No. 15-55446

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICANS FOR PROSPERITY FOUNDATION,
Plaintiff-Appellee,

v.

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

On Appeal from the United States District Court
for the Central District of California
Case No. 2:14-cv-09448-R-FFM

ANSWERING BRIEF OF PLAINTIFF-APPELLEE AMERICANS FOR PROSPERITY FOUNDATION

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CORPORATE DISCLOSURE STATEMENT

Americans For Prosperity Foundation is a nonprofit corporation organized under the laws of Delaware. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

The First Amendment grants individuals who support private advocacy organizations the right to remain anonymous lest public disfavor and harassment chill their speech. *See, e.g.*, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460–66 (1958). Federal statutes respect this constitutional right by forbidding the disclosure—whether to the public or to state governments—of the confidential federal tax form (called "Schedule B") that nonprofit charities file with the Internal Revenue Service ("IRS"), listing the names and addresses of their major donors nationwide. Federal statutes further authorize criminal penalties for any breach of confidentiality.

California's Attorney General, after accepting charitable registrations and renewals for more than a decade without need for Schedule Bs, suddenly began demanding, on pain of draconian sanctions (including personal fines against a charity's officers), that Schedule Bs be filed with her. She did so without acknowledging any change in position, much less justifying it; without issuing any implementing regulations; and without establishing any meaningful assurance of confidentiality.

Plaintiff-Appellee Americans for Prosperity Foundation ("Foundation") is a 501(c)(3) nonprofit that promotes limited government and free markets by educating individuals around the country about practical ways to improve their

circumstances. Its views—like those of Charles and David Koch, who are two of its founders—are not universally popular. It has learned from experience that it must zealously guard the confidentiality of its donors to ensure their safety and enable their continuing association.

Before granting a preliminary injunction protecting against disclosure of the Foundation's Schedule B, the district court specifically considered evidence of threats, violence, and harassment directed at the Foundation, as attested to in sworn affidavits and confirmed by accompanying documentation. The court found based on the available record "that public disclosure of [the Foundation's] Schedule B, and thus the names and addresses of its donors, would open those persons up to harassment, retaliation, and chilling of free speech." Excerpts of Record ("ER") 24, Docket Entry 12-2. Because "members [of the Foundation] whose identities are known have been subject to threats of harassment and violence," ER 24–25, the Foundation's "proffered evidence tends to show" that if other supporters of the Foundation "were known to the public they would face similar harassment and retaliation." ER 25. "These negative consequences," the court concluded, "would objectively work to chill protected First Amendment speech." ER 25.

Accordingly, to preserve the *status quo* and enable development of a more complete evidentiary record, the district court exercised its discretion to grant a preliminary injunction preventing the Attorney General from enforcing her demand

for the Foundation's Schedule B. In doing so, the court explained why "the balance of hardship[s] sharply favors [the Foundation]." ER 14. On the one hand, freezing the status of this one charity's Schedule B poses no prejudice to the Attorney General, who "has not suffered harm from not possessing [the Foundation's] Schedule B for the last decade." *Id.* On the other hand, "[t]he hardship [the Foundation] would face from disclosure . . . is far greater and likely irreparable"—especially because confidentiality protections and anonymity, once relinquished, can hardly be reclaimed. *Id.* "When, as here," a government action "infringes on First Amendment rights of those 'seeking to express their views,' the 'balance of equities and the public interest . . . tip sharply in favor of enjoining" that government action." ER 4 (quoting *Klein v. City of San Clemente*, 584 F.3d 1196 (9th Cir. 2009)).

The Attorney General falls far short of establishing that the district court abused its discretion by entering a preliminary injunction as it did. This Court should therefore affirm and leave the *status quo* preserved pending final adjudication. Notably, discovery is proceeding apace *en route* to a trial currently scheduled for February 2016. From there, both the district court and this Court will have the benefit of the evidentiary record that is appropriate for deciding, fully and finally, the important First Amendment issues presented in this case.

STATEMENT OF JURISDICTION

The district court has jurisdiction under 28 U.S.C. §§ 1331 and 1343. This is an appeal of an order granting a preliminary injunction, which this Court has jurisdiction to hear under 28 U.S.C. § 1292(a)(1). The order issued on February 23, 2015. The Attorney General of California noticed appeal twenty-nine days later, on March 24, 2015, making the appeal timely under 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the district court abuse its discretion when it preliminarily enjoined the Attorney General from enforcing her demand that the Foundation disclose the names and addresses of its major donors, as listed on an otherwise confidential and specially protected "Schedule B" form filed with the U.S. Internal Revenue Service?

PERTINENT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

U.S. Constitution, First Amendment

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Additional pertinent provisions are included in the addendum at the end of this brief.

STATEMENT OF THE CASE

On February 23, 2015, the District Court for the Central District of California preliminarily enjoined the Attorney General of California "from demanding, and/or from taking any action to implement or to enforce her demand for, a copy of the [Americans for Prosperity] Foundation's Schedule B to IRS Form 990 or any other document that would disclose the names and addresses of the Foundation's donors, until this Court issues a final judgment." ER 4. The court did so after finding (among other things) that disclosing the names and addresses of the Foundation's donors would chill their speech and their willingness to associate with the Foundation by exposing them to harassment and violence. ER 12–13, 24–25. The Attorney General has appealed the preliminary injunction.

I. The Foundation And The Threats It Confronts

Americans for Prosperity Foundation is a nonprofit private advocacy organization devoted to promoting limited government and free markets by educating Americans about how to improve their lives and circumstances. ER 54. Two of its founders are David Koch—who is also the Foundation's Chairman—and his brother Charles Koch. ER 83. The views of the Foundation are by no means universally popular. ER 80.

