17-17403

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INSTITUTE FOR FREE SPEECH,

Plaintiff-Appellant,

v.

XAVIER BECERRA, in his official capacity as the Attorney General of California,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California

No. 14-cv-00636-MCE-DAD
The Honorable Morrison C. England, Jr., Judge

DEFENDANT-APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

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INTRODUCTION

This case raises a First Amendment challenge to a California law requiring charities to confidentially disclose to the California Registry of Charitable Trusts federal tax forms containing the identity of certain of its donors, as a condition for soliciting charitable contributions in the state. The district court granted Defendant-Appellee Attorney General Xavier Becerra's motion to dismiss the first amended complaint by Plaintiff Institute for Free Speech (IFS). IFS appeals from that dismissal order.

IFS was formerly known as the Center for Competitive Politics. There is no dispute that the issues IFS raises on appeal are controlled by precedent, specifically this Court's decision in a prior appeal in this case. *Ctr. for Competitive Politics v. Harris (CCP)*, 784 F.3d 1307 (9th Cir. 2015). There is also no dispute that the district court faithfully applied this Court's decision in *CCP*. Instead, IFS argues in its opening brief that *CCP* was wrongly decided. But, absent en banc review in this Court or review by the Supreme Court, *CCP* remains binding precedent. Accordingly, the Attorney General requests that this Court summarily affirm the district court's decision.

BACKGROUND

IFS is a charitable organization. (ER 66.) Under California law, all organizations seeking to solicit charitable contributions in the state must register

with the California Registry of Charitable Trusts. (*Id.*) One of the requirements for registration is that charitable organizations must include with their annual renewal a copy of their Internal Revenue Service Form 990, including Schedule B to that form, which lists the names and addresses of an organization's contributors. (ER 66-67; 4.) The Registry keeps confidential the contents of Schedule B. (ER 4.)

I. THIS COURT REJECTED IFS'S FACIAL CHALLENGE TO THE SCHEDULE B REQUIREMENT IN A PRIOR APPEAL.

This is the second time this case comes before this Court. In IFS's previous appeal, this Court affirmed the district court's denial of a preliminary injunction, holding that IFS had not shown that its "significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirement," and thus had failed to show an "actual burden" on its or its supporters First Amendment rights. *CCP*, 784 F.3d at 1316. This Court also rejected the argument that the disclosure requirement "in and of itself constitutes First Amendment injury." *Id.* In light of IFS's failure to demonstrate a burden, this Court concluded that "the disclosure requirement bears a 'substantial relation' to a 'sufficiently important' government interest." *Id.* at 1317 (citation

omitted). Thus, IFS's facial challenge failed under the applicable "exacting scrutiny" standard.[1] *Id.*

This Court left open the possibility that Plaintiff could show "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties," warranting relief on an as-applied basis. *Id.* (citing *McConnell v. FEC*, 540 U.S. 93, 199 (2003)). IFS sought and was denied certiorari review. *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015).

II. THE FIRST AMENDED COMPLAINT FAILED TO STATE A FIRST AMENDMENT CLAIM.

After remand from this Court, IFS filed its First Amended Complaint (FAC). (ER 64.) IFS again raised a First Amendment challenge to the Schedule B disclosure requirement. (ER 86-87.) The FAC also alleged that the disclosure

[1] To date, this Court has subsequently applied *CCP* in rejecting two other First Amendment challenges to California's Schedule B requirement. *Americans for Prosperity Found. v. Harris*, 809 F.3d 536 (9th Cir. 2015) ("We are bound by our holding in *Center for Competitive Politics*, 784 F.3d at 1317, that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional."). The Second Circuit has likewise rejected a similar challenge to New York's Schedule B requirement. *Citizens United v. Schneiderman*, 882 F.3d 374, 383-84 (2d Cir. 2018).

requirement constitutes an unlawful search and seizure under the Fourth Amendment. (ER 87-88.)[2]

The Attorney General moved to dismiss the amended complaint, and, applying *CCP*, the district court granted the motion. "Plaintiff amended its complaint in the face of the Ninth Circuit's admonitions as to the shortcomings of their [*sic*] claims, yet the FAC still fails to identify any cognizable burden on Plaintiff's freedom of association." (ER 10.) Specifically, the district court noted that the FAC had "no allegations that the Attorney General's demand for and collection of Schedule B forms for nonpublic use has caused any threat, harm, or negative consequences to Plaintiff or its members." (*Id.*) The district court also rejected IFS's Fourth Amendment claim, concluding that "the FAC does not demonstrate that the requirement to submit a copy to the Attorney General, for nonpublic use, of the very same Schedule B on file with the IRS amounts to a search or seizure." (ER 16.) Moreover, "whatever minimal intrusion" the

[2] The FAC also claimed that the disclosure requirement is preempted by federal law (ER 88-89), but IFS did not oppose the Attorney General's argument that this claim be dismissed. (ER 2 n.1.) This Court rejected the same Fourth Amendment claim in *CCP*, concluding that "Section 6104 [of the Internal Revenue Code] does not so clearly manifest the purpose of Congress that we could infer from it that Congress intended to bar state attorneys general from requesting the information contained in Form 990 Schedule B." *CCP*, 784 F.3d at 1319; *see also Citizens United*, 882 F.3d at 389 (rejecting similar preemption challenge to New York's Schedule B requirement for charities).

