Nos. 16-55727 & 16-55786

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,
Plaintiff-Appellee/Cross-Appellant

v.

XAVIER BECERRA,
in his official capacity as the Attorney General of California,
Defendant-Appellant/Cross-Appellee

Appeal from the United States District Court for the Central District of California, No. 2:14-cv-09448-R-FFM, Judge Manuel L. Real

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BRIEF FOR AMICUS CURIAE AMERICAN TARGET ADVERTISING, INC. SUPPORTING AMERICANS PROSPERITY FOUNDATION AND AFFIRMANCE

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Dated: January 27, 2017

CORPORATE DISCLOSURE STATEMENT

American Target Advertising, Inc. is a corporation organized under the laws of Virginia. Its parent corporation, The Viguerie Company, is a corporation organized under the laws of Virginia, and no publicly held corporation owns 10% or more of the stock of either.

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STATEMENT OF INTEREST[1]

American Target Advertising, Inc. ("American Target") is an agency that provides services to nonprofit organizations that communicate with members of the general public and solicit contributions nationally, including in California. Its clients include 501(c)(3) nonprofit organizations that are registered with the Registry of Charitable Trusts under California's charitable solicitations law, and affected by the demands of the California Attorney General at issue in this case. American Target is registered with the Registry of Charitable Trusts as fundraising counsel. *Amicus* submits this brief because it is concerned for the rights of communication, particularly dissent, and private association being violated by the Attorney General.

[1] Appellant and Appellee have consented to the filing of this brief. No party's counsel or other person authored this brief, in whole or in part, or contributed money to fund its preparation or submission.

SUMMARY OF THE ARGUMENT

Boiled down to its essence, this case is about the reasonable fear Americans may have about bullying and retribution for donating to causes that dissent or are unpopular with segments of society or government officials. There is a propensity of some segments of society towards violence or other forms of intimidation directed at those with whom they disagree, and just the very nature of disclosure to government at issue in this case trespasses on the right of private association and has chilling effects on a broad array of rights. "Sunlight" has a dark side when the rights of private association and dissent are involved.

Title 26 of the U.S. Code includes a strict post-Watergate regime protecting the confidentiality of tax return information filed with the Internal Revenue Service (IRS) that is intended to give Americans confidence in the tax system, which encourages compliance with it. This regime governs access to, inspection of, and intra-office disclosure of tax return information by both federal and state officials. This regime comes with civil penalties for violations, and criminal penalties for willful violations, when access, inspection, or intra-office disclosure is not expressly authorized by Title 26. For state attorneys general and their staff, the regime requires protocols such as signed agreements and inspections when the IRS grants access to this confidential tax return information for law enforcement purposes.

In violation of this rigid confidentiality regime, the California Attorney General decided to bypass the requirement set in place by Congress that attorneys general may only obtain confidential tax return information for administration of state charitable solicitation laws by requesting it from the IRS. The Attorney General instead decided to use an extortionate, dragnet method of obtaining donor names and addresses from charities as a condition for them to solicit contributions from Californians. Charities that do not divulge this confidential tax return information to the Attorney General are denied their First Amendment right to solicit contributions.

A regulation adopted by the Attorney General fails to cure trespass on rights and constitutional violations, and its inadequacy merely enhances the Attorney General's violations of federal law and constitutional rights.

ARGUMENT

I. This Case is About Reasonable Fears of Harmful Intrusion on Dissent, Conscience, and Private Association.

Officious power and private recrimination to bully and silence dissent was used in the 1950s (and before and after) in an attempt to shut down or severely diminish and weaken the civil rights movement. Although the targets are mostly different today, the basic reasons for and nature of intimidation against dissent are nonetheless centuries old. Also, the Internet was not available in the 1950s to quickly and widely spread malicious information and directions identifying and

targeting dissenters and individuals associated with dissenters. The Internet allows faster and wider identification of supporters of causes speaking out against terrorism and other domestic mayhem, or identifying donors to causes disliked by, or unpopular with, segments of society. Today, the homes and businesses of dissenters, donors, and the like can be targeted by satellite pictures that can be shared on the Internet for miscreants to view.

This case is about intimidation of dissent and association, and the reasonable fear of being bullied and harmed for one's beliefs, and acts of conscience and private association. The times show both targeted and indiscriminate acts of mayhem towards those who associate even in the most innocent ways with causes deemed unpopular by segments of government, the news media and Internet outlets, or society. This case is also about a convenience, not a need, of government to use mass, dragnet licensing methods with important and multiple First Amendment implications to extort, under threat of losing First Amendment rights to solicit contributions, names and addresses of donors to tax-exempt causes ranging from civil rights and religious-oriented organizations, to battered spouse shelters and organizations battling terrorism, but not to politicians who can reward donors with officious, taxpayer-funded crony benefits.

It's not just donors who have something to fear in this atmosphere. African-American star Jennifer Holiday backed out of performing at President Trump's

Inauguration after death threats and social media racial slurs.[2] "[I]t was reported [on January 14, 2017] that opera tenor Andrea Bocelli also decided against performing after receiving death threats and not because he feared boycotts as was originally reported."[3] "[A] mentally handicapped white man [was] tortured in Chicago by African-American assailants as they laugh and express their disgust for white people and President-elect Donald Trump," reports *The Daily Caller* on January 4, 2017.[4] At the time of confirmation hearings for Sen. Jeff Sessions as U.S. Attorney General, an "individual with a Twitter account referred to [Republican Senator Tim] Scott as a 'house nigga.'"[5] *The National Interest* reports:

> There were punches thrown, limos set ablaze, and windows smashed amid violent protests in D.C. the day of President Trump's inauguration. But in Seattle the fury led to a shooting, as leftist radicals tried to shut down a speech by Breitbart.com tech editor Milo Yiannopoulos. A 34-year-old man suffered what sources described as

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[2] Lisa Respers France, *Jennifer Holliday talks death threats and backlash over Trump inauguration*, CNN.com (Jan. 18, 2017), http://www.cnn.com/2017/01/18/entertainment/jennifer-holliday-trump/.

[3] Sarah Lee, *Blind tenor Andrea Bocelli backs out of Trump inauguration after receiving death threats*, TheBlaze.com (Jan. 14, 2017), http://www.theblaze.com/news/2017/01/14/blind-tenor-andrea-bocelli-backs-out-of-trump-inauguration-after-receiving-death-threats/.

[4] Scott Greer, *'F**k Donald Trump, F**k White People!': 4 People In Custody After Man Kidnapped, Tortured On Facebook Live*, The Daily Caller (January 4, 2017), http://dailycaller.com/2017/01/04/fk-donald-trump-fk-white-people-4-people-in-custody-after-man-kidnapped-tortured-on-facebook-live/#ixzz4WCWwJ2Ry.

