IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 14-15978

CENTER FOR COMPETITIVE POLITICS,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

PLAINTIFF-APPELLANT'S REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

STATE STATUTES

OTHER AUTHORITIES

INTRODUCTION

In her brief on appeal, California's Attorney General argues that the Center for Competitive Politics ("CCP") has violated the Uniform Supervision of Trustees for Charitable Purposes Act's disclosure requirements. This claim is both ungenerous and untrue. Recently, the Attorney General has required certain § 501(c)(3) organizations to file an unredacted Schedule B form, which contains their sensitive donor information, as a precondition of membership in the state's Registry of Charitable Trusts. By all appearances, this unwritten policy is not uniformly applied—rather, the Attorney General sends letters to organizations stating that their registration information is incomplete, sometimes after accepting registrations filed *without* such information for many years. In any event, this policy is not the result of any properly promulgated statute or regulation, nor has it been otherwise subjected to any form of public debate. It is, in the traditional sense of the word, arbitrary.

To justify this demand, the Attorney General relies upon an expansive view of her power to enforce the law. Her articulation of this power has no discernible limiting principle, and could justify future, potentially more serious infringements upon constitutional liberties. This danger flows inexorably from her consistent confusion of two distinct situations: the enforcement of laws, undertaken pursuant to checks and protections with which this Court is familiar, and a generalized

demand for sensitive information imposed as a condition of doing business in California.

The Attorney General gives insufficient attention to both the First Amendment and a duly-enacted federal statute designed to prevent her from obtaining § 501(c)(3) donor information. In the First Amendment context, she misapplies United States Supreme Court and Ninth Circuit precedent to eliminate the long-standing requirement that governments appropriately tailor any law (or arbitrary policy) infringing upon an associational freedom. In the preemption context, she suggests that a 1976 statute and an inapplicable 1987 decision of this Court trump a law, passed almost twenty years later, that specifically prevents state attorneys general from obtaining § 501(c)(3) donor information.

ARGUMENT

I. CCP is not seeking to evade the laws of California.

The Attorney General asserts that CCP "never filed with the Registry a copy of its IRS Form 990 Schedule B with its major donor information, *as required by law*, but this compliance failure was not caught until this year." Ans. Br. at 4 (emphasis supplied). The insinuation that CCP has violated the law is unwarranted. By protecting its donor information, CCP seeks to comply with laws of the United States, including the statutes duly enacted by Congress, the pronouncements of the United States Supreme Court, and the Constitution's protection of associational

liberties. *See* U.S. CONST. art. VI, cl. 2. The Attorney General, by contrast, attempts to enforce an unprecedented, uncabined, and unwritten disclosure regime. The scope of compulsory disclosure she seeks from educational nonprofits has never been upheld by *any* court. In fact, this litigation is apparently the first time California's disclosure regime has been subject to any formal consideration whatsoever.

The Attorney General argues that "[p]ursuant to state regulations, charitable organizations must file, among other things, a complete copy of the IRS Form 990 as filed with the IRS, including an unredacted Schedule B that includes information about major donors." Ans. Br. at 4 (citing CAL. CODE REGS. tit. 11, § 301 (2014)). But that is not what California law says. The statute simply refers to "Internal Revenue Service Form 990," and makes no mention of the need for an unredacted Schedule B. CAL. CODE REGS. tit. 11, § 301. CCP and other filers (including *amicus* National Organization for Marriage Education Fund ("NOM-Ed") and nonprofits represented by *amicus* Charles Watkins) have *consistently and without reprobation* filed the public version of Form 990 with the Registry, and been granted membership therein. NOM Br. at 2 ("NOM-Ed's status is presently

listed as 'Current' on the Registry of Charitable Trust[s] online database").[1] Thus, while there is a state law on the topic, it does not compel the result the Attorney General urges.

By contrast, California law clearly requires the Attorney General "to promulgate rules and regulations specifying…the contents" of reports filed with the Registry. Ans. Br. at 9. She has failed to do so in this context. While the law is at best unclear, she has promulgated no rules or regulations that conclusively state that all § 501(c)(3) organizations must file an unredacted Schedule B. Thus, the registration requirements are neither ascertainable nor uniformly applied. Instead, she has chosen to seek compliance with this disclosure regime—which is not memorialized in law—by issuing notices to registrants once her employees "'bec[o]me aware that [they a]re receiving the public version [of Form 990].'" Watkins Br. at 8 (quoting 2010 email correspondence between Mr. Watkins and former Assistant Attorney General Belinda Johns). CCP, a Registry member since 2008, received such a notice in 2014. [ER 61]. NOM-Ed, a Registry member since 2010, received its first notice in 2013. NOM Br., Ex. B.

