Revenue and Taxation Code section 23703) and may be subject to the minimum tax penalty.

2. Late fees will be imposed by the Registry of Charitable Trusts for each month or partial month for which the report(s) are delinquent. Directors, trustees, officers and return preparers responsible for failure to timely file these reports are **also personally liable** for payment of all late fees.

   PLEASE NOTE: Charitable assets **cannot** be used to pay these avoidable costs. Accordingly, directors, trustees, officers and return preparers responsible for failure to timely file the above-described report(s) are **personally liable** for payment of all penalties, interest and other costs incurred to restore exempt status.

3. In accordance with the provisions of Government Code section 12598, subdivision (e), the Attorney General **will suspend the registration** of the above-named entity.

If you believe the above described report(s) were timely filed, they were not received by the Registry and another copy must be filed within thirty (30) days of the date of this letter. In addition, if the address of the above-named entity differs from that shown above, the current address must be provided to the Registry prior to or at the time the past-due reports are filed.

In order to avoid the above-described actions, please send all delinquent reports to the address set forth above, within thirty (30) days of the date of this letter.

Thank you for your attention to this correspondence.

Sincerely,

Registry of Charitable Trusts

For KAMALA D. HARRIS
Attorney General

Detailed instructions and forms for filing can be found on our website at http://ag.ca.gov/charities.