[5] *Black GOP Senator Tim Scott Absolutely Destroys His Racist Left-Wing Critics*, HEATSTREET (Jan. 11, 2017), http://heatst.com/politics/tim-scott-twitter/.

> a "life-threatening" gunshot wound to the abdomen. He was taken to Seattle's Harborview Medical Center in critical condition.[6]

The limousine set ablaze belonged to a Muslim immigrant.[7]

As reported by *The New York Times* on January 17, 2017, Rebekah Mercer is "[a] trustee of the American Museum of Natural History in Manhattan [who] donates millions to organizations skeptical of climate change," and "several scientists and environmental organizations said that she should resign or be removed from her position" as trustee of the museum.[8] Former California Attorney, now U.S. Senator General Kamala Harris recently sent a rhetorically charged, fear-mongering fundraising email stating that she is "scared for communities of color who are being targeted by this new President and his allies," and she is "angry that the Republicans plan to rip health insurance away from millions of Americans," concluding her thought: "I have one piece of advice: RISE

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[6] Daniel McCarthy, *Beware the Rise of Left-Wing Authoritarianism*, The National Interest (Jan. 21, 2017), http://nationalinterest.org/feature/beware-the-rise-left-wing-authoritarianism-19145.

[7] Sean Langille, *Limo torched in DC protests belongs to Muslim immigrant, may cost $70,000 in damages*, Washington Examiner (Jan. 23, 2017), http://www.washingtonexaminer.com/limo-torched-in-dc-protests-belongs-to-muslim-immigrant-may-cost-70000-in-damages/article/2612747.

[8] Robin Pogrebin, *Museum Trustee, a Trump Donor, Supports Groups That Deny Climate Change*, The New York Times (Jan. 17, 2017), https://www.nytimes.com/2017/01/17/arts/design/natural-history-museum-trump-climate-change.html?rref=collection%2Fsectioncollection%2Fscience&action=click&contentCollection=science&region=stream&module=stream_unit&version=latest&contentPlacement=2&pgtype=sectionfront&_r=1.

UP." *See* App, at A-1 – A-2. From CNSNews.com in November 2016, "As *USA Today* noted, a federal judge found this month that there was 'strong' evidence that the [Internal Revenue Service] 'had discriminated against conservative groups because of their political stances.'"[9]

The California Attorney General is callously neglectful of an atmosphere that is now crazed and even violent towards people who dissent from progressive doctrines, who speak out against radical terrorism, and others who may simply be in the wrong place at the wrong time. The times are dangerous for dissent and association by conservatives.

The exact nature of the ideological or religious associations being targeted may be different from the times of Protestant kings silencing and attempting to purge Catholicism, or white political leaders silencing and intimidating the civil rights strides of African-Americans, but the underlying ugly nature of intolerance by some in government and violence by segments of society directed at dissent and association of their ideological opponents is pretty much the same. This needs no proof in trial-by-trial fashion. America's constitutional fabric is meaningless without protecting the right of private association and the security of peaceable

[9] Hans Bader, *Another Judge Confirms: IRS Targeted Tea Party Groups*, CNSNews.com (Nov. 21, 2016), http://www.cnsnews.com/commentary/hans-bader/.

dissenters.

II. The Attorney General Has Violated a Rigid, Post-Watergate Federal Regime Protecting the Confidentiality of Tax Return Information That Expressly Applies to State Officials.

The Attorney General's dragnet collection of the names and addresses of those who wish to associate with nonprofit causes through donations not only adversely affects important First Amendment rights and the security of dissenters, but also crosses the line of post-Watergate reforms to the federal tax code that provide civil and criminal penalties for unauthorized state access, inspection, and intra-office disclosure of confidential federal tax return information.[10]

A rigid federal regime protects the confidentiality of Schedule B to Internal Revenue Service (IRS) Form 990 that identifies certain donors to 501(c)(3) and 501(c)(4) nonprofit organizations. Schedule B is filed with the IRS under this rigid post-Watergate confidentiality regime that includes civil and criminal penalties for federal and state officials who not only disclose that information to the general public, but access it in ways not expressly authorized by Title 26 of the U.S. Code (Internal Revenue Code, or IRC) and regulations and interpretations promulgated

[10] The initial confidentiality rules were enacted under the Tax Reform Act of 1976, Pub.L. 94–455. See *Office of Tax Policy, Dept. of Treasury*, Report to the Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions, Vol. I: Study of the General Provisions (Oct. 2000), https://www.treasury.gov/resource-center/tax-policy/Documents/Report-Taxpayer-Confidentiality-2010.pdf.

by the IRS.[11]

The most important thing to understand about this post-Watergate regime for purposes of this case is that it does not simply bar disclosure of tax return information to the public, but governs use by federal and state officials. Much emphasis has been placed on disclosure to the general public, but the essence of post-Watergate reforms focus as much on limiting which government officials may handle such information, when, and under what conditions, and "disclosure" includes intra-office disclosure, as described below. Unless disclosure of tax return information is *expressly* authorized under the Internal Revenue Code, it is *unlawful*.[12] The post-Watergate reforms therefore focus as much (if not more) on unauthorized disclosure to, and use by, federal and state officials as the public.

Schedule B is a form created exclusively under federal law, and there is express federal law controlling its access, confidentiality, and use even with regard to state attorneys general for enforcement of charitable solicitation laws, as explained in greater detail herein below. The Attorney General cites no case law

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[11] *See*, Mark Fitzgibbons, *The 9th Circuit's Donor Privacy case: Nixon in State's Clothing*, The Daily Caller (Jan. 4, 2016), http://dailycaller.com/2016/01/04/the-9th-circuits-donor-privacy-case-nixon-in-state-clothing/.

[12] "For a disclosure of any return or return information to be authorized by the Code, **there must be an affirmative authorization** because section 6103(a) otherwise prohibits the disclosure of any return or return information by any person covered by section 7213(a)(1)." Disclosure & Privacy Law Reference Guide, IRS Publication 4639, 1-49. (Emphasis added.)

that federal law does not control confidentiality of Schedule B except the 2015 *Center for Competitive Politics v. Harris* decision by the Ninth Circuit,[13] which as explained herein below is based in a Ninth Circuit decision that did not address the unique facts and aspects of the Attorney General's actions in the present case. The United States Supreme Court has recognized repeatedly that federal preemption of state regulation need not be stated expressly in a statute, including in instances where it is clear by the structure and purpose of the federal law, [14] as it is with regard to the confidentiality of donor names and addresses filed with the IRS on

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[13] "The Foundation's preemption claim is foreclosed by the Ninth Circuit's decision in *CCP*, 784 F.3d at 1318-19, and the district court did not rule on it. Accordingly, this brief does not address the preemption claim." Opening Brief of Appellant-Cross-Appellee (the "Attorney General"), at 15, footnote 1. See *Center for Competitive Politics v. Harris*, 784 F.3d 1307 (9th. Cir. 2015).