CCP cannot ascertain with certainty when the Attorney General began issuing these notices. Mr. Foley indicated that "[p]rior to scanning, Registry staff

[1] Indeed, NOM-Ed's registrant information, accessible via search on the Attorney General's website (http://rct.doj.gov), notes that NOM-Ed's last renewal as a Registry member was on January 13, 2014.

goes through each filing and removes all confidential data which is scanned separately as a 'confidential' document. The Registry publishes the non-confidential documents on its searchable website, but maintains the schedule B records as confidential records, accessible to in-house staff only. This process has been consistent since 2007 when the Registry became automated." [ER 51].

But Mr. Foley's declaration does not state that the Attorney General has consistently sought unredacted Schedule B information since 2007. Instead, there are indications that these demands are quite new. Watkins Br. at 8 ("no client notified the firm that California was requesting an unredacted Schedule B until 2010").

In any event, Registry review of CCP's filings did not trigger staff attention between 2008 and 2013. *Amici* have had similar experiences. Thus, either the Attorney General's unwritten policy is a novel one, or the segregation of confidential information has been done with less-than-sufficient care. Neither case suggests any attempt by CCP to skirt California law, which CCP certainly claims "no right to disregard." *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

II. The Attorney General's guarantee of confidentiality is insufficient to justify the disclosure she demands.

Despite the Attorney General's assurances, the confidentiality of donor information provided to the Registry is uncertain. As *amici* demonstrate, Registry staff may exercise less care with the information than the Attorney General

professes. Watkins Br. at 9 ("Either (1) [Registry official]'s statement about always requiring the unredacted Schedule B…is false, because no charity that failed to file an unredacted Schedule B before was ever asked for it; or (2) no one in the Registry of Charitable Trusts office was reviewing the Forms 990 that were filed to ensure that the unredacted Schedule B was filed"). If, as Mr. Watkins indicated, this policy began in 2010, Registry staff failed to discover that CCP and NOM-Ed were filing redacted Schedule B information for three and four years, respectively. Thus, the possibility that this same staff could inadvertently disclose sensitive donor information is decidedly non-trivial.

This is particularly disconcerting because the Attorney General professes to maintain confidentiality procedures akin to those of the IRS, but insists that no law requires her to do so. Ans. Br. at 12-13; *Id.* at 41 (averring that California's collection of unredacted Schedule B information is not "subject to the Federal confidentiality rules") (citations and quotations omitted). Indeed, confidentiality of the Schedule B is simply a present—and potentially transient—feature of the Attorney General's unwritten policy. A future Attorney General could determine that unredacted Schedule B information, even if filed in the past, is a public record. And even if the Attorney General's unwritten policy as to confidentiality continues with her successors, this too could be subject to challenge under the Public Records Act.

Once donor information is provided to the Attorney General, there is no sufficient guarantee that it will not become public. And once that donor information becomes public, contributor privacy is irreversibly violated. *ProtectMarriage.com – Yes on 8 v. Bowen*, No. 11-17884, 2014 U.S. App. LEXIS 9312 at *16-19 (9th Cir. May 20, 2014) (finding that after donor information was revealed publicly, it was so "vast[ly] disseminat[ed]" by third parties that the court could "no longer provide Appellants with effective relief").

III. The Attorney General incorrectly considers her demand for CCP's donor information a necessary corollary to her law enforcement powers.

a. The Attorney General is not demanding disclosure pursuant to a particularized investigation.

The Attorney General maintains that her disclosure regime is a constitutional exercise of her law enforcement powers. Ans. Br. at 8. Certainly, the Attorney General has the power to investigate members of the Registry of Charitable Trusts. *Id.* at 8; CAL. GOV. CODE § 12588. In the course of such an investigation, she may request documents or compel persons to produce records with "the same force as a subpoena." Ans. Br. at 8 (citing CAL. GOV. CODE § 12588).

But the demands at issue *here* are not the result of any particularized suspicion of wrongdoing by CCP, nor of a formal audit or investigation. Instead, annual filing with the Registry operates as a licensing regime—if a nonprofit corporation provides the appropriate documentation, then that corporation is

licensed to solicit funds in California. The Attorney General's quiet addition of a requirement that CCP reveal its donors to her as a condition of obtaining that license is not the equivalent of an investigation.