The Foundation has learned from experience that it must zealously guard the confidentiality of its donors for the sake of protecting their trust and ensuring their safety. ER 80. The Foundation's events and offices throughout the country regularly draw protests at which persons associated with the Foundation are threatened with violence. ER 58. At the Foundation's 2011 summit held in Washington DC, for example, violent protestors tried to storm the meeting, physically accosted and injured some attendees, and placed the remaining attendees at serious risk. ER 58.[1]

Among the chief targets are David Koch and Charles Koch. Over the past few years, they have faced unrelenting threats and attacks via social media, phone calls, email, and protests outside their homes and offices, due in part to their work with, or perceived ties to, the Foundation. ER 58. These threats are serious and often horrific, ranging from threats to kill or injure David and Charles, to threats of violence against their families, to threats to firebomb company facilities or disrupt

[1] *See* Clare O'Connor, *Occupy the Koch Brothers: Violence, Injuries, and Arrests at DC Protest*, Forbes (Nov. 5, 2011, 12:10 PM), http://www.forbes.com/sites/clareoconnor/2011/11/05/occupy-the-kochs-violent-clashes-injuries-and-arrests-at-protest-against-corporate-greed/ (visited June 24, 2015, as were all websites cited in this brief); Matthew Boyle, *Conservative Group Staffers, Event Attendees: 911 Hung Up On Us Four Times During Occupy DC Mob*, Daily Caller (Nov. 7, 2011, 12:50 AM), http://dailycaller.com/2011/11/07/koch-group-staffers-event-attendees-911-hung-up-on-us-four-times-during-occupy-dc-mob/.

company business activities. ER 58–59. One person sent the following email from the address deadkochs@Safe-mail.net:

> someone offered me $500,000 to kill david and charles koch i declined the offer and said that i'd do it for absolutely nothing just to rub it in there faces that money can't by you happiness because it's going to make me extremely happy to kill the two of them i'm flying to where they are today so by the end of the week the two biggest piles of shit in american will be dead david and charles are the lowest form of human existence in the universe but will be dead very soon and guess what i'm doing it for free. I'm not even going to give them the chance to plead or beg for they life just going to sneak up behind them a pop pop pop or maybe get them while they sleep somehow mark my words they will be dead by the end of the month.

ER 65. Equally appalling threats teem across social media:

- "Let's drag those Koch brothers out, and let the hangman do his deed, so they can twist in the wind."
- "The Koch should be publicly executed. A firing squad on national television. For treason. No, I am not kidding."
- "Guillotine the Koch brothers please."
- "I wouldn't murder anyone nor condone it, but man I fantasize about the death of the Koch Brothers . . . ."
- "I say we kill the Koch brothers and their entire family line";
- "Kill the Koch brothers."
- "Every day I pray to G-d that someone will murder the 2 Koch brothers! I was thinking if say 100K people chipped in ten bux we could hire a hit man to rid the world of these FUCKING ASSHOLES!!"
- "If I was given a chance to murder a Koch brother in cold bloo[d] I would SURELY TAKE IT."

- "someone needs to KILL the Koch brothers NOW!!!"
- "Can someone assassinate the Koch family already? Whats taking so long?"

ER 61–63.

Members of the public are not the only harassers. California officials have also previously targeted David Koch and Charles Koch and tried to smear advocacy groups supposedly associated with them. ER 25–26, 55–56, 59. For example, officials at the California Fair Political Practices Commission imposed fines on two nonprofit organizations and unjustifiably broadcast claims that these groups were part of the "'Koch Brothers' Network' of dark money political nonprofit corporations." ER 59.[2] The Commission's former chair later admitted there was no evidence connecting David or Charles Koch to the relevant groups' activities or funding in California. ER 59.[3]

The vitriol directed at the Foundation is not limited to David Koch and Charles Koch. Other donors whose affiliation with the Foundation is publicly known have received threats of physical harm, have had their businesses boycotted, and have been subjected to character assassination in their hometown

[2] California Fair Political Practices Commission, *FPPC Announces Record Settlement in $11 Million Arizona Contribution Case* (Oct. 24, 2013), http://www.fppc.ca.gov/press_release.php?pr_id=783.

[3] *See* Elizabeth Harrington, *Official: Kochs Not Involved in California Campaign Finance Violation*, Washington Free Beacon (Nov. 4, 2013, 4:40 PM), http://freebeacon.com/politics/official-kochs-not-involved-in-california-campaign-finance-violation/.

newspapers. ER 54. Last year, for example, reporters published a list of potential donors to the Foundation. ER 55. Individuals on the list were immediately harassed and their businesses boycotted. ER 55.

Faced with such bullying, current and potential donors to the Foundation understandably fear that disclosure will put them and their families at risk. Indeed, dozens of potential donors, a number of whom live in California, have reluctantly refused to contribute to the Foundation because they would face reprisals if their contributions become publicly known. ER 55. Current donors have also expressed grave concerns about disclosure of their names and addresses, and they have indicated that they will cease or reduce their contributions if their identities are revealed to officials of California. ER 55.

II. IRS Form 990 And Schedule B

The Internal Revenue Service recognizes the Foundation as a 501(c)(3) nonprofit charity. ER 86. As a result, the Foundation is exempt from federal income taxes, but it must file an annual tax return known as a "Form 990." ER 86; *see* IRS Form 990, http://www.irs.gov/pub/irs-pdf/f990.pdf. Once filed, a return must be "made available to the public." 26 U.S.C. § 6104(b).

When it files its Form 990 with the IRS, the Foundation must include a separate form called "Schedule B," or the "Schedule of Contributors," which lists the name and address of each of the Foundation's major donors—namely every

individual nationwide who donated more than $5,000 to the Foundation during that tax year. ER 86; *see* IRS Schedule B to Form 990, http://www.irs.gov/pub/irs-pdf/f990ezb.pdf.