[14] "Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. E. g., *Jones v. Rath Packing Co*., 430 U. S. 519, 525, 530-531 (1977). More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. Id., at 525; *Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta*, 458 U. S. 141, 152-153 (1982). A federal statute, for example, may create a scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' *Rice v. Santa Fe Elevator Corp*., 331 U. S. 218, 230 (1947). Alternatively, federal law may be in 'irreconcilable conflict' with state law. *Rice v. Norman Williams Co.*, 458 U. S. 654, 659 (1982). Compliance with both statutes, for example, may be a 'physical impossibility,' *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 142-143 (1963); or, the state law may 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' *Hines v. Davidowitz*, 312 U. S. 52, 67 (1941)." *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25, 31 (1996).

Schedule B.

A. The Attorney General's Schedule B Confidentiality Regulation Is Insufficient to Protect Confidentiality and Further Demonstrates the Attorney General's Violation of Federal Law

The Attorney General writes in her Opening Brief, "[Its] longstanding policy of keeping Schedule B confidential recently was codified by regulation in July 2016. *See* Cal. Code Refs. Tit 11, [sec.] 310(b) (effective July 8, 2016)." Attorney General Opening Brief at 11- 12. In January 25, 2016 public comments in response the a Notice of Proposed Rulemaking submitted by 63 entities and lawyers involved in nonprofit affairs, and over 1,400 individuals, this regulation was criticized as woefully inadequate and an evasion of federal confidentiality law. *See* App., A-12 – A-23.[15] Some 11 other sets of comments were filed by other parties, all finding fault with the proposed regulation.[16]

The Attorney General states that the "Registry [of Charitable Trusts] has a full-time clerical staff of approximately 22 supplemented by seasonal and student workers." Attorney General Opening Brief at 8. The rigid federal regime protecting against state employee access to, inspection of, and intra-office

[15] To save space in the Appendix to this brief, the exhibit is shortened by removing names of individuals, but the entire document with all of the over-1,400 individuals signing may be viewed at http://www.responseaction.com/ca-comments-signers.

[16] The Attorney General provided American Target copies of such comments upon request, but has not posted them at its website.

disclosure of confidential federal tax return information is violated because the Attorney General fails to meet the protocols deemed authorized by federal law, as explained below.

Names and addresses of donors filed with the IRS on Schedule B are confidential federal tax return information, although the rest of Form 990 may be collected and examined outside the scope of the confidentiality protections of tax return information.[17] Although the Ninth Circuit held in *CCP v. Harris* that federal law does not preempt the actions of the Attorney General,[18] the security lapses of the Attorney General, first denied to the Court but eventually acknowledged after being caught by Americans for Prosperity Foundation (AFPF),[19] are of its own doing based on its refusal to operate within federal law governing the privacy and security of confidential federal tax return information addressed herein below. The proposed rule fails to provide safeguards and adequate protections of the confidentiality of donor names and addresses, including lack of notice to victims, lack of remedies, and lack of penalties or discipline for employees who breach confidentiality. See App. A-16 – A-17.

[17] "In the case of an organization which is not a private foundation (within the meaning of section 509(a)) or a political organization exempt from taxation under section 527, paragraph (1) shall not require the disclosure of the name or address of any contributor to the organization." IRC 501(c)(4)(d)(3)(A).

[18] *See CCP v. Harris*, 784 F.3d at 1319.

[19] *See* Attorney General Opening Brief at 12.

B. Access to, and Inspection of, Schedule B by the Attorney General Is Governed Expressly by Federal Law.

Access to confidential tax return information for the administration of state charitable solicitation laws is governed expressly and exclusively by IRC § 6104(c)(3), which reads:

> 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**. Such information may only be inspected by or disclosed to a person other than the appropriate State officer if such person is an officer or employee of the State and is designated by the appropriate State officer to receive the returns or return information under this paragraph on behalf of the appropriate State officer."

(Emphasis added.)

Access by the IRS to the Attorney General for the administration of state charitable solicitation laws may be authorized only after a written request by the Attorney General to the IRS. IRC § 6104(c)(3) clearly establishes that the IRS may deny such requests, and the IRS may set conditions when it grants access to Schedule B. Acquisition of Schedule B donor names and addresses using the charitable solicitation registration process is unauthorized by the Internal Revenue Code, hence, is unlawful under the explicit and rigid regime created by Congress for inspection and disclosure of federal tax return information, even in the

administration of state charitable solicitation laws.

C. The Attorney General Has Violated the Rigid Protocols of Unauthorized Access (UNAX).

The IRS has issued guidelines and details for "Information Disclosure to State Officials Under IRC 6104(c)." *See* Section 2, Chapter 28, Part 7 of the Internal Revenue Manual (IRM).[20] The IRS lays out a regime about unauthorized access, called "UNAX," with the protocols that state officials must follow if and when authorized access to confidential tax return information is granted by the IRS.[21] Pursuant to IRC § 6104, the IRS requires a Disclosure Agreement between state attorneys general and the IRS,[22] a Safeguard Security Report (SSR),[23] and

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[20] https://www.irs.gov/irm/part7/irm_07-028-002.html#d0e125.

[21] The UNAX rules are further described at Internal Revenue Manual section 10.5.5, "IRS Unauthorized Access, Attempted Access or Inspection of Taxpayer Records (UNAX) Program Policy, Guidance and Requirements," https://www.irs.gov/irm/part10/irm_10-005-005.html.

[22] IRM 7.28.2.7 (09-22-2015), "Procedures for the Disclosure of Return Information of Organizations Described in IRC 501(c) Other than IRC 501(c)(3)" reads:

> Upon an ASO's [Appropriate State Officer's] written request, the IRS may disclose return and return information of IRC 501(c) organizations that are not IRC 501(c)(3) organizations for the purpose of, and only to the extent necessary for, the administration of state laws regulating the solicitation or administration of charitable funds or charitable assets.

other protocols and security measures not found in the Attorney General's regulation or in its practices.[24]

The Disclosure Agreement constitutes the written request required by this provision. The TEGE Liaison may make disclosures in individual instances based on an ASO's or their designee's oral requests.

The TEGE Liaison keeps the appropriate records of these disclosures.

[23] IRM 7.28.2.2 (09-22-2015), "Disclosure Agreements" reads: "Per IRM 7.28.2.1 (3), the IRS will only make disclosures under IRC 6104(c) to those state agencies that have submitted their Safeguard Security Report (SSR) to PGLD and have entered into a disclosure agreement with the IRS regarding IRC 6104(c)."