The Attorney General's understanding of her "investigatory" powers would transmogrify her demand letter—signed by Office Technician "A.B."—into the equivalent of a subpoena issued pursuant to some individualized suspicion and subject to judicial review. *See, e.g. Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346, 348 (9th Cir. 1988) ("*Local 375 I*") ("The Secretary of Labor is empowered to issue subpoenas whenever *he believes the Act is being violated*") (emphasis supplied). But the Attorney General demands an unredacted Schedule B from all nonprofit corporations seeking to solicit contributions in California. This is inconsistent with the need for a particularized suspicion of wrongdoing to justify a demand for otherwise confidential information. Regardless, the Attorney General has not provided any information to the effect that CCP (or any *amicus*) is suspected of violating the law.[2]

Indeed, *were* this an audit or an investigation, CCP would have avenues to defend the confidentiality of its contributor list. Ans. Br. at 10 (assurance that CCP's donor information will be "treated as a confidential document…used

[2] Other than, of course, by failing to provide an unredacted Schedule B as a precondition of engaging in constitutionally protected charitable solicitations. *Riley v. Nat'l Fed. of the Blind*, 487 U.S. 781 (1988).

exclusively for law enforcement purposes"); *cf.* Ans. Br. at 11, n. 3 (assurance that "[i]n response to a California Public Records Act request for an organization's filings," the Attorney General would never distribute CCP donor information). For instance, in the context of an actual subpoena, CCP could seek a protective order. CAL. CIV. PROC. CODE § 2031.060(a).

b. The Attorney General's understanding of her investigatory authority is subject to no limiting principle.

The Attorney General may not defend her encroachment upon CCP's constitutional rights by merely labelling her actions an "investigation." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 392 (2000) (the Supreme Court "ha[s] never accepted mere conjecture as adequate to carry a First Amendment burden"); *Bates v. City of Little Rock*, 361 U.S. 517, 525 (1960) ("[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion"). Such an understanding of her power "is at odds with standard First Amendment analyses because it is unbounded and susceptible of no limiting principle." *Citizens United v. FEC,* 558 U.S. 310, 359 (2010) (quotation marks and citation omitted); *see also Gibson v. Florida Legis. Investigation Comm.*, 372 U.S. 639, 539, 545 (1963) ("The fact that the general scope of the inquiry is authorized and permissible does not compel the conclusion that the investigatory body is free to inquire into or all demand all forms of information").

Indeed, the Attorney General could make the same argument, citing the same authorities, to demand all emails sent from CCP accounts. Emails are certainly "information" under CAL. GOV. CODE § 12588, and their contents might "serve[] the Attorney General's legitimate interest in ensuring compliance with and enforcing the law." Ans. Br. at 31. But just because information might be tangentially useful for law enforcement purposes does not mean government officials have open access to it. U.S. CONST. amend. IV (guaranteeing persons the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures").

The same principle—that exercises of government power must be tailored to comply with the Constitution—applies just as fully here, where government action under the guise of law enforcement works a First Amendment violation. Indeed, ample Ninth Circuit and Supreme Court precedent demonstrate just that.

c. The Attorney General's case law is either inapplicable or mischaracterized.

The Attorney General believes that the mere invocation of her law enforcement power is sufficient to quell any First Amendment objection to her demand unless CCP makes a *prima facie* showing of specific harm. Ans. Br. at 38 ("the Court need not examine whether the contested Schedule B disclosure requirement" is properly tailored). She supports this contention with two lines of case law that are inapplicable, and a third that is mischaracterized.

The first line of cases concerns investigations undertaken against specific organizations pursuant to suspected wrongdoing. As noted, this is wholly unrelated to a universally applicable disclosure paradigm. The second line of cases concerns voter persuasion—not charitable solicitation. But federal law prohibits every entity subject to the Attorney General's policy from encouraging citizens to vote for particular candidates. 26 U.S.C. § 501(c)(3) (educational nonprofits may "not participate in, or intervene in…any political campaign on behalf of (or in opposition to) any candidate for public office").[3] Finally, the Attorney General misinterprets foundational Supreme Court precedent from the civil rights era.

i. Particularized Investigations Cases

The Attorney General asserts that her compelled disclosure regime is not subject to review unless CCP first demonstrates harm. She is wrong. Her principal authorities for this proposition are *Brock v. Local 375, Plumbers Int'l Union*, 860 F.2d 346 (9th Cir. 1988) ("*Local 375 I"*), *Dole v. Local 375, Plumbers Int'l Union*,

[3] Section 501(c)(3) organizations may support or oppose ballot measures, so long as this is not a substantial part of the organization's activity. T.D. 8308, 1990-2 C.B. 112, 1990 IRB LEXIS 2217 at *24-25 (categorizing ballot initiative activity as "lobbying"); 26 U.S.C. § 501(c)(3) ("no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h))"); *see also* INTERNAL REVENUE SERVICE, *Frequently Asked Questions About the Ban on Political Campaign Intervention by 501(c)(3) Organizations: Contributions to Ballot Measure Committees*, http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Social-Welfare-Organizations (last accessed July 16, 2014).