This donor information is extremely sensitive—not least because of First Amendment concerns—and is treated accordingly by federal law. The IRS is forbidden from disclosing the "name or address of any contributor" listed on a Schedule B. 26 U.S.C. § 6104(b). Federal employees who violate this stricture risk civil and criminal penalties. *See* 26 U.S.C. §§ 7213, 7431. And although charities themselves normally must share their tax returns with the public, *see* 26 U.S.C. § 6104(d)(1), they are "not required to publicly disclose their donors." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1460 (2014); *see* 26 U.S.C. § 6104(d)(3)(A) (exempting charities from having to disclose "the name or address of any contributor"). In short, a charity's Form 990 is public, but its Schedule B is not.

III. The Attorney General's Regulation Of The Foundation

California has its own regulatory scheme for charities. Along with three other States (Illinois, Michigan, and Oregon), California has adopted the Uniform Supervision of Trustees for Charitable Purposes Act ("Charities Act"). Cal. Gov't Code §§ 12580–12599.8; *see* Marion R. Fremont-Smith, *Governing Nonprofit Organizations: Federal and State Law and Regulation* 312–13 (2004) (discussing the uniform act).

The Charities Act requires charities to register with California, § 12585, and to file "periodic reports," the "contents" of which are set by "rules and regulations" promulgated by the Attorney General, § 12586(b). According to the Attorney General's regulations, *see* Cal. Code Regs., tit. 11, §§ 300–312.1, a charity's periodic report must be filed annually, and must include the charity's "Form 990." § 301. Yet no rule or regulation states that a Schedule B must be filed.

The Charities Act further mandates that each "report" a charity files with the Attorney General "shall be open to public inspection," unless exempted by "rules and regulations adopted by the Attorney General." Cal. Gov't Code § 12590.[4] Although the Attorney General is *authorized* to exempt materials from this public-disclosure mandate, she has not ostensibly *exercised* that authority. To the contrary, she has promulgated a regulation reiterating that "the reports filed with the Attorney General . . . shall be open to public inspection." Cal. Code Regs., tit. 11, § 310. Thus, every annual report the Foundation files with the Attorney General—including any Schedule B enclosed with the report—should ostensibly be available to the public.

[4] This provision also directs the Attorney General to withhold from public inspection an "instrument"—which differs from a periodic "report"—if the instrument is "not exclusively for charitable purposes." Cal. Gov't Code § 12590; *see also* § 12586(a) (distinguishing "instruments" from "periodic reports"). Thus, certain *instruments* are withholdable, but all *periodic reports* are open to the public.

The Attorney General recently acknowledged (only *after* unsuccessfully defending against the preliminary injunction and contending it was unnecessary) this gaping hole in California law for safeguarding the confidentiality of donor information. In early June 2015—well after the preliminary injunction issued, and, indeed, after the Attorney General had filed her Opening Brief to this Court—she began requesting comments on a new "proposed regulation dealing with Schedule B" to be codified at § 301.1. *See* Unopposed Motion To Take Judicial Notice, Exhibit 1 at 1, Docket Entry 18-2.[5] As now proposed for comment, § 301.1 would prohibit the Attorney General from disclosing a Schedule B except in limited circumstances: "Donor information treated as confidential by the Internal Revenue Service pursuant to Internal Revenue Code section 6104(d)(3)(A) shall be treated as confidential by the Attorney General and shall not be disclosed except" in an enforcement proceeding or in compliance with a court or administrative order. *Id.* at 2. This proposed new regulation would, of course, be superfluous if the Attorney General's contentions to date were correct and she was already forbidden from disclosing Schedule B. By all indications, the Attorney General is contemplating adding § 301.1 precisely because California law as it exists today otherwise *compels*—rather than *forbids*—disclosure of any Schedule B on file.

[5] This citation is to a letter from a Deputy Attorney General of California. As a public record created by a state administrative agency, it is appropriate for the Court to take judicial notice of this letter. *See Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n.1 (9th Cir. 2004).

The Foundation has long complied with the Charities Act and its implementing regulations. Since at least 2001, the Foundation has annually filed with the California Attorney General the requisite periodic report containing the Foundation's Form 990. ER 29, 33–34. In none of those years, however, did the Foundation submit its Schedule B. ER 29. Indeed, the Foundation keeps the names and addresses of its donors strictly confidential, and it has never disclosed its Schedule B to officials of California or any other State. ER 29. For a decade, the Attorney General apparently had no qualms with this approach. For each year from 2001 through 2010, she "[a]ccepted" the Foundation's annual registration renewal and listed the Foundation as an active charity in compliance with California law. ER 33–34.

IV. The Attorney General's Demand For Schedule Bs

Two years ago, the Attorney General changed course. In a letter dated March 7, 2013, the Attorney General declared the Foundation's 2011 annual report "**incomplete** because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors." ER 38 (emphasis in original). On December 17, 2013, she issued another letter deeming the Foundation's 2012 report "**incomplete**" for the same reason. ER 40 (emphasis in original). During the following months, she twice repeated her demands for the Foundation's 2011 and 2012 Schedule Bs. ER 42, 44. On June 17, 2014, the Foundation asked the

Attorney General to wait until resolution of a then-pending case—*Center for Competitive Politics v. Harris* ("*CCP*"), No. 14-15978 (9th Cir.)—that challenged the legality of such demands. ER 46. She refused. ER 48–49.

Matters reached a boil on October 29, 2014, when the Attorney General issued an ultimatum: unless the Foundation turned over its Schedule Bs for 2011 and 2012 within 30 days, the Attorney General would (1) notify the California Franchise Tax Board "to disallow" the Foundation's state tax exemption; (2) impose late fees on the Foundation's "directors, trustees, officers, and return preparers responsible for failure to timely file the [Schedule B]," and these individuals would be "**personally liable** for payment of all late fees"; and (3) "**suspend the registration**" of the Foundation. ER 51–52 (emphasis in original).