[24] The following are examples from the Internal Revenue Manual that the Attorney General appears to have evaded:

IRM Section 11.3.32.14, reading in relevant part:

> As a condition for their access to Federal returns or return information, state agencies must agree to the following requirements:
>
> Establish and maintain, to the satisfaction of IRS, a permanent system of standardized records with respect to any request made by the agency for inspection or disclosure, the reason for the request and the date of the request, and, in addition, any disclosure made by or to it.
>
> Establish and maintain, to the satisfaction of IRS, a secure area or place in which the returns or return information are stored.
>
> Restrict, to the satisfaction of IRS, access to the returns and return information to persons whose duties or responsibilities require access and to whom disclosure may be made.
>
> Provide such other safeguards as IRS may determine necessary or appropriate to protect the confidentiality of the returns and return information.

As demonstrated by its model Disclosure Agreement, the IRS interprets "disclosure" for purposes of IRC § 6104 as applicable even to disclosure to, and access by, down-the-chain employees within the Attorney General's office for administration of charitable solicitation laws, i.e., intra-office disclosure by state charity regulators.[25] The administration of charitable solicitation law is the

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> Furnish to the IRS the safeguard reports described in IRM 11.3.36.6.3, *Agency Reports*. The Safeguard Procedures Report is submitted no later than 45 days before scheduled receipt of Federal tax information. The Safeguard Activity Report is submitted annually.
>
> Upon completion of use, either return the tax information, along with any copies, to IRS or destroy the returns, return information, and copies, and furnish a written report to IRS describing how the destruction was accomplished. Give written notification to all agency representatives and any other person authorized to access Federal returns or Federal return information of the criminal penalties and civil liability provided by IRC §§7213, 7213A, and 7431 for unauthorized disclosures or inspection of Federal returns or return information.

IRM 11.3.32.18, reads in relevant part:

> All persons having access to Federal returns or return information under the terms of this IRM shall be informed, in accordance with the instructions in IRM 11.3.1, *Introduction to Disclosure*, of the criminal penalties and civil liability for unauthorized accesses or disclosure.

[25] IRM 7.28.2.4 (09-22-2015) 3 reads: "Appropriate state officer" (under IRC 6104(c)(6)(B)) means . . . D. The head of an agency designated by the state attorney general as having primary responsibility for overseeing the solicitation of funds for charitable purposes (for IRC 501(c) organizations other than IRC

Attorney General's admitted purpose in demanding, acquiring, and inspecting Schedule B donor information. Thus, under the IRS's interpretation, the issue is not merely protections against disclosure of Schedule B by the Attorney General to third parties, but disclosure to and access by full-time staff, students, and seasonal workers within the Office of the Attorney General. The Attorney General has failed to satisfy this regime protecting against unauthorized intra-office disclosure.

D. The Attorney General's Willful Violations of Law.

The Attorney General ignores the statutorily mandated role of the IRS in authorizing, supervising, and monitoring disclosure of Schedule B information to attorneys general, and subsequent access and inspection by employees in their offices. Attorney General staff may be led to believe they are not subject to sanctions for violations of the federal law even though federal law expressly

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501(c)(1) or IRC 501(c)(3))." As stated in the model Disclosure Agreement at SECTION 6. Use and Redisclosure of Returns and Return Information Disclosed to the Attorney General under this Agreement:

> 6.1 The Attorney General or any designee to whom a return or return information has been disclosed may thereafter disclose such return or return information:
>
> > A. to another employee of [insert State name] for the purpose of and only to the extent necessary in the administration of the laws described above [which includes IRC 6104(c)].

governs their acts.[26]

IRS Publication 1075, "Tax Information Security Guidelines for Federal, State, and Local Agencies" (Sept. 2016), describes unauthorized access (which it calls "UNAX" at Section 6.3, page 38) rules and protocols applicable under both IRC 6103 and IRC 6104, and unauthorized disclosure, and it warns of the civil and criminal penalties for violators.[27]

The Attorney General was aware of the restrictions governing acquisition of, and access to, confidential tax return information under IRC § 6104, and intra-office disclosure of it. The attached portion of a transcript of a December 11, 2015 deposition of former California Senior Assistant Attorney General Belinda Johns conducted by Americans for Prosperity Foundation shows the Attorney General knew that confidential tax return information is to be obtained from the IRS, with certain firewalls, protocols and IRS inspections required once that information is obtained. *See* App. A-3 – A-11.

Ms. Johns, who once headed the Registry of Charitable Trusts, also acknowledged the "severe" legal restrictions on state charity regulators in a paper she co-authored in 2013 on "Evolving State Regulation: From Index Cards to the

[26] This brief does not address the lawfulness of acquiring Schedule B donor information using judicial warrants compatible with the Fourth Amendment.

[27] https://www.irs.gov/pub/irs-pdf/p1075.pdf.

Internet,"[28] in which she and her co-author wrote:

> Efforts to work jointly with the Internal Revenue Service, however, have been hampered by federal legislation that severely restricts the authority of the IRS to share information with state charity regulators. In 2012, [The National Association of State Charity Officials (NASCO)] urged Congress to amend legislation to ease those restrictions and, in the meantime, NASCO is working with IRS staff to explore ways in which information-sharing may be improved within the current structure.

Dissatisfied with this "severe" federal regime, and unable to secure changes in the federal law to its liking, the Attorney General appears to have chosen to evade them instead.

E. Civil and Criminal Penalties Apply to State Officials.

The Attorney General's decision to bypass IRC § 6104(c)(3) and the legal protocols protecting donor names and addresses appears more like purposeful evasion of law governing disclosure and inspection. These violations should be subject to IRC § 7431 ("Civil damages for unauthorized inspection or disclosure of returns and return information") and IRC § 7213 ("Unauthorized disclosure of information").

IRC 7213(a)(2) reads in relevant part: "It shall be unlawful for any [state or

[28] Belinda Johns and Karin Kunstler Goldman, *Evolving State Regulation: From Index Cards to the Internet*, 2013 Columbia Law School Charities Regulation and Oversight Project Policy Conference on The Future of State Charities Regulation, https://academiccommons.columbia.edu/catalog/ac%3A168613.

other employee] willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)) acquired by him or another person under . . . section 6104(c)." As stated above, the IRS interprets "disclosure" under this post-Watergate regime as applying to intra-office disclosure by state officials. Acquisition for "the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations" is regulated exclusively under IRC § 6104(c)(3). Therefore, disclosure within the Attorney General's office when Schedule B was acquired outside the authorized method under IRC § 6104(c)(3), and when the Attorney General is failing to comply with the federal regime of annual inspections and reports, is itself unauthorized. IRC § 7213(a)(2) states: "Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution."