921 F.2d 969 (9th Cir. 1990) ("*Local 375 II*"), and *Perry v. Schwarzenegger*, 591 F.3d 1126 (9th Cir. 2009).

These cases do not shift the constitutional burden to plaintiffs. Quite the opposite is true: plaintiffs only must demonstrate harm when they seek to *avoid* a disclosure regime that the government has *already* demonstrated will survive scrutiny. And these cases concern *specific* parties asserting First Amendment privilege in objecting to an otherwise valid exercise of government power.

In the *Local 375* cases, an audit revealed evidence of wrongdoing, which prompted the state's disclosure request. *Local 375 II*, 921 F.2d at 970 (disclosure demanded after "a routine compliance audit…uncovered a series of questionable financial transactions"). This type of disclosure—the kind conducted pursuant to the "investigatory powers of administrative agencies"—merely had to meet the "Ninth Circuit standard of judicial scrutiny in an agency enforcement proceeding." *Local 375 I*, 860 F.2d at 348. Thus, the *Local 375* cases were of a fundamentally different nature than the instant case. By only demanding disclosure *after* finding suspicious behavior, the government effectively demonstrated tailoring. Then, and only then, did the burden shift to the plaintiff to avoid such disclosure by demonstrating harm.

The Attorney General's other authority for shifting the *prima facie* burden to CCP, *Perry v. Schwarzenegger*, concerned California voters' adoption of a

constitutional amendment banning same-sex marriage (Proposition 8). There, the district court determined that "[t]he question of discriminatory intent may inform the court's equal protection analysis," and thus the case "may require the record to establish…the voters' motivation or motivations for supporting Prop. 8." *Perry v. Schwarzenegger*, 2009 U.S. Dist. LEXIS 55594 at *13-14 (N.D. Cal. 2009). The plaintiffs sought "production of documents…encompassing, among other things, Proponents' internal campaign communications concerning strategy and messaging," on the theory that such communications "could fairly readily lead to admissible evidence illuminating the messages disseminated to voters." *Perry*, 591 F.3d at 1132-1133 (citations and quotation marks omitted). To avoid producing these documents, this Court required the Prop. 8 proponents to show *prima facie* First Amendment harm. *Id.* at 1140.

Again, *Perry*'s context is crucial. First, the case was not about donor disclosure. Second, this Court only required a showing of harm by litigants seeking to avoid an otherwise lawful production request which met "the Rule 26 standard of [being] reasonably calculated to lead to the discovery of admissible evidence." *Perry*, 591 F.3d at 1143. Importantly, the parties "agreed to redact…the names of rank-and-file members of the campaign" whose communications might be disclosed—in other words, persons analogous to CCP's donors. *Id.* at 1133.

The Attorney General's remaining authorities are similarly unavailing. A non-precedential concurrence in *Doe No. 1 v. Reed* considered a disclosure law that had previously survived exacting scrutiny. 697 F.3d 1235 (9th Cir. 2012). It applied the *Local 375* cases when the same plaintiff, who had previously lost in the Supreme Court, sued to stop "the continued disclosure of already disclosed names." *Id.* at 1246-49. The Attorney General's out-of-circuit authorities, *In re Motor Fuel Temperature Sales Practices Litigation* and *Nat'l Org. for Women v. Terry*, consider First Amendment privilege in the civil discovery context—the *Perry* scenario already discussed above. 641 F.3d 470, 489-492 (10th Cir. 2011); 886 F.2d 1339, 1355 (2d Cir. 1989). Finally, the citation to *United States v. Comley* is entirely inapposite, as that case concerned an administrative subpoena "seek[ing] tape recordings or transcripts prepared by Comley of telephone conversations between Comley and an NRC [Nuclear Regulatory Commission] employee who [wa]s the subject of an NRC investigation." 890 F.2d 539 (1st Cir. 1989).

In short, none of these cases concern a demand remotely analogous to the one at issue here.

ii. Campaign Finance Cases

The Attorney General relies heavily upon quotations from campaign finance cases discussing a plaintiff's need to demonstrate a valid fear of threats,

harassment, or reprisals in order to avoid disclosure. These excerpts are taken wholly out of context. *See, e.g.*, Ans. Br. at 25 (arguing that under *Buckley v. Valeo*, 424 U.S. 1, 71-72 (1976), a plaintiff must show *prima facie* harm); *see also id.* at 16 (citing *Citizens United v. FEC*, 558 U.S. 310, 366-371).

Buckley first held that "compelled disclosure…cannot be justified by a mere showing of some legitimate governmental interest." 424 U.S. at 64. It then thoroughly reviewed the Federal Election Campaign Act's disclosure provisions. The Court concluded that only two types of compelled donor disclosure were constitutional: (1) individuals contributing money specifically for advertisements urging a vote for or against a candidate, and (2) individuals giving to an organization with the "major purpose" of running such advertisements. *Id.* at 79-81.[4] Although this was a "significant encroachment[]," the Court found that "evils of campaign ignorance and corruption" could only constitutionally be stymied with such "closely drawn" disclosure. *Id.* at 64, 68, 25.