Schedule B requirement poses "is more than outweighed by the Attorney General's interest in enforcing the law and protecting the public from fraud." (ER 17.)

IFS appeals from that dismissal, and has moved for initial hearing en banc. On appeal, IFS does not dispute that the district court "faithfully applied" this Court's previous decision in *CCP* in dismissing the complaint. (Pet. for Initial Hearing En Banc at 1.) Instead, IFS argues that *CCP* was wrongly decided. (Appellant's Opening Br. at 28.) Because this appeal is clearly controlled by precedent, the Attorney General moves for summary affirmance of the district court's decision.

LEGAL STANDARD

Under Ninth Circuit Rule 3-6, this Court can summarily dispose of civil appeals if "it is manifest that the questions on which the decision in the appeal depends are so insubstantial as not to justify further proceedings." "Motions to affirm should be confined to appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief." *U.S. v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam). "Where the outcome of a case is beyond dispute, a motion for summary disposition is of obvious benefit to all concerned." *Id.*

ARGUMENT

Because this appeal is controlled by precedent, the Attorney General moves for summary affirmance of the district court's decision.[3] IFS's opening brief argues that in *CCP*, this Court "mistakenly determined that compelled disclosure does not constitute a First Amendment injury." (AOB 27-28.) Accordingly, IFS argues that *CCP* should be overturned. (AOB at 29.) "The *CCP* panel decision contains a number of errors, one of which seriously mangled Circuit precedent," IFS argues. (*Id.* at 37.) "Consequently," IFS contends, "it ought to be treated as less authoritative than more considered case law." (*Id.*) Under cases preceding *CCP*, IFS claims it would "likely have prevailed on the merits." (*Id.* at 43.)[4] In short, IFS asks this Court to disregard its holding in *CCP* that a disclosure requirement does not *ipso facto* constitute First Amendment injury. *CCP*, 784 F.3d

[3] Under General Order 3.6, the Attorney General also requests that this case and motion be presented to the panel that decided *CCP*. *U.S. v. Ameline*, 409 F.3d 1073, 1085 n.9 (9th Cir. 2005) (en banc) (in criminal sentencing matter, noting that "A new appeal taken after the filing of the district court's order will be subject to the usual procedure pertaining to comeback cases, as provided in General Order 3.7."); *see U.S. v. Cordoba*, 194 F.3d 1053, 1064 (9th Cir. 1999) (Goodwin, J., concurring separately) (describing "comeback case" procedure).

[4] Although IFS's brief at one point contends that dismissal was improper even under *CCP*, the opening brief does not substantively address this point at all. (AOB at 28.) Accordingly, this argument is waived on appeal. Fed. R. App. P. 28(a)(8); *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (noting that this Court will "review only issues which are argued specifically and distinctly in a party's opening brief," and thus the Court will not "manufacture arguments for an appellant").

at 1316 ("[C]ontrary to CCP's contentions, no case has ever held that a disclosure requirement in and of itself constitutes First Amendment injury."). But the law of the case and circuit precedent foreclose this.

Under the law-of-the-case doctrine, "one panel of an appellate court will not reconsider matters resolved in a prior appeal in the same case." *Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1392 (9th Cir. 1995). Although this doctrine is not an absolute bar to reconsideration of previously decided matters, *id.* at 1393, IFS points to no intervening change of authority, new evidence, or clear error on the previous disposition warranting reconsideration. (*See generally* AOB.)

Moreover, *CCP* is binding precedent, which can only be revisited by an en banc court or the Supreme Court. *Palmer v. Sanderson*, 9 F.3d 1433, 1437 n.5 (9th Cir. 1993) ("As a general rule, a panel not sitting en banc may not overturn circuit precedent."); *see also U.S. v. Garza*, 980 F.2d 546, 555 (9th Cir. 1992) (same).

Recognizing these obstacles, IFS states that if its claims are foreclosed by *CCP*, this Court should "affirm the district court's decision on the papers." (AOB at 44 n.18.) IFS concedes "No party nor this Court would benefit from consideration of that question by another three-judge panel bound by the *CCP* opinion." (Pet. for Initial Hearing En Banc at 1.) Because, in IFS's words, "the

district court below faithfully applied" *CCP*, (*id.*), this Court should summarily affirm the district court's decision.[5]

CONCLUSION

For these reasons, this Court should summarily affirm the district court decision.

Dated: June 8, 2018

Respectfully submitted,

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[5] IFS's pending motion for initial hearing en banc, does not prevent summary disposition. The panel can grant summary disposition and stay its mandate until the petition for initial hearing en banc is resolved.