Once again, the Foundation reached out to the Attorney General in an effort to resolve the dispute amicably, but the Attorney General remained unwilling to withdraw her demand for the Foundation's Schedule B. ER 89–90, 125–30. So on December 9, 2014, the Foundation filed its Complaint, arguing that the Attorney General's disclosure demand violated the First Amendment and was preempted by 26 U.S.C. § 6104.[6] ER 79–130, 143. Six days later, the Foundation moved for a preliminary injunction. ER 144–45.

[6] The preemption argument is not at issue here. In basing the preliminary injunction on First Amendment grounds, the district court "decline[d] to address plaintiff's preemption arguments." ER 15. The Foundation respectfully maintains

The Attorney General offered two main arguments in opposing the preliminary injunction: (1) the Foundation has failed "to make a prima facie showing of a First Amendment violation," ER 9; and (2) her demand satisfies "exacting scrutiny," because there is both a "compelling" state interest and a "substantial relationship between the information sought and [that] overriding and compelling state interest." ER 3 (quoting *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87, 92 (1982)). The district court rejected both.

V. The District Court's Ruling Under Review

At a hearing on February 17, 2015, the district court granted the Foundation's motion for a preliminary injunction. ER 15. The court first ruled that it was "not necessary" for the Foundation "to make a prima facie showing of a First Amendment violation." ER 11. On that point, it noted that this Court had issued an injunction pending appeal in *CCP*, even though there was no evidence in that case of any burden on the plaintiff's First Amendment rights. ER 9–11 (citing Order, *CCP*, No. 14-15978, Docket Entry 34 (9th Cir. Jan. 6, 2015)).

In any event, the district court further concluded that, even if a *prima facie* showing were necessary, the Foundation "has made such a showing." ER 11. The court incorporated its previous finding that the Foundation "has proffered sufficient

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its preemption claim below, but does not press preemption as an alternative ground for affirmance.

evidence establishing that public disclosure would have a chilling effect on free speech." ER 12 (citing ER 23–27). In that earlier order, the court had found that the evidence of threats, violence, and harassment directed at the Foundation "demonstrat[es] that public disclosure of [the Foundation's] Schedule B, and thus the names and addresses of its donors, would open those persons up to harassment, retaliation, and chilling of free speech." ER 24. As the court put it, "members [of the Foundation] whose identities are known have been subject to threats of harassment and violence," ER 24–25, and the Foundation's "proffered evidence tends to show" that if the identities of additional Foundation supporters "were known to the public they would face similar harassment and retaliation." ER 25. "These negative consequences," the court concluded, "would objectively work to chill protected First Amendment speech." ER 25.

At the preliminary-injunction hearing in February 2015, the court built on these earlier findings and further concluded that the Foundation would be harmed under the First Amendment "even if [its] Schedule B was only disclosed to" the Attorney General. ER 12. Whereas the Attorney General claimed that disclosure to her alone would be harmless because her "policy" is to keep every Schedule B confidential, ER 12, the district court disagreed. First, it found that the purported confidentiality policy is "not binding," both because it is inconsistent with California Government Code § 12590—the statutory provision that mandates

public inspection of a charity's annual reports—and because the "policy" is "entirely discretionary and could change at any moment." ER 12. Disclosure to the Attorney General would thus threaten the same First Amendment harms as disclosure to the public. Second, the court found that the Foundation's donors would be chilled by the prospect of harassment from California officials, irrespective of any potential public disclosure. ER 12–13.

Applying exacting scrutiny, the court concluded that the Foundation has raised serious questions about whether the Attorney General has an adequate "interest" in making her disclosure demand. ER 13. The court expressed doubts about the Attorney General's interest, in part because she sought the names and addresses of all of the Foundation's major donors *nationwide*—not just those in California—and in part because the Attorney General "lacks express[] statutory authority" to demand the Foundation's donor information. ER 13. Questions mount given the availability of "numerous less intrusive alternatives" that the Attorney General might use to achieve her law-enforcement goals without demanding the names and addresses of all of the Foundation's major donors nationwide. ER 13–14 (describing potential alternatives).

Assessing the potential damage to each party, the court reasoned that "the balance of hardship[s] sharply favors [the Foundation] because [the Attorney General] has not suffered harm from not possessing [the Foundation's] Schedule B

for the last decade. The hardship [the Foundation] would face from disclosure, however, is far greater and *likely irreparable*." ER 14 (emphasis added). Moreover, "[w]hen, as here," a government action "infringes on First Amendment rights of those seeking to express their views, the balance of equities and the public interest tip . . . in favor of enjoining" that government action. ER 14–15 (citing *Klein*, 584 F.3d 1196). The court thus found that the Foundation has "demonstrated that the balance of hardships and public interest sharply . . . favor [the Foundation]." ER 15.

Because all four factors of the preliminary-injunction test—(1) likelihood of success; (2) likelihood of irreparable harm; (3) balance of equities; and (4) public interest—weighed in favor of the Foundation, the court granted the Foundation's motion for a preliminary injunction on First Amendment grounds. ER 15.

On February 23, 2015, six days after the hearing, the district court issued a written order specifying the terms of the preliminary injunction:

> **IT IS HEREBY ORDERED** that the Attorney General is preliminarily enjoined from demanding, and/or from taking any action to implement or to enforce her demand for, a copy of the Foundation's Schedule B to IRS Form 990 or any other document that would disclose the names and addresses of the Foundation's donors, until this Court issues a final judgment.

ER 4. The written order also reiterated many of the rulings and findings the court had made at the hearing. ER 2–4. Twenty-nine days later, on March 24, 2015, the Attorney General timely noticed her appeal of the preliminary injunction. ER 78.

Subsequent to noticing her appeal, the Attorney General sought a stay of further district court proceedings, which stay the Foundation opposed and the district court denied. Supplemental Excerpts of Record ("Supp. ER") 150–52. Accordingly, discovery has been proceeding apace. Per the district court's scheduling order, discovery will close on January 4, 2016; the final pretrial conference will be held on January 15, 2016; and any trial will commence on February 23, 2016. Supp. ER 149.