[4] *Citizens United v. FEC* is not to the contrary, despite the Attorney General's implication otherwise. 558 U.S. at 325 (requiring disclosure from a speaker producing "a feature-length negative advertisement that urge[d] viewers to vote against Senator [Hillary] Clinton for President," and "pejorative" advertisements for that film); Ans. Br. at 16. *Citizens United* blessed as-applied disclosure challenges by communicants showing a "reasonable probability that disclosure of [their] contributors' names will subject to them to threats, harassment, or reprisals." *Id.* at 367 (quotations and citations omitted). But this must be read in the context of a disclosure regime which had *already survived a facial challenge*. The Attorney General's paradigm has not.

Thus, the threats, harassments, or reprisals language from *Buckley* and its progeny concern *exceptions* to disclosure regimes that have *already* survived heightened constitutional review. This exception is for speakers who still insist upon encouraging specific electoral outcomes, yet wish to maintain their donors' anonymity. In *these* cases, it is permissible to require a plaintiff to demonstrate extraneous harm. *See Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 102 (1982). Proving threats, harassment, or reprisals is not a threshold question, but rather a tertiary one that is only applicable when the disclosure regime has already been found to be properly tailored. *See McConnell v. FEC*, 540 U.S. at 93, 197-199 (upholding federal campaign finance disclosure regime facially, but preserving exception for speakers which might suffer threats, harassment, or reprisals if forced to comply).

In any event, CCP is different from the plaintiffs in *Buckley* and its progeny—federal law already prohibits CCP from advocating for or against specific candidates. 26 U.S.C. § 501(c)(3). These cases, which tie donor disclosure directly to that narrow category of speech, cannot assist the Attorney General here. In fact, they support CCP's case by demonstrating the skepticism with which the Supreme Court views compelled donor disclosure, and the careful tailoring analysis courts are required to conduct before permitting demands for that sensitive information.

iii. Civil Rights Era Cases

The Attorney General, lastly, argues that she need not demonstrate tailoring because *NAACP*-era Supreme Court cases "establish [the need for] a *prima facie* showing [of harm by the plaintiff]." Ans. Br. at 23. This is also wrong.

While the Attorney General's briefing on *Talley* suggests the opposite, the Court never found that Mr. Talley would be subject to threats, harassment, or reprisals for disclosing the source of his speech, as Justice Clark specifically noted in his dissent. *Talley v. California*, 362 U.S. 60, 69 (Clark, J., dissenting). Moreover, in *Gibson v. Florida Legislative Investigation Committee*, another compelled disclosure case involving the NAACP, the Court held that the "strong associational interest in maintaining the privacy of membership lists of groups engaged in the constitutionally protected free trade in ideas and beliefs may not be substantially infringed upon" given only "a slender showing" of government tailoring. 372 U.S. at 555-56. While *Gibson* noted that popular antipathy toward the civil rights movement certainly made protecting associational liberty "all the more essential," the Court roundly professed that "of course, all legitimate organizations are the beneficiaries of these [First Amendment] protections." *Id.* at 556-557.

Finally, this Court did not require a *prima facie* showing of harm from a plaintiff challenging the City of Seattle's shareholder disclosure law—which this

Court invalidated under First Amendment exacting scrutiny. *Acorn Investments v. City of Seattle*, 887 F.2d 219, 225 (9th Cir. 1989) Notably, in doing so, this Court did not even consider whether the shareholder information would be publicly disclosed. *Id.*

IV. The Attorney General's demand for CCP's donor information does not survive the strict test of exacting scrutiny.

Courts uniformly recognize that "[s]tate-mandated compelled disclosure… indisputably impinges on th[e] vital freedoms of belief and assembly." *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1206 (E.D. Cal. 2010). Thus, the Attorney General bears the burden to demonstrate that her disclosure regime survives exacting scrutiny.

a. In compelled disclosure cases, exacting scrutiny is a mandatory and searching test.

"As *Buckley* made clear, it is not enough for the state to have 'some legitimate government interest;' the Court 'also ha[s] insisted that there be a…'substantial relation' between the governmental interest and the information required to be disclosed.' 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." *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, No. 12-55726, 2014 U.S. App. LEXIS 11199 at *38 (9th

Cir. June 16, 2014) (citations omitted) (emphasis supplied) (brackets in original). This has long been the law in this Circuit. *Acorn Invs. v. City of Seattle*, 887 F.2d at 225 (state must show "a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed") (quoting *Buckley*, 424 U.S. at 64).