Within the Internal Revenue Code's disclosure and inspection regime and the related enforcement and penalty provisions of the Internal Revenue Code, the onus is as much on state officials and employees as on the IRS to comply. IRC § 7213A applies to unauthorized inspection of returns or return information. The purposes for demanding and acquiring donors names and addresses admitted by the Attorney General in the litigation thus far constitute "inspection" for purposes of

IRC § 7213A as well. As noted in *CCP v. Harris*:

> 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 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.[29]

IRC § 7213A(a)(2) applies to state employees, and reads: "It shall be unlawful for any person (not described in paragraph (1)) willfully to inspect, except as authorized in this title, any return or return information acquired by such person or another person under a provision of section 6103 referred to in section 7213(a)(2) or under section 6104(c)." IRC § 7213A(c) states: "For purposes of this section, the terms "inspect", "return", and "return information" have the meanings given such terms by section 6103(b)." IRC § 6103(b) states: "The terms "inspected" and "inspection" mean any examination of a return or return information." IRC § 7602(a), "Examination of books and witnesses," reads in part: "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal

[29] *CCP v. Harris*, 784 F.3d at 1311.

revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized— (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry."

The Attorney General's acquisition of Schedule B using the charitable solicitation registration process for purposes of subsequent inspection is not authorized. It appears, therefore, that the inspection purposes admitted by the Attorney General and judicially noticed by the Ninth Circuit's *CCP v. Harris* decision, as noted above, would make Attorney General employees and officials subject to the criminal penalties set forth in IRC § 7213A. IRC 7213A(b)(1) states: "Any violation of subsection (a) shall be punishable upon conviction by a fine in any amount not exceeding $1,000, or imprisonment of not more than 1 year, or both, together with the costs of prosecution."

The acquisition of donor names for purposes of inspection by the Attorney General is not authorized under the Internal Revenue Code. Disgorgement is compelled under duress of losing First Amendment rights to communicate with donors and others in California and threat of fines. Inspection by the Attorney General could therefore not be authorized under Title 26, the Internal Revenue Code.

The charity-specific method of access to Schedule B under IRC § 6104(c)(3) is unlike the dragnet method used by the Attorney General requiring all charities to provide Schedule B names and addresses. IRC 6104(c)(3) demonstrates that Congress was well that state charity regulators may desire to obtain confidential tax return information, and it expressly provided a method for its access, but with express controls on how access may be granted to this information that is also protected constitutionally.

Like other states that require the filing of IRS Form 990 in their charitable solicitation registration processes, the Attorney General had accepted redacted Schedules B for many years, at least implicitly acknowledging federal law that names and addresses of donors are confidential federal tax return information. On its own initiative and without authorization under the Internal Revenue Code, the Attorney General then decided that it would no longer register charities that filed a redacted Schedule B, and is now acquiring donor names and addresses in violation of the Internal Revenue Code's restrictions and in disregard of First Amendment rights.[30]

[30] "Regulation of a solicitation must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech * * * and for the reality that, without solicitation, the flow of such information and advocacy would likely cease." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988), citing *Schaumburg v. Citizens*

Congress did not authorize state access and intra-office disclosure in the dragnet fashion used by the Attorney General, which violates the right of association articulated in *NAACP v. Alabama*.[31] Instead, Congress requires states to work through the IRS on a case-by-case basis to limit acquisition and inspection of donor names. This regime is "severe" for good reason.

III. Why the Federal Regime Controls.

As discussed herein, the post-Watergate federal regime protecting the confidentiality of federal tax return information, complete with civil and criminal penalties for violations, is not limited in its application to only the IRS, but applies to state officials and employees. A decision that state attorneys general may unilaterally acquire and inspect Schedule B outside this regime renders IRC §

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for Better Environment, 444 U.S. 620, 632 (1980), *Secretary of State v. Munson*, 467 U.S. 947, 959 - 960 (1984). *See also Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003).

[31] "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. 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, which embraces freedom of speech." *NAACP v. Alabama*, 357 U.S. 449, 460 (1958) (cites omitted); "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the **vital relationship between freedom to associate and privacy in one's associations**." *Id*, 357 U.S. at 462. (Emphasis added.)

6104(c)(3) meaningless -- making it mere surplusage -- because state attorneys general would naturally avoid its "severe" (as Belinda Johns put it) restrictions.

Since Schedule B is entirely a creation of federal law it is unlike other items or matters traditionally subject to state jurisdiction and regulation, such as local property, where there may be a strong presumption against preemption by the federal government. Indeed, even under the traditional jurisdiction that states have over charities, it was unprecedented that states could acquire the names of donors to charities in dragnet fashion until the Attorney General only relatively recently began. Prior to the Attorney General's acts, acquisition of donor names was further limited by protections of the right of private association expressed in *NAACP v. Alabama*. See footnote 28 above.

The fact that Schedule B is entirely a creation of federal law would seem to create a presumption that federal law properly governs its confidentiality, access, inspection, and disclosure. Here, there is actually no state law enacted by the California legislature expressly authorizing collection of confidential Schedule B information that IRC § 6104(c)(3) "preempts." That notwithstanding, the federal regime created by IRC § 6104(c)(3) applicable to a federal tax return schedule is designed to protect charities and individuals from abuses by the states, and does nothing to prohibit legitimate state law enforcement.

A decision that the federal confidentiality regime does not preempt the

Attorney General's acts may not have fully considered the scope and severity of the federal unauthorized access laws -- complete with the UNAX protocols and even criminal penalties for violations by state officials -- demonstrating the intent of Congress to preempt state acts contrary to this regime.

The post-Watergate tax return confidentiality regime was created after the Supreme Court issued it opinion in *NAACP v. Alabama*, which articulated constitutional principles about restrictions on state attorneys general using government process to trespass on private associations between nonprofit organizations and their financial adherents.[32] *If anything*, IRC 6104(c)(3) provides a federally legislated limited exception to the constitutional bar on state attorneys general acquiring donor names and addresses that, unlike *Stokwitz v. United States*,[33] is law of the land.

The *Stokwitz* decision cited in *CCP v. Harris* does not fit with IRC 6104, which created a rigid regime that expressly acknowledges and wholly, even if "severely," accommodates the role of states in administration of charitable solicitation laws. And, the facts in *Stokwitz* differ greatly from the Attorney General's dragnet demands for confidential tax return information. Indeed, the

[32] "We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment." *NAACP v. Alabama,* 357 U.S. at 460.

[33] 831 F.2d 893 (9th Cir. 1987).

Attorney General presented no evidence or examples that a state may lawfully demand the filing of confidential federal tax return information as a condition for any person or entity to obtain a state registration or license. *CCP v. Harris* therefore sets bad precedent in this regard.[34] The court also asserted that nothing in Section 6104(c)(3) expressly preempted the Attorney General because nothing indicates Congress intended to regulate state access to this information, or that the federal regime applied to actions of any government entity other than the IRS.[35]

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[34] *Amicus curiae* Free Speech Coalition even cites to federal law that *quid pro quo* for tax return information constitutes a felony.