SUMMARY OF ARGUMENT

The Supreme Court has repeatedly held that the First Amendment protects private advocacy groups from compulsion to disclose the identities of their supporters to state officials when doing so would expose their supporters to threats, harassment, and reprisals, or when the state officials lack a compelling interest substantially related to their disclosure demand. *E.g.*, *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 557–58 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 526–27 (1960); *NAACP v. Alabama*, 357 U.S. at 460–66. The preliminary injunction now under review comports with those seminal precedents, as well as settled law that informs a district court's exercise of discretion to preserve the *status quo* pending final adjudication.

To begin with, the Foundation in this case established a likelihood of success on the merits, or else, at the very least, it raised serious merits questions. As the

district court found, the evidence in this case establishes that persons who are publicly known to be affiliated with the Foundation are threatened, harassed, and subjected to reprisals.

The Attorney General does not dispute these factual findings. Instead, she contends they are irrelevant because she has promised (in this litigation) to keep confidential the identities of the Foundation's major donors if they are revealed to her, so these donors should not fear becoming known to the public. This promise rings hollow. California's statutory *law*—which supersedes the Attorney's General's promises—ostensibly *requires* disclosure of all forms a charity submits to the Attorney General, including a Schedule B containing donor identities. *See* Cal. Gov't Code § 12590; Cal. Code Regs., tit. 11, § 310. Moreover, the Attorney General has conceded that she—or any future successor—could change her confidentiality policy at any moment. The First Amendment does not relegate a private advocacy group and its supporters to the standardless, ephemeral discretion of government officials as the sole bulwark protecting them against exposure to intimidation and retaliation. Such protection (if it can be called "protection") is especially unsatisfying in a case, like this one, where relevant government officials have a track record of themselves going after persons affiliated with the advocacy group, particularly in recent years.

Once her demand for the Foundation's Schedule B is subjected to the exacting scrutiny that applies, the Attorney General fails to justify it. Instead of factual proof, she offers *ipse dixit*, asserting a general interest in enforcing laws related to charities. But she cites no evidence whatsoever that she has a particular need for the identities of the *Foundation*'s donors nationwide. She does not suggest, for instance, that the Foundation or its donors have violated a particular California law or otherwise are being investigated for a specific reason. The lack of justification for demanding the Foundation's Schedule B is all the more glaring because the Attorney General lacks statutory authorization to compel a charity to disclose the names and addresses of its donors. Similarly, the lack of adequate tailoring is obvious because there are numerous, less-restrictive alternatives that the Attorney General has available to pursue her law-enforcement interests, short of demanding donor names and addresses nationwide. Accordingly, the Foundation is likely to prevail on the merits of its First Amendment claim.

Moreover, the Foundation established that it faces irreparable harm absent a preliminary injunction. If compelled to disclose the names and addresses of its donors, the Foundation and its supporters would be chilled from exercising their First Amendment right to engage in expressive association. The government causes "irreparable injury" when it places individuals "in fear of exercising their constitutionally protected rights of free expression, assembly, and association,"

Allee v. Medrano, 416 U.S. 802, 814–15 (1974), as even the temporary "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion).

Finally, the balance of equities and public interest decisively favor a preliminary injunction. On one side of the scale, the Attorney General lacks any particular need for the Foundation's Schedule B, which California has been content to go without for more than a decade, under circumstances that have not changed in the slightest. On the other side of the scale, the Foundation and all its supporters face the jarring, irreparable loss of cherished First Amendment freedoms—not to mention the threats, harassment, and reprisals—that would result from interim disclosure of the Foundation's Schedule B. What is more, this Court has long recognized that there is a "significant public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (citation omitted).

In sum, the balancing of interests in this case is not close; it tips overwhelmingly in favor of a preliminary injunction, just as the district court explained. Especially when evaluated through this Court's operative standard of review, abuse of discretion, the district court's entry of the preliminary injunction and rationale therefor should be beyond fault. Accordingly, this Court should affirm and leave the preliminary injunction in place while discovery unfolds, the record is compiled, and the case proceeds to final judgment.

STANDARD OF REVIEW

Appellate review of a district court's grant of a preliminary injunction is "limited and deferential." *Southwest Voter Registration Education Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (*en banc*). This Court "can reverse the district court only if it abused its discretion," *Demery v. Arpaio*, 378 F.3d 1020, 1027 (9th Cir. 2004), as it might if "it base[d] its decision on an erroneous legal standard or on clearly erroneous findings of fact," *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012) (citation omitted).

Consistent with the "deferential" nature of this Court's review, it "will not reverse the district court's decision simply because we would have arrived at a different result if we had applied the law to the facts of the case." *Doe v. Harris*, 772 F.3d at 570 (brackets, citation, and quotation marks omitted); *accord Garcia v. Google, Inc.*, --- F.3d ----, 2015 WL 2343586 (9th Cir. May 18, 2015) (*en banc*). "Mere disagreement with the district court's conclusions is not sufficient reason for us to reverse the district court's decision regarding a preliminary injunction." *National Wildlife Federation v. National Marine Fisheries Service*, 422 F.3d 782, 793 (9th Cir. 2005).

Special deference is paid to the district court in cases—like this one—where a preliminary injunction safeguards First Amendment interests. "The Supreme Court has directed that when a district court grants a preliminary injunction

protecting First Amendment rights, 'i[f] the underlying constitutional question is close . . . we should uphold the injunction and remand for trial on the merits.'" *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128 (9th Cir. 2011) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 664–65 (2004); alterations in *Thalheimer*).