"The Supreme Court has described exacting scrutiny as a 'strict test.' Although distinct from strict scrutiny, 'exacting scrutiny is more than a rubber stamp.'" *Chula Vista*, 2014 U.S. App. LEXIS 11199 at *37 (quoting *Buckley*, 424 U.S. at 66; *Minn. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012)). "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." *McCullen v. Coakley*, No. 12-1168 2014 U.S. LEXIS 4499 at *37 (U.S. June 26, 2014) (citation and quotation marks omitted). Compelled disclosure must be "closely drawn to avoid unnecessary abridgment of associational freedoms." *Buckley*, 424 U.S. at 25. Application of exacting scrutiny is not optional: the Supreme Court "insist[s]" on this rigorous review. *Id*. at 64.

Curiously, the Attorney General claims that CCP has "offered not one objective and articulable fact to substantiate its infringement claim." Ans. Br. at 13. But it is undisputed that the Attorney General seeks "state scrutiny" of CCP's donor information. *NAACP*, 357 U.S. at 466. This alone triggers exacting judicial

scrutiny. *Buckley*, 424 U.S. at 64. ("We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure cannot be justified by a mere showing of some legitimate governmental interest"); *Chula Vista*, 2014 U.S. App. LEXIS 11199 at 38 (justifying compelled disclosure is "the government's burden").

b. Exacting scrutiny requires the government to tailor its demand to a sufficiently important interest, and the Attorney General has failed to do so.

CCP concedes that law enforcement is an important governmental interest. But the analysis does not end there: the Attorney General still must demonstrate *how* her disclosure regime vindicates that interest. She has not done so. Absent a proper fit between the government's interest and the disclosure required, the demand fails constitutional scrutiny. *Gibson*, 372 U.S. at 551 ("[W]e rest our result on the fact that the record in this case is insufficient to show a substantial connection between" the state interest and the information sought, "which…is an essential prerequisite to demonstrating the immediate, substantial, and subordinating state interest necessary to sustain" encroachment upon associational liberty). "In the First Amendment context, fit matters." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456 (2014).

The Attorney General believes that she "explained and the district court considered why the information is necessary and how it is used to regulate charities

and enforce state law." Ans. Br. at 29. But below, she merely noted that "the information contained in the IRS Form 990 and Schedule B filed with the IRS allows the Attorney General to determine, often without conducting an audit, whether an organization has violated the law, including laws against self dealing, improper loans, interested persons, or illegal or unfair business practices." [ER 23-24] (citations to California law omitted). At the hearing held below, the Attorney General's counsel stated that "if it would be helpful to the court, [she would be] happy to explain how this information is useful to the AG in doing her job." [ER 25]. Nevertheless, counsel did not explain how an unredacted Schedule B is "useful to the AG in doing her job." Moreover, the district court's tailoring analysis was limited to recitation of conclusory statements from the Attorney General's briefing, as quoted above. [ER 14].

At last, in her brief on appeal, the Attorney General first offered some explanation. She claims that this information permits her to "ascertain whether a donor is also an officer or director of a charity and whether more than 49 percent of 'interested persons' are being compensated by the charity in violation of California Corporations Code section 5227." Ans. Br. at 30. That provision of California law states that "not more than 49 percent of the persons serving on the board of a corporation may be" a person previously compensated by the corporation, or a close family member of such a person. CAL. CORP. CODE § 5227.

But board member names and compensations are already reported on the redacted, public copy of Form 990. [ER 36]. This public form also reports whether "any officer, director, trustee, or key employee ha[s] a family relationship or a business relationship with any other officer, director, trustee, or key employee." [ER 35].

The Attorney General maintains that she "can also discover donors who are 'self dealing' by passing money through to family members or to fund enterprises that are for their own benefit and not for a public charitable purpose in violation of California Corporations Code sections 5233 and 5236." Ans. Br. at 30. But CAL. CORP. CODE § 5233 deals entirely with self-dealing by directors, defined as "a transaction to which the *corporation* is a party and in which one or more of its directors has a material financial interest." CORP. CODE § 5233(a).

The public version of Form 990 requires that filers list the compensations directors receive from both the filer and any related organizations. [ER 36]. It further requires that filers disclose whether "the organization was a party to a business transaction" with a "current or former, director, trustee, or key employee," a "family member of a current or former officer, director, trustee, or key employee," or an "entity of which a current or former officer, director, trustee, or key employee (or family member thereof) was an officer, director, trustee, or direct or indirect owner. [ER 33]; *see also* Watkins Br. at 6 (referencing Schedule L,

"where non-employment transactions with officers, directors, and other key employees are reported"). It is difficult to imagine a scenario where indications that a director is also a contributor would provide additional, useful evidence of wrongdoing. In any event, if the publically available information suggests a problem in this vein, the Attorney General may *then* request donor information in the context of an audit. The Attorney General's scenario does not justify a demand for all significant donors to all organizations.