[35] The entire passage reads:

> 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

This seems entirely contradicted by the provisions identified herein above about the federal regime expressly applicable to state attorneys general and their employees in the conduct of administering state laws.

The decision in *CCP v. Harris* notes that nothing in the legislative history to IRC § 6104 suggests that it should be construed differently than how IRC § 6103 was construed in *Stokwitz*.[36] The Ninth Circuit's decision in *Stokwitz*, however, was not law of the land when IRC 6104(c)(3) was enacted; *NAACP v. Alabama* was. Nor were states using dragnet registration methods to collect Schedule B information when IRC 6104(c)(3) was enacted. CITE about date

The position of the IRS is at odds *Stokwitz* when it comes to protecting confidential tax return information. Its Disclosure & Privacy Law Reference

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> 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.

CCP v. Harris, 784 F. 3d at 1318 – 1319.

[36] "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." Id., 784 F. 3d at __.

Guide (IRS Publication 4639) reads, "For a disclosure of any return or return information to be authorized by the Code, *there must be an affirmative authorization* because section 6103(a) otherwise prohibits the disclosure of any return or return information by any person covered by section 7213(a)(1)."[37]

Stokwitz did not address the constitutional bar on the invasion of the right of association expressed in *NAACP v. Alabama*, nor the express and rigid regime under IRC 6104(c)(3) for the administration of state charitable solicitation laws. It involved the tax return information of a single taxpayer found at his desk, not purposeful dragnet demands on "more than 100,000" charities. See Attorney General Opening Brief at 6. It should not control or influence this matter.

The canon of implied preemption is summarized nicely by the Congressional Research Service: "When a statute is silent on preemption, the Court has asked three questions in determining whether state law has been preempted implicitly: Is there a direct conflict between federal and state law—can they be implemented simultaneously? Would implementation of state law "frustrate congressional purpose"? Has federal law has "occupied the field" of regulation?" Larry M. Eig, "Statutory Interpretation: General Principles and Recent Trends," *Congressional*

[37] https://www.irs.gov/pub/irs-pdf/p4639.pdf, page 1-49. (Emphasis added.)

Research Service (Dec. 2011, at 21).[38] The Attorney General's dragnet, extortionate demands for confidential Schedule B information trespass on rights and seem to clearly frustrate the congressional purpose of keeping donor names filed with the IRS confidential. This is an area occupied by the federal regime even as applied to administration of state charitable solicitation laws, and even if the Attorney General considers it "severe."

[38] http://pgil.pk/wp-content/uploads/2014/12/statutory-interpretation-general-principles-and-recent-trends.pdf.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment and permanently enjoin the Attorney General's extortionate demands for confidential Schedule B information with respect to the Americans for Prosperity Foundation, and should reverse and remand with instructions to enjoin permanently these dragnet, extortionate demands of the Attorney General with respect to all charities.

Dated: January 27, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

In accordance with Federal Rule of Appellate Procedure 32(a)(5), (a)(6), (a)(7)(B), and (a)(7)(C), I certify that the foregoing brief is proportionately spaced using Times New Roman 14-point font and contains 6,986 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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APPENDIX

KAMALA
HARRIS
★ ★ ★
SENATOR

-

This was not the presidential inauguration I wanted today, but the hard truth of this moment is that there is no going back.

Like you, I am worried about the future of our country. I am heartbroken for millions of people in our immigrant communities who are terrified they will be deported or worse. **I am scared for communities of color who are being targeted by this new President and his allies. I am angry that the Republicans plan to rip health insurance away from millions of Americans.**

We know that the cause of justice and equality is more urgent than ever -- because the progress we have made so far is now on the line. Because people's lives are on the line.

I only have one piece of advice: RISE UP.

Do not despair. Do not become overwhelmed. We cannot throw up our hands at a time that requires all of us to roll up our sleeves.

Republicans may have taken the House, the Senate, and even the White House, but they cannot take away our power. This movement, all of us working together to make change, will be the difference in the challenging fights that lay ahead.

You have a powerful voice. Use it. Don't sit on the sidelines and wait for someone else to solve the problems facing your community -- dig deep and get involved. For some, that might mean a run for office. For others, it will mean working locally in their communities to bolster local and state efforts to create social safety nets as our federal programs come under attack.

Make calls, write letters, and join protests as we resist Trump's radical agenda. Apathy is how they win. Don't let them win.

We cannot fall into the trap, as Martin Luther King, Jr., would say, of the "appalling silence of the good people." There is too much injustice before us to stay silent.

History is looking to all of us to get into what my colleague John Lewis calls "good trouble." That's why I intend to fight for the voiceless and vulnerable in California and across the country. But I cannot do that alone.

As we face what I believe is an inflection point in the history of this country -- one that is similar to the Civil Rights Movement -- we must all look in the mirror with furrowed brow and ask ourselves: Who are we?

I believe the answer is a good one. We are a great country. Imperfect, but great because of our values, ideals, and diversity. One election cannot erase that.

The gains the opposition makes in the coming weeks and months, while painful, are not permanent. As Coretta Scott King taught us, the fight for civil rights -- the struggle for justice and equality -- must be fought and won with each generation.

It's time for our generation to rise up and take control of our destiny. Choose hope, not hate. Choose action, not apathy. Roll up your sleeves and get ready to fight.

Thanks for everything,

Kamala

CONTRIBUTE

PAID FOR BY KAMALA HARRIS FOR SENATE

(Received Jan. 20, 2017. Emphasis added.)

A-3

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

----------x

AMERICANS FOR PROSPERITY FOUNDATION,

Plaintiff,

v.

KAMALA HARRIS, in her Official Capacity as Attorney General of the State of California,

Defendant.

----------x

VIDEOTAPED DEPOSITION OF

BELINDA JOHNS

DECEMBER 11, 2015

9:26 a.m.

REPORTED BY:
PAUL J. FREDERICKSON
JOB NO. 41996

file from my office, could not make notes on the file. And then I was supposed to destroy it with a confidential shred of a particular size. And then I had to fill in more information on the log.

If -- if we wanted to utilize those, those documents, we had to send a letter to the charity asking for all recent document -- you know, all correspondence with IRS. So -- but we weren't supposed to use the address on the -- on the packet I received. We had to go to the phonebook or something and independently verify the address.

We could send a letter saying, This is an audit letter, like any of our audit letters would look like, please send us all correspondence between your organization and IRS in this time period.

And then we could use those documents in the course of a -- of an investigation.

Q. Do you recall specifically receiving packets of information from the IRS through this protocol that you just described?

A. Yes, I did.

Q. And to your recollection did you follow all the steps the IRS required for safeguarding the information received from them?

A. I did.

Q. And so that includes storing it in your office, logging information?

A. No, not in my office.

Q. Not in your office?

A. Had to be behind two barriers beyond the -- the locked door to the office at large. And -- until I actually shredded it.