A district court appropriately issues a preliminary injunction if the movant establishes that four factors, as balanced together, weigh in its favor. Traditionally, these factors are described as: "[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). But these factors are subject to a "sliding scale," whereby "a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). A plaintiff who demonstrates that the balance of hardships tips "sharply" in her favor need only raise "serious questions going to the merits"—a lesser showing than likelihood of success on the merits. *Id.* at 1131–35. In other words, as an alternative to the traditional *Winter* test, a plaintiff can secure a preliminary injunction by satisfying the "serious questions" test: "[1] there is a likelihood of irreparable injury to plaintiff; [2] there are serious questions going to the merits; [3] the balance of

hardships tips sharply in favor of the plaintiff; and [4] the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012).

The Attorney General is wrong to submit that the Foundation bears an "evidentiary burden . . . more rigorous" than usual because the target of its preliminary injunction is the government. Opening Brief ("Op. Br.") 23. In fact, the plaintiffs in *Winter*, *Alliance for the Wild Rockies*, and *M.R.* all sought preliminary injunctions against the government. None of these decisions—nor any subsequent Supreme Court or Ninth Circuit decisions—so much as hints that plaintiffs suing the government bear a heightened burden. Instead, the applicable standards are precisely as described above.[7] If anything, precedent establishes that preliminary injunctions are especially appropriate in First Amendment challenges—even though such challenges are (to state the obvious) customarily directed against the government. *See, e.g.*, *Thalheimer*, 645 F.3d at 1128.

[7] None of the three Ninth Circuit cases the Attorney General cites supports the proposition that a more rigorous evidentiary standard applies to preliminary injunctions against the government. The first, *Midgett v. Tri-County Metropolitan Transportation District of Oregon*, 254 F.3d 846 (9th Cir. 2001), concerned a *permanent* injunction, not a *preliminary* injunction. The second, *Thomas v. County of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992), explained that certain claims against police officers require evidence of a "persistent pattern of misconduct" to establish a likelihood of success on the merits. That standard does not apply to *other* claims against the government—in particular, the First Amendment claim here—nor does it change the applicable evidentiary standard, which is *likelihood* of success on the merits. The third case, *Coalition for Economic Equity v. Wilson*, 122 F.3d 718 (9th Cir. 1997), says nothing whatsoever about evidentiary standards.

ARGUMENT

I. The Foundation Will Likely Succeed On Its As-Applied First Amendment Challenge

The First Amendment grants individuals who donate to private advocacy organizations the right to remain anonymous lest public disfavor or retaliation chill their speech. *Gibson*, 372 U.S. 539, 557–57; *Bates*, 361 U.S. 516, 526–27; *NAACP v. Alabama*, 357 U.S. at 460–66; *Perry v. Schwarzenegger*, 591 F.3d 1147, 1159–60 (9th Cir. 2010); *Familias Unidas v. Briscoe*, 619 F.2d 391, 398–402 (5th Cir. 1980).

To vindicate this right, the Supreme Court has "held laws unconstitutional that require disclosure of membership lists for groups seeking anonymity." *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (citing *Brown*, 459 U.S. at 101–02). Anonymous speech is not only accepted but celebrated in America. As "famously embodied in the Federalist Papers," which were published under the pseudonym "Publius," there is a long and "respected tradition of anonymity in the advocacy of political causes" in this country. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 343 & n.6 (1995).

"It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective restraint on freedom of association." *NAACP v. Alabama*, 357 U.S. at 462. Forcing an advocacy group to identify its supporters is akin to "[a] requirement that adherents of particular

religious faiths or political parties wear identifying arm-bands." *Id.* (quoting *American Communications Ass'n v. Douds*, 339 U.S. 382, 402 (1950)). Such compulsion has a "deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association"—especially when the targeted group espouses "unpopular" beliefs. *Gibson*, 372 U.S. at 557. And it is just as noxious to compel disclosure of an organization's *donors* as it is to compel disclosure of its *members*. In this context, the Supreme Court has "not drawn fine lines between contributors and members," but has instead "treated them interchangeably." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976).

A. The Attorney General's Disclosure Demand Must Satisfy Exacting Scrutiny

Forced disclosure of a group's supporters is constitutional only if it survives "the closest scrutiny." *NAACP v. Alabama*, 357 U.S. at 460–61. This test—which is also framed in terms of "exacting scrutiny"—requires the government to show that there is "a substantial relation between the disclosure requirement and a sufficiently important governmental interest." *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (citations and quotation marks omitted).

What constitutes a *sufficiently* important interest fluctuates depending on context: "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis v. FEC*, 554 U.S. 724, 744 (2008). In other words, "[e]xacting scrutiny encompasses a balancing test."

Center for Competitive Politics v. Harris, 784 F.3d 1307, 1312 (9th Cir. 2015). When the burden from disclosure is "quite small"—as tends to be the case in the electoral context—the government may need only an "important" interest to satisfy exacting scrutiny. *E.g.*, *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520, 538 (9th Cir. 2015) (*en banc*). But when—as in this case—the government demands the names and addresses of contributors to a private advocacy group *outside* of the electoral context so as to threaten a demonstrated chill, there is "a significant encroachment upon personal liberty" such that "the State may prevail only upon showing a subordinating interest which is *compelling*." *Bates*, 361 U.S. at 524 (emphasis added); *accord Gibson*, 372 U.S. at 546, 555, 557; *NAACP v. Alabama*, 357 U.S. at 463.

Even when a disclosure requirement survives a facial challenge under exacting scrutiny, a particular group will nonetheless prevail in an as-applied challenge if it "can show a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassment, or reprisals.'" *Brown*, 459 U.S. at 92 (quoting *Buckley v. Valeo*, 424 U.S. at 74). Prior to *Brown*, the Supreme Court in *Buckley v. Valeo* had upheld, against facial challenge, a federal law requiring political parties to disclose the names of their contributors. 424 U.S. at 60–74. Then, in *Brown*, when the Socialist Workers Party challenged a similar Ohio law, the Court held the law unconstitutional as applied to the Socialist

Workers Party. It did so because the evidence established "a reasonable probability that disclosing the names of contributors . . . will subject them to threats, harassment, and reprisals." 499 U.S. at 100.