Under CAL. CORP. CODE § 5236, "[a] corporation shall not make any loan of money or property to or to guarantee the obligation of any director or officer, unless approved by the Attorney General…." Again, any loans to directors or officers are reported on the public version of Form 990. [ER 40] (disclosing loans "to current and former officers, directors; trustees, key employees, highest compensated employees, and disqualified persons"); [ER 33] ("Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, substantial contributor or employee thereof, a grant selection committee member, or to a 35% controlled entity or family member of any of these persons?").

Even if the redacted Form 990 did not provide the Attorney General with the information she professes to obtain solely from Schedule B, she could further all of her asserted ends by narrower means. To give just one example, if unable to glean

whether directors or officers had contributed to an organization from its public Form 990, she could promulgate rules requiring filers to disclose that information. [ER 33] (asking whether "the organization" reported any "receivables from…any current or form officers, directors, trustees, key employees, highest compensated employees, or disqualified persons"). There certainly is no need to obtain *all* donors to *all* nonprofits who give over a threshold amount.

Lastly, the Attorney General asserts that she "uses major donor information to test whether complaints filed against an organization alleging self dealing and other violations are frivolous or whether they merit further action." Ans. Br. at 30-31. It remains unclear how donor information would further a self-dealing investigation. But even if it could, the Attorney General may already investigate complaints, and—as the *Local 375* cases demonstrate—even obtain some donor information, during an investigation predicated on a particularized suspicion of wrongdoing.

Thus, the Attorney General has provided no evidence of tailoring, nor has she properly justified her disclosure demand. To the extent that *any* of her asserted uses of donor information are valid, her infringement upon the associational liberty of CCP's contributors is plainly not, as she purports, a "narrowly tailored" means of serving her law enforcement interest. Ans. Br. at 33.

V. Federal law preempts the Attorney General's demand.

In 2006, Congress passed a law prohibiting state attorneys general from obtaining unredacted Schedule B information from § 501(c)(3) organizations, in order to administer charitable solicitation regimes. 26 U.S.C. § 6104(c)(3). In other words, federal law prohibits this very state officer, seeking this very document, for the very purpose asserted, from obtaining CCP's donor list.

a. The authorities the Attorney General cites do not interpret § 6104(c)(3).

The Attorney General claims that § 6104(c)(3) "do[es] not apply to demands by state officials…directly to charitable organizations either for copies of the returns themselves or for information contained in those returns." Ans. Br. at 14. In support, she relies entirely upon a 1987 Ninth Circuit decision interpreting a 1976 law, and the 1976 law's legislative history. But a 1987 case interpreting a different statute—26 U.S.C. § 6103—does not govern a preemption challenge to a separate statutory provision enacted nearly twenty years later. "Unless the facts of the cited case and the case under consideration are closely analogous, the cases are distinguishable and the cited case is of little precedential value." *United States v. Kissler*, 937 F. Supp. 884, 888 (D. Alaska 1996). As in district court, the Attorney General's argument rests largely on this Court's holding "in *Stokwitz*…in which it analyzed the applicability of the confidentiality provisions set forth in section *6103* of the Internal Revenue Code" and determined that section "'6103 was not

designed to provide the only means for obtaining tax information; it simply provides the only means for acquiring such information from the IRS.'" Ans. Br. at 37 (quoting *United States v. Stokwitz*, 831 F.2d 893, 897 (9th Cir. 1987) (emphasis supplied).

In response to CCP's observation that §§ 6103 and 6104 are different provisions enacted at different times, the Attorney General argues that § 6103 controls any interpretation of § 6104. Ans. Br. at 39. This is far from obvious—both statutes fall under Internal Revenue Code Chapter 61, in the subchapter labelled "miscellaneous provisions." As CCP argued in its opening brief, the 1987 *Stokwitz* decision does little to inform a case about 26 U.S.C. § 6105 (which governs the confidentiality of tax information arising under treaty obligations). Section 6104's references to § 6103 do not vitiate the fact that the two are separate statutes. Section 6103 largely deals with individual tax returns and a general grant of power to the Treasury Secretary to disclose return information, pursuant to certain rules. Section 6104 claws back this power when it applies to the very circumstances presently before this Court. 26 U.S.C. § 6104(c)(3). By contrast, § 6103 does not even address the particulars of the *Stokwitz* case—tax returns obtained via a warrantless search by coworkers and supervisors. 831 F.3d at 893.

b. The Attorney General's legislative history does not purport to interpret § 6104(c)(3).