And -- and then there was an annual inspection by the safeguards team who came out from Virginia or wherever their office was. And they would meticulously go through and make sure that -- well, they would just ask me questions. I never could put anything in our database. I couldn't even keep the log as a document on my desktop, so I had to keep doing it in my handwriting. And they would check over my logs. And the only way we could have put information into the database would have been if we had the same level of security that the revenue agencies have, which is determined by IRS, for tax information. It would have required an extended audit of the Hawkins Data Center to make sure that we had all those safeguards in place and simply wasn't workable.

And then in the end, we weren't getting enough of these packets to make it worthwhile to

even go through the process.

Q. Were all of the safeguards that you mentioned specified by the information sharing agreement between California and the IRS?

A. I don't think they were all in the agreement. I think there was a separate document that we got from the safeguards people. And I had to fill out a large questionnaire at the beginning of each year answering questions about my barriers and my shredder and all this stuff.

Q. So you received, to your recollection, a separate document from safeguards people specifying all of the safeguards that you would have to implement for information received from the IRS through this --

A. Yes.

Q. -- information sharing agreement?

A. Yes.

Q. Do you recall where that separate document would be stored at the California Attorney General's office?

A. It would be in the Treadwell Trust module of the Pro Law.

Q. And I just want to go through just to make sure that I'm clear on all the different

safeguards you recall.

A. Yeah.

Q. So first you would store the documents behind two barriers in addition to the office's locked door?

A. I'm sorry, start again.

Q. Sure.

You would store the documents received from the IRS behind two barriers in addition to the office's locked door?

A. Yes. We had a storeroom, and then I put them in a locked file cabinet.

Q. The documents were all in paper copy rather than electronic?

A. Paper.

Q. You would keep a log in which you would record what with respect to these documents?

A. Date of receipt. Name of charity. Date of documents. Whether it was revocation or intermediate sanctions or whatever the action IRS was taking. And then -- and then later disposition, which was always shred.

Q. Would you shred in-house? Did you have a special shredder in the office --

A. I had to buy a shredder that was in my

office.

Q. And would you personally shred the IRS documents?

A. Yes, I was the only person who could do that.

Q. Who was allowed to look at these IRS documents other than yourself?

A. Anyone in the Charitable Trust Section.

Q. Did you have to be present with them when they were looking at the IRS documents?

A. Yes.

Q. Would you record on a log who was reviewing the documents other than yourself?

A. I don't remember if I did that. I don't think that was part of the log.

Q. But nobody could look at the documents without you personally approving and participating in the review?

A. Yes. Well, I at least had to be in the room.

Q. You had to be in the room?

A. To make sure they didn't take anything out or make notes.

Q. It was forbidden to make notes of the IRS documents?

A. That's what safeguard said.
Q. It was forbidden to upload these paper documents to an electronic file system?
A. Absolutely.
Q. And you say the IRS would have permitted electronic uploading if you had the same electronic safeguards as a revenue agency?
A. Yes.
Q. Do you recall what those electronic safeguards are?
A. No, they're really -- really complex and only revenue agencies have them because they're intended to safeguard tax documents.
Q. What are examples of revenue agencies?
A. Franchise Tax Board.
Q. So the California Franchise Tax Board can have electronic copies of these kind of information received from the IRS?
A. And does.
Q. And does?
A. Yes.
Q. But the Charitable Trust Section doesn't have as advanced electronic safeguards as the California Franchise Tax Board?
A. I don't believe anybody in the

Department of Justice has that level. They're quite convoluted, and apparently it would take two days or more. The safeguards people would bring out PriceWaterhouse to audit the data center to make sure all that stuff was in place. We weren't getting enough to make that worthwhile.

Q. And you said at least once a year members of the IRS safeguard team would come and ask you questions and check on whether you were following all of the safeguards?

A. Yes.

Q. For receiving the IRS information?

A. Yes.

Q. And you would also fill out a form that you would send to the safeguards team documenting, detailing all the measures you took to implement these safeguards?

A. Yes.

Q. Do you recall whether any -- you kept any of the logs that you referenced detailing receipt and use of information received from the IRS?

A. I -- I left them behind when I left the office. So --

Q. Do you recall where you left those logs?

A. I left them in San Francisco. They -- so I don't know if Tanya Ibanez has them in Los Angeles now or if they're still in San Francisco.

Q. Are you aware of any inadvertent disclosures of information received from the IRS through these information sharing agreements?

A. I am not.

Q. Would the information that came from the IRS through these information sharing agreements include, among other things, a Form 990?

A. It did sometimes because that was the basis for the action. That was the evidence behind the audit memo. Not always but usually.

Q. Usually there would be a Form 990 in the packet for a particular charity that you received from the IRS?

A. Yes, and it would be -- because the action was taken for a specific -- specific year or years. So it would be the 990s for those specific years, which could be five years earlier.

Q. So there could be multiple Form 990s in any given packet for a charity?

A. Yes.

Q. Would those Form 990s also have attached

January 25, 2016

Jami L. Cantore, Deputy Attorney General
California Department of Justice
Charitable Trusts Section
300 S. Spring St., Suite 1702
Los Angeles, CA 90013

Re: December 11, 2015 Notice of Proposed Rulemaking on Donor Confidentiality Purportedly Under Title 11, Division 1, Chapter 4

Dear Ms. Cantore:

The 63 undersigned nonprofit organizations, entities, and lawyers, as well as the over 1,400 other interested parties concerned about privacy from government and the right of private association, collectively representing millions of donors and millions more potential donors across the country, and having many decades of experience in informing citizens of causes that are important for Americans and their communities,[1] as well as having decades of experience developing relationships and private associations with citizen donors, submit these comments in response to the above-captioned proposed rulemaking about confidentiality of donor names

[1] The causes of America's nonprofit organizations cover many issues -- controversial and not -- such as medicine and science, religion and politics, social welfare, public policy and private actions, cures for diseases, feeding the poor, housing the homeless, caring for wounded veterans and their families, providing care for abused and abandoned animals, and promoting safety in our communities. Cumulatively, they touch on every major aspect of society. Some inform citizens about civil liberties, the Constitution, and other law. Many criticize actions taken by the legislative, executive and judicial branches of government, and are independent checks on government. Some even attempt to hold law enforcement officials such as the Attorney General accountable. They are used to criticize large private institutions and even other nonprofit entities. Nonprofits are independent of the government's officious views, and collectively are commonly referred to as the "Independent Sector." Donations to nonprofits are a valuable and irreplaceable means of **private association** integral to non-governmental, Tocquevillian democracy in American society, and for the benefit of people, animals, the environment, government accountability, and the security of our freedoms.

now demanded by the Attorney General as part of the charitable solicitation registration process.