Recently, this Court confirmed that a charitable organization "would warrant relief on an as-applied challenge" against the Attorney General's demand for that organization's Schedule B—specifically upon a challenger's showing of "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." *Center for Competitive Politics*, 784 F.3d at 1317 (citations and quotation marks omitted).

While insisting that compelled disclosure is not subject to exacting scrutiny unless the Foundation first makes a threshold showing of First Amendment injury, *see* Op. Br. 26–30, the Attorney General does not grapple with Judge Real's factual findings specifically indicating that such a showing has been made. ER 11–13; *infra,* Section I-B.[8] Indeed, if exacting scrutiny is not triggered by the record compiled in *this* case, then it is difficult to imagine how it ever could be implicated in *any* disclosure case. This is precisely the sort of as-applied challenge and

[8] We respectfully submit that Judge Real was also correct, as a matter of law, to rule that compelled disclosure always triggers exacting scrutiny, even when there is no *prima facie* showing of First Amendment injury. ER 9–11. This issue is of no moment in this appeal, however, because the Foundation has demonstrated First Amendment injury by any fair measure. ER 11–13.

evidence-backed record that this Court expressly left open in *Center for Competitive Politics*.

This Court's opinion in *Center for Competitive Politics* does not support the arguments the Attorney General tries to derive from it. Whereas this Court there confronted a *facial* challenge to the Attorney General's demand for Schedule Bs, this appeal concerns the Foundation's *as-applied* challenge to the same demand. In further contrast, the plaintiff in that case—the Center for Competitive Politics or "CCP"—had offered no factual proof of either irreparable harm or First Amendment chill. As the Court put it, CCP had not shown "*any* 'actual burden' . . . on its or its supporters' First Amendment rights." 784 F.3d at 1316 (emphasis added). In particular, CCP had produced "no evidence to suggest that [its] significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the Attorney General's disclosure requirement." *Id.* Given the complete absence of proof, the Court affirmed the district court as having acted within its discretion by denying CCP's request for a preliminary injunction. *Id.* at 1317.

The affirmance in *Center for Competitive Politics* should have no bearing on this appeal. Unlike CCP, the Foundation *has* introduced evidence demonstrating

why the Attorney General's demand is likely unconstitutional as applied to it.[9] And, consistent with the as-applied nature of the Foundation's challenge, the district court enjoined the Attorney General from demanding Schedule Bs only from the Foundation. ER 4.

All of this is to say that the Foundation can establish likelihood of success by showing that it is likely to prevail under either of the two exacting scrutiny tests: (1) the *Brown-Buckley* test, under which the Foundation must show a reasonable probability that compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals, *see Doe v. Reed*, 561 U.S. 186, 200–01 (2010); *Brown*, 459 U.S. at 92; *Buckley v. Valeo*, 424 U.S. at 74; *Center for Competitive Politics*, 784 F.3d at 1317; or (2) the classic test, under which the Attorney General must show a substantial relation between the disclosure

[9] Notably, *Center for Competitive Politics* affirmed the denial of a preliminary injunction. As a "general rule," this Court's "decisions at the preliminary injunction phase" are not binding, unless they are "conclusions on pure issues of law." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Department of Agriculture*, 499 F.3d 1108, 1114 (9th Cir. 2007). That is because "decisions on preliminary injunctions are just that—preliminary—and must often be made hastily and on less than a full record." *Southern Oregon Barter Fair v. Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004). Moreover, to the extent that the *Center for Competitive Politics* opinion could be read as speaking to legal questions beyond the threshold, dispositive holding that CCP made no requisite showing of First Amendment harm (as the district court noted as its basis for denying an injunction, *Center For Competitive Politics v. Harris*, 2014 WL 2002244, at *6 (E.D. Cal. May 14, 2014)), those aspects of the opinion would be nothing more than *dicta*. *See, e.g.*, *NLRB. v. International Brotherhood of Electrical Workers, Local 340*, 481 U.S. 573, 592 n.15 (1987) (a statement "unnecessary to the disposition" of an earlier case is *dicta*).

requirement and a compelling interest, *see Gibson*, 372 U.S. at 546; *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463; *see also Center for Competitive Politics*, 784 F.3d at 1312 n.3 (noting that *Gibson*, *Bates*, and *NAACP v. Alabama*—all of which applied the classic test—were "as-applied challenges"). Under either test, the Foundation is likely to prevail.

B. The Attorney General's Disclosure Demand Chills the Foundation and Its Donors by Posing the Real Specter of Threats, Harassment, or Reprisals

The district court found it likely that disclosing the Foundation's Schedule B to the Attorney General would subject the Foundation's donors to threats, harassment, and retaliation. ER 12–13, 24–25. Corroborating evidence demonstrates that this factual finding was by no means clearly erroneous.

1. The danger of disclosure to the public

It is undisputed that, if the identities of the Foundation's donors are made public, the donors will encounter threats, violence, economic reprisals, and other manifestations of public hostility. Already the Foundation's events are subject to violent protests; already its known supporters are accosted physically and verbally (with some receiving horrific death threats); and already dozens of potential donors have refused to contribute for fear that their affiliation with the Foundation would become public and they, in turn, would become targets of the intimidation campaign waged by the Foundation's opponents. ER 53–65. Such harassment has

repeatedly led the Supreme Court to strike down government demands that an organization identify its supporters. *E.g.*, *Brown*, 459 U.S. at 93–94; *NAACP v. Alabama*, 357 U.S. at 462–63.

Accordingly, the court below found that supporters of the Foundation who are "known" to the public "have been subject to threats of harassment and violence," ER 24–25, and that "if [other of] the Foundation's members' identities were known to the public they would face similar harassment and retaliation," ER 25.