The Attorney General contends that "legislative history also demonstrates that Congress intended to allow state officials to obtain federal tax filings and/or the information contained in federal tax filings." Ans. Br. at 34. But that legislative history, procured from a 1976 publication of the Joint Committee on Taxation, applies exclusively to "disclos[ure of tax information] to State tax officials *solely* for use in administering the State's tax laws. The tax information will not be available to the State Governor or any other nontax personnel…." [SER 65] (emphasis original). Regardless, 1976 Senate floor statements plainly do not determine the meaning of a different statute enacted three decades later. "Legislative history can never produce a pellucidly clear picture," and this is doubly true when it is used to toss an anchor into the future. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) (citation and quotation marks omitted).

By contrast, the text of 26 U.S.C. § 6104(c)(3) covers precisely the document the Attorney General seeks to retrieve, for precisely the reasons that she seeks to retrieve it. Although her answering brief unfailingly declines to quote the full text of the statute in question, that statute's language *is* "pellucidly clear." State attorneys general may not procure unredacted Schedule B information to further "the administration of State laws regulating the solicitation or administration of the

charitable funds or charitable assets of such organizations." 26 U.S.C. § 6104(c)(3). It would be odd indeed if this meant that "[s]ection 6104 does not limit the authority of the Attorney General or other state officials to obtain this or other information, including a complete Schedule B, directly from plaintiff or any other 501(c)(3) organization registered to do business in California." Ans Br. at 37.[5]

c. The Attorney General's demand fails any preemption analysis.

"[T]he categories of preemption are not 'rigidly distinct.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 n. 6 (2000) (citing *English v. General Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)). CCP has consistently pled that this case bears the hallmarks of all three categories of preemption. The express language of the statute forbids the Attorney General from obtaining Schedule B information to regulate charitable solicitation. 26 U.S.C. § 6104(c)(3). The "'federal interest'" in maintaining this privacy for § 501(c)(3) donors is "'so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (quoting *Rice v. Santa Fe Elevator Corp.*, 332 U.S. 218, 230 (1947)). And CCP's "compliance with

[5] The Attorney General's remaining argument—that, because a copy of a Schedule B form would not be the exact same form "'*filed with, or furnished to, the Secretary*,'" it is "not federal tax return information and thus section 6104 is not applicable—is, to be generous, somewhat metaphysical. Ans. Br. at 41 (quoting 26 U.S.C. § 6103(b)(3)) (emphasis in original). It is unlikely to accurately state Congress's intention.

the" Attorney General's demand "would frustrate the purposes of the federal scheme." *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 531 (1st Cir. 2007).

The Attorney General's belief that § 6104 does not apply to her compulsory requests for the same donor information that Congress forbade her from obtaining from the Treasury Secretary simply cannot be the law. *Livadas v. Bradshaw*, 512 U.S. 107, 119 (1994) ("Pre-emption analysis, rather, turns on the actual content of respondent's policy and its real effect on federal rights"). The Attorney General may not procure indirectly that which Congress banned her from procuring directly. *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (citing *Morales v. TWA*, 504 U.S. 374, 386 (1992)) (even indirect effects of state law can be preempted by federal law). "As a result, states are barred from relying on mere formal distinctions in an attempt to evade preemption.…" *PPL EnergyPlus, LLC v. Nazarian*, Nos. 13-2419 and 13-2424, 2014 U.S. App. LEXIS 10155 at *18 (4th Cir. June 2, 2014) (quotations and citation omitted). The Secretary's argument—that the original form is protected by federal law, but copies are not—is precisely the sort of "formal distinction" this Court should decline to permit.

VI. The non-merits factors demonstrate that, absent injunctive relief, CCP will suffer irreparable injury due to enforcement of a law that is not in the public interest.

"The loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Associated Press v. Otter*, 682 F.3d

821, 826 (9th Cir. 2012) (citation omitted). CCP has demonstrated that it will likely succeed on the merits of its First Amendment claim. It thus deserves protection against the irreparable harm it would suffer absent the requested injunction. Indeed, in such circumstances, CCP will either be forced to submit to the Attorney General's regime—at the expense of the First Amendment rights of it and its contributors—or be denied the ability to engage in protected charitable solicitations in the wealthiest state in the Union. *Guadiya Vaishnava Soc'y 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") (citation omitted). Even if CCP had only shown a likelihood of success on its preemption claim, this would still work irreparable harm. *Arizona v. United States*, 641 F.3d 339, 366 (9th Cir. 2011), *aff'd in part, rev'd in part on other grounds*, 132 S. Ct. 2492 (2012) ("We have 'stated that an alleged constitutional infringement will often alone constitute irreparable harm'") (quoting *Assoc. Gen. Contractors v. Coal. For Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991)).

The public interest would also be vindicated by issuance of an injunction in either case: "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F. 3d 638, 653 (D.C. Cir. 2013).

CONCLUSION

For the foregoing reasons, the district court's order ought to be reversed.

Respectfully Submitted,

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