As an initial matter, the demands by the California Attorney General for names and addresses of donors to charities and other nonprofit organizations violate the privacy and private right of association of donors to tens of thousands of worthy causes. Secondly, we reject the notion that the demands are legal: They are (1) unconstitutional (despite recent decisions by the Ninth Circuit denying injunctive relief, but ignoring fundamental Supreme Court precedent such as *NAACP v. Alabama*[2]), (2) illegal under post-Watergate reforms to federal taxpayer information privacy laws, and (3) neither required or contemplated by California's charitable solicitation statute, nor needed for California's law enforcement purposes. Thirdly, the proposed rulemaking fails to provide safeguards and adequately guarantee protections of confidential taxpayer information and privacy of donors to charitable, educational and other philanthropic causes from unauthorized disclosure to government officials, and even as to disclosure to the general public. Moreover, the provision of the proposed rule that the Attorney General will provide other state agencies, bureaus or departments confidential tax information pursuant to administrative subpoenas would make the Attorney General's office a hub for further violations of privacy and federal law, cloaked from any obligation of notice for due process, and depriving charities or donors opportunity to seek court relief to block violations of federal law and privacy rights.

I. <u>The AG's demands for names and addresses of donors are unconstitutional</u>.

While there are still several court challenges on constitutional grounds pending, the demands for names and addresses of donors violate the holding in *NAACP v. Alabama*, and are unconstitutional trespasses on

[2] 357 U.S. 449 (1958).

the right and security of private association.[3] The disclosure and inspection of donor names are susceptible to politically motivated abuses regardless of the political party of the current or future AGs – or members of their staffs. Also, it is well settled that charitable solicitations are protected by the First Amendment, so the AG's threats to deny this right to charities wishing to protect the privacy of their donors is extortionate and abusive, and compounds the AG's constitutional violations.

II. The AG's demands for names and addresses on IRS Form 990 Schedule B violate federal law. Civil and criminal penalties apply to state officials.

Donor names and addresses on Schedule B of Form 990 filed with the Internal Revenue Service are deemed confidential by federal law. See, generally, IRC sections 6103 and 6104 governing confidential taxpayer information. Following post-Watergate reforms, federal law protects against unauthorized (1) **disclosure** to[4] and (2) **inspection** by state

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[3] "We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment." *Id.* 357 U.S. at 460. "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, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* at 460 - 461. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and **privacy in one's associations**." *Id.* at 462. Cites omitted and emphasis added.

[4] IRC section 6103(a) is clear that "return information shall be confidential, and except as authorized by this title . . . no officer or employee of any state . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer of employee or otherwise under the provisions of this section." "The term 'disclosure' means the making known **to any person in any**

officials. There are both **civil and criminal penalties** for state officials who **disclose or inspect** confidential taxpayer information without authorization under federal law. See IRC sections 7213 and 7213A. These penalties indicate the seriousness of the intended protections of taxpayer confidentiality that the AG is now violating.

The federal statutes are clear that confidential taxpayer information may be obtained only in limited circumstances, and with statutory checks on **disclosure to and inspection by state officers and employees**. IRC sections 6103 and 6104 foreclose the AG's dragnet licensing demands for private donor information because they are not expressly authorized.[5]

III. The AG's demands using charitable solicitation registration are not authorized by California's charitable solicitation statute, and are not needed for law enforcement purposes.

The AG's demands creating disclosure to, and inspection by, herself and other state employees of confidential taxpayer information are not required or expressly authorized by California's charitable solicitation statute, and certainly are not "necessary" -- a condition required by IRC section 6104(c)(3) -- to the licensing of charitable solicitation. If ever relevant to an investigation of a particular nonprofit, this federally protected

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manner whatever a return or return information." IRC section 6103(b)(8) (emphasis added). This law therefore clearly applies to disclosure to and by state officials and employees. As interpreted by the IRS, the federal statutes' ban on disclosure except as authorized by the statutes themselves is clear: "For a disclosure of any return or return information to be authorized by the Code, there must be an **affirmative authorization** because section 6103(a) otherwise prohibits the disclosure of any return or return information by any person covered by section 7213(a)(1)." *Disclosure & Privacy Law Reference Guide*, IRS Publication 4639, 1-49 (emphasis added).

[5] Only "[u]pon written request by an appropriate State officer, the Secretary [of the Treasury] may make available for inspection or disclosure returns and return information of any organization described in section 501(c) (other than organizations described in paragraph (1) or (3) thereof) for the purpose of, **and only to the extent necessary in**, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations." IRC section 6104(c)(3) (emphasis added).

confidential information may be obtained from the IRS under the lawful conditions of the controlling federal statutes, or by investigative methods consistent with the Fourth Amendment and particularized suspicion rather than through an unnecessary dragnet licensing process affecting all registrants and their donors.

IV. The proposed rule fails to provide safeguards and adequate protections of the confidentiality of donor names and addresses.

The proposed rule is striking in how it utterly lacks description of any safeguards, processes, protocols, or accountability to maintain confidentiality of donor information.[6] It fails to adequately state how the AG will maintain and protect the confidentiality of donor information, and prevent accidental, reckless, and even willful disclosure and inspection in violation of federal law. It fails to state which employees in the AG's office may and may not access this confidential information.[7] It fails to provide notice to victims of breaches, fails to provide remedies, and fails to provide penalties or discipline for employees of the AG's office who breach the confidentiality of donor names and addresses.

As stated above, the AG's office will be a hub for further unlawful disclosures to other state agencies, bureaus or departments that themselves may have no safeguards. The proposed regulation's failure to acknowledge the restrictions of disclosure to, or inspection by, certain state agencies as set forth in IRC sections 6103 and 6104 leaves open further violations of federal law, compounding the AG's violations of IRC section 6103, yet cloaked from notice to victims. Since the AG has ignored and transgressed the federal law of confidentiality as if it did not apply to her, it

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[6] When, for example, the IRS **lawfully** discloses private tax information under the defined and limited exceptions in IRC section 6103, the recipient government agency must "(1) establish a system of records to keep track of all disclosure requests, the date of the request, and the reason for the request; (2) establish a secure area in which to store the information; and (3) restrict access of persons to that information." *Johnson v. Sawyer*, 120 F.3d 1307, 1320 (5th Cir. 1997).

[7] *Id.*

is likely she will raise claims of defenses for breaches not contemplated by the federal statutes such as state sovereign immunity. And, the provision that other government offices merely agree "to maintain the confidentiality of the information received consistent with this regulation" without express safeguards not only risks further violations of federal law, but is an irresponsible extension of this regulation that is irresponsible on its face.

The proposed rule is not a serious effort. The unlawful demands for confidential taxpayer information by the AG are only further compounded by the proposed rule. The better course is for the AG to retract her demands for names and addresses of donors, or face the prospect of civil and even criminal challenges for her intentional acts.

Respectfully submitted,

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