IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

C.A. No. 14-15978

CENTER FOR COMPETITIVE POLITICS,
Plaintiff-Appellant,

v.

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

URGENT MOTION UNDER CIRCUIT RULE 27-3(b)
PLAINTIFF-APPELLANT'S REPLY TO DEFENDANT-APPELLEE'S OPPOSITION TO URGENT MOTION

NECESSARY ACTION ON OR BEFORE JANUARY 10, 2015

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

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Introduction

This case is presently before this Court on appeal of a denial of a motion for preliminary injunction.[1] Before the district court, the Attorney General failed to provide any substantive explanation as to how the compelled disclosure of donors to the Center for Competitive Politics ("CCP") was necessary to the State's regulation of charitable entities. Pl.-Appellant's Opening Br. at 16-19. Consequently, the principal dispute on appeal is whether, under exacting scrutiny, the Attorney General, as a government defendant, bore the burden below of demonstrating that her compelled disclosure regime was substantially related to an important governmental interest. *See Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 755 F.3d 671, 684 (9th Cir. 2014) ("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

[1] The Attorney General posits that the "issue in this appeal is whether the district court abused its discretion in denying plaintiff's motion for a preliminary injunction." Opp'n to Urgent Mot. at 6, n. 2 ("Opp'n to Mot."). That is not quite correct. The question before this Court is whether the district court made a legal error when it determined (1) that the Center did not demonstrate a likelihood of success on the merits of its constitutional claims, and (2) that under the so-called "sliding scale" approach, CCP did not face irreparable injury meriting a preliminary injunction. "When the district court is alleged to have relied on an erroneous legal premise" in denying a preliminary injunction, the Court "review[s] the underlying issues of law *de novo*," and does not rely on the more lenient "abuse of discretion" standard. *Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004); CCP Opening Br. at 5 (citing and quoting same).

First Amendment burden the disclosure requirement imposes on political speech") (emphasis in original, other punctuation altered, citations omitted). The Attorney General, conversely, argued that she need make no showing whatsoever unless CCP first provided concrete evidence that its donors would suffer threats, harassments, or reprisals as a result of this compelled disclosure. Appellee Ans. Br. at 18. This latter argument succeeded below.

CCP contends that the Attorney General and the district court misread the applicable case law, and relied upon a series of decisions involving particularized government investigations and discovery disputes to claim that CCP bore the burden of proof. As argued to this Court, that line of cases does not fit the present circumstance, where the Attorney General is defending her disclosure regime as a universal one applicable to every § 501(c)(3) entity seeking to raise funds in California. Pl.-Appellant's Reply Br. at 10-18.

Before *this* Court, the Attorney General has attempted to expand the record below by making representations concerning the utility of CCP's donor information to her law enforcement mission. Pl.-Appellant's Reply Br. 20-24 (responding to the Attorney General's explanations first raised on appeal); Watkins

Br. at 6. None of these representations has been tested by discovery, trial, or an opportunity for full rebuttal.[2]

Consequently, the record below still stands: the Attorney General has failed to explain her need for CCP's donor information. This alone ought to suffice for CCP to obtain a preliminary injunction under the proper exacting scrutiny analysis. "[S]omething…outweighs nothing every time." *SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (*en banc*). The "First Amendment cannot be encroached upon for naught." *Id*. But the Attorney General's December 11th letter has substantially increased the danger of irreparable harm to CCP, and strengthens its case for preliminary relief.

[2] At oral argument, the Attorney General offered, yet again, additional representations concerning the use of this information. For instance, counsel suggested a scenario involving a lightly capitalized charity disclosing over $2 million in donations, the vast majority of which came from inflating the value of a worthless painting to a substantial value. It remains unclear as to whether that was an actual or hypothetical example, and what California law enforcement (as opposed to federal tax enforcement) interest would be served by knowing the names of donors to such an organization. Form 990 would already provide the Attorney General with reason to be suspicious: the public form would show extremely low outlays and an extremely high professed income. Moreover, the public 990 would list the *amount* of the painting donation, but not the name and address of the donor herself. At that point, the Attorney General would be within her rights to subpoena the circumstances of that particular donation. The Attorney General's latest example—whether reality or speculation—cannot justify, under exacting scrutiny, obtaining *all* donors to *all* charities. In any event, this scenario was not briefed in this Court or provided to the district court in any form. *Center for Competitive Politics v. Harris*, Tr. Recording at 28:25 (9th Cir.); *available at:* http://cdn.ca9.uscourts.gov/datastore/media/2014/12/08/14-15978.mp3.

A. The Attorney General's December 11th letter shifts the burden under the sliding scale analysis, justifying preliminary relief.

"[U]nder the so-called sliding scale approach, as long as the Plaintiff[] demonstrate[s] the requisite likelihood of irreparable harm and show[s] that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in Plaintiffs' favor." ER 6 (citing *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-1136 (9th Cir. 2011)). The Attorney General posits that "[t]he December 11, 2014 letter that plaintiff requests that this Court consider has no bearing on this question." Opp'n to Mot. at 6, n. 2. This is not the case.

This Court has determined "'that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" *Perry v. Schwarzenegger*, 591 F.3d 1126, 1139 (9th Cir. 2010) (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003)). And "[o]ne injury to [a party's] First Amendment rights is the disclosure itself. Regardless of whether they prevail at trial, this injury will not be remediable on appeal." *Perry*, 591 F.3d at 1137. Such is the case here.

Moreover, the specific harm threatened by the Attorney General is a significant one: either CCP must stop engaging in constitutionally protected speech soliciting contributions in California—the wealthiest and most populous state in the Union—or it must submit to the Attorney General's compelled disclosure

regime.[3] *Gaudiya Vaishnava Soc. v. San Francisco*, 952 F.2d 1059, 1064 (9th Cir. 1991) (recognizing solicitation of charitable contributions as "fully protected speech"). First Amendment injuries, even for "'minimal periods of time, unquestionably constitute[] irreparable injury.'" *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The Attorney General's assertion that harm may be avoided "by complying with state law," and that the injury to CCP is thus "of its own making" is deeply flawed. Opp'n to Mot. at 9, 10. When a highwayman gives one a choice between "your money or your life," he does not establish his legal right to either option. Similarly, the Attorney General simply begs the question in assuming, incorrectly, that there is no First Amendment harm inherent in the compelled disclosure of donor and membership lists. *See Acorn Invs. v. City of Seattle*, 887 F.2d 219, 226 (9th Cir. 1989) (unconstitutional to require disclosure of panoram-business shareholders to city, not because of potential harm to those shareholders, but

[3] This is true whether or not CCP's donors are publically disclosed in the future, a question that has not been tested by discovery or significant legal analysis. CCP continues to believe that the Attorney General has provided little reason to rely upon simple assertions on this point. It is known that a large number of "compliance failures" have not been caught by the Attorney General's staff. Watkins Br. at 8, quoting 2010 correspondence with then-Assistant Attorney General Belinda Johns ("We have always required the same Sched B as filed with IRS and that is what is filed by most charities and only recently became aware that we were receiving the public version – hence the letter to charities that filed that version this year"); NOM Br., Ex. B (letter dated April 22, 2013 requesting National Organization for Marriage's Educational Fund's ("NOM-Ed") unredacted Schedule B for the first time).

because there was "no logical connection between the City's legitimate interest" and the demand); *Perry*, 591 F.3d at 1133-34 (district court and parties agreed that "names of rank-and-file members" protected by First Amendment privilege); *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (providing NAACP with "immunity from *state* scrutiny of membership lists") (emphasis supplied); *Buckley v. Valeo*, 424 U.S. 1, 63-66 (in facial challenge lacking discussion of particularized risk to donors, "strict test established by *NAACP vs. Alabama* [was] necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment right," and noting that Supreme Court has "treated [contributors and members] interchangeably").[4]

Finally, the imminence of this irreparable harm was not known before CCP received the Attorney General's December 11 letter which, for the first time, gave a date certain by which significant and concrete penalties would fall upon CCP and its officers if it did not submit to the Attorney General's demand. This letter, sent mere days after oral argument, is manifestly unlike any previous communication that CCP has received from the Registry of Charitable Trusts. CCP has previously

[4] *See also Talley v. California*, 362 U.S. 60, 69 (1960) (Clark, J., dissenting) (ordinance struck down on First Amendment grounds despite a "record… barren of any claim, much less proof, that [plaintiff] would suffer any injury whatsoever"); *Perry*, 591 F.3d at 1143 ("[a]lthough the evidence presented by proponents is lacking in particularity, it is consistent with the self-evident conclusion that important First Amendment interests are implicated by [requests for internal communications]").

received two letters noting that its filing was incomplete because CCP failed to turn over its donor list. The first, sent out by the Registry on February 6, 2014 and signed by "A.B.", caused CCP to initiate this litigation on March 7, 2014. The second, sent out by the Registry on October 15, 2014 was simply signed "Registry of Charitable Trusts." Opp'n to Mot., Ex. 1. Both set (conflicting) 30-day deadlines. As is apparent from CCP's response of November 7, it believed that this follow-up letter had been sent in error, likely because Registry officials were not aware of the ongoing litigation initiated by the Attorney General's first demand. Opp'n to Mot., Ex. 2.

Thus, despite the Attorney General's assertions to the contrary, the Attorney General's imposition of a new date certain—January 10, 2015—before CCP's tax status is jeopardized, its officers become personally liable for late fees, and CCP's membership in the Registry is suspended, further compounds the irreparable harm at issue here. Accordingly, CCP's request for the protection of an injunction before that date ought to be granted. *Wild Rockies*, 632 F.3d at 1131 (Under sliding scale analysis, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits").

B. The balance of hardships tips sharply in favor of CCP.

While none of the Attorney General's assertions have been tested by discovery, the available evidence indicates that the Attorney General's *immediate*

demand for CCP donor information is completely unfounded. As briefing by *amicus curiae* Charles Watkins demonstrates, it was potentially not until 2010 that the Attorney General's staff even began to *notice* that charities were filing public copies of Form 990. Watkins Br. at 8 (quoting correspondence with Assistant Attorney General Belinda Johns). Moreover, *amicus* National Organization for Marriage Educational Trust Fund, a Registry member since 2010, has not suffered any consequences for its own failure to file an unredacted Schedule B. CCP also requests that this Court take judicial notice of similar proceedings brought against the Attorney General by an additional organization on December 9th, 2014[5] in the United States District Court for the Central District of California. *Americans for Prosperity Found. v. Harris*, Case No. 14-9448. *See United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (permitting judicial "notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue" and collecting cases). The Plaintiff in that matter had regularly obtained membership in the Registry since 2001, but was informed of a demand for its donors by letter in 2013. Case No. 14-9448 (Doc. 1, ¶¶ 3-4). All of these examples accord with CCP's own experience. Pl.-Appellant's Br. at 4 ("CCP, a Registry member since 2008, received such a notice in 2014").

[5] Two days before the Attorney General sent her December 11th demand letter.

Taken together, these instances demonstrate that the Attorney General has no pressing need for this information. She has successfully operated the Registry for many years without the donor information of an as-yet unknown, but clearly substantial, number of filers. They also demonstrate that the origin, scope, and motivation for the Attorney General's sudden demand are not yet known. Put simply, the Attorney General's ability to combat fraud in California will not be substantially harmed by a continuance of the State's previous approach to Schedule B—an approach followed by the overwhelming majority of her sister states without apparent ill-effect.[6]

Conversely, compliance with the Attorney General's demand would significantly infringe upon the First Amendment rights of CCP and its donors. Because "the balance of hardships tips sharply in [CCP's] favor," *Wild Rockies*,

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[6] Many states join California in requiring Form 990 as part of their annual charitable-solicitation reports. Some explicitly exclude Schedule B, but others use language similar to Cal. Code Regs § 301. None of this latter group interpret those provisions to require unredacted Schedule B information. *See, e.g.*, Fla. Stat. § 496.405(2)(a) ("[a] copy of the financial statement or Internal Revenue Service Form 990 and all attached schedules… [but organizations] may redact information that is not subject to public inspection pursuant to 26 U.S.C. s. 6104(d)(3) before submission."); Ga. Code § 43-17-5(b)(4) ("a copy of the Form 990… which the organization filed for the previous taxable year pursuant to the United States Internal Revenue Code"); Haw. Stat. § 467B-6.5(a) ("the annual report shall be a copy of that Form 990 or 990-EZ"); 14 Ill. Admin. Code Pt. 400 Appx. A ("a copy of the Federal return"); Kan. Stat. § 17-1763(b)(15) ("a copy of the federal income tax return of the charitable organization").

632 F.3d at 1132, and given that CCP has also raised "serious questions going to the merits," an injunction ought to issue. *Id*.

Conclusion

Many factual questions in this case have yet to be tested through the crucible of discovery and trial. But the Attorney General's December 11th letter is an immediate threat of irreparable injury. Combined with the district court's error in failing to properly apply exacting scrutiny, and the Attorney General's failure to demonstrate any substantive hardship she has suffered for lack of § 501(c)(3) charities' donor lists, this Court should grant CCP's motion to supplement the record and issue an injunction pending appeal. Doing so will protect its ability to hear the important legal questions already presented at this stage of the litigation.

Respectfully Submitted,

s/ Allen Dickerson

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Date: January 5, 2014.

9th Circuit Case Number(s) 14-15978

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