The Attorney General does not dispute these findings.[10] Instead, she argues that this evidence is irrelevant because it establishes a reasonable probability of harm to the Foundation's donors only if there is "*public* disclosure" of their identities, and her confidentiality policy prevents public disclosure. Op. Br. 32–33. The Attorney General's argument, in other words, is that her demand for the Foundation's Schedule B cannot violate the First Amendment so long as she

[10] Without making a serious run at showing a particular factual finding to be clearly erroneous, the Attorney General simply denigrates some of the testimony as "uncorroborated," and other parts as "hearsay." Op. Br. at 31. She raised similar objections to the district court, which properly denied them. ER 11–12, 24 n.1. It is only appropriate and expected, at the preliminary-injunction phase, for district judges to rely on evidence that might be inadmissible at trial. *E.g.*, *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (*en banc*); *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *Mullins v. City of New York*, 626 F.3d 47, 51–52 (2d Cir. 2010) (collecting cases).

appends "confidential" to how she describes her policy for purposes of the instant litigation. Her argument, with all due respect, rings hollow.

2. The danger of disclosure to the Attorney General

To begin with, the district court correctly ruled that the Foundation would suffer First Amendment injury even if its Schedule B were disclosed only to the Attorney General. ER 12–13.

i. California law requires public disclosure of Schedule B notwithstanding the confidentiality "policy"

First, although the Attorney General purports to keep an organization's Schedule B confidential, she tellingly cites no binding legal authority (whether a statute, regulation, or even a manual) that actually guarantees confidentiality. Instead, all she offers is a single paragraph in a fact declaration (the Declaration of Kevis Foley), crafted and submitted solely in response to this lawsuit, stating that there is a "policy" of treating Schedule B as confidential. ER 73 ¶ 8. Remarkably, the Attorney General has produced neither a copy of this purported "policy" nor a citation to where it can be found. There is, in sum, good reason to doubt that the "policy" has any meaningful existence outside of litigation—and there is no reason why the Foundation and its donors should count on it for the complete, lasting protection to which the First Amendment entitles them.

Indeed, Ms. Foley's testimony flies in the face of California's operative law. In her declaration, Ms. Foley ignores California Government Code § 12590, the on-point statutory provision governing public access to reports filed by charities. Section 12590 mandates that all reports a charity files with the Attorney General "shall be open to public inspection," unless exempted from disclosure by "rules and regulations adopted by the Attorney General." The lone regulation the Attorney General has adopted on this subject—a regulation that Ms. Foley also ignores in her declaration—is of a piece, providing that all reports a charity files "shall be open to public inspection." Cal. Code Regs., tit. 11, § 310. There is simply no discernible basis in California's governing statutes or regulations to exempt Schedule B from the mandatory disclosure requirement of § 12590. The Attorney General appears now to have recognized as much. In early June 2015 (months after the preliminary injunction in this case had issued over her opposition), she proposed a new regulation (§ 301.1) that would, if adopted as proposed, do something new—namely, *exempt* Schedule B donor information from public disclosure. *See* Docket Entry 18-2, Exhibit 1 at 1–2. To state the obvious, the Attorney General would not go through the trouble of promulgating a new regulation on this subject unless—as the Foundation has pointed out and the district court indicated below, *see* ER 12—California law otherwise mandates public disclosure of Schedule Bs filed by charities.

The Attorney General nonetheless cites *Center for Competitive Politics* for the proposition that "the regulation requiring the filing of a complete Schedule B does not involve public disclosure of any kind." Op. Br. 32. That misreads the opinion. The Court in *Center for Competitive Politics* speculated in a footnote, without benefit of an evidentiary record, that public disclosure of Schedule B "is *likely* not authorized by California law." 784 F.3d at 1316 n.9 (emphasis added). But it did not and could not rule on this point. Indeed, the Court's opinion never so much as cites or discusses Cal. Gov't Code § 12590 or Cal. Code Regs., tit. 11, § 310, which are the controlling provisions. Nor did the Court have the benefit of the Attorney General's recent proposal to adopt § 301.1 for the sake of prescribing confidentiality; notably, in neither *Center for Competitive Politics* nor in her Opening Brief here did the Attorney General indicate that such a proposed change in law might be contemplated or forthcoming.

The Attorney General also emphasizes that the Foundation "overlooks the fact that section 12590 confers *considerable discretion* on the Attorney General to exempt information from disclosure." Op. Br. 47 n.17 (emphasis added). Yet any such discretion can be exercised *only* through "rules and regulations adopted by the Attorney General." Cal. Gov't Code. § 12590. The only such regulation the Attorney General has adopted tracks § 12590, confirming that all reports filed by charities with the Attorney General "shall be open to public inspection." Cal. Code

Regs., tit. 11, § 310. As for the new regulation she has proposed (§ 301.1), it is only proposed—not guaranteed to take effect and certainly not currently *in* effect.

Finally, the laws protecting the Foundation's Schedule B as filed with the IRS afford a telling point of comparison. *Contra* Op. Br. 32. The IRS is barred by federal statute from publicly disclosing an organization's Schedule B; any violation of that express prohibition is subject to criminal as well as civil penalties. *See* 26 U.S.C. §§ 6104(b), 7213, 7431. In stark contrast, California law—which is quite distinct from Ms. Foley's declaration—not only fails to prohibit public disclosure of the Foundation's Schedule B once it is in the Attorney General's hands, but by all indications *requires* it.

ii. The confidentiality "policy" is, in any event, too discretionary to satisfy the First Amendment

Second, even if today's confidentiality "policy" did currently shield the Foundation's Schedule B from disclosure (which it does not, for reasons explained above), it might be no good tomorrow: As the Attorney General conceded to the district court, any "future Attorney General" could exercise her discretion on a moment's whim "to change this policy" and release the Foundation's Schedule B. Supp. ER 156 n.13. The Attorney General tried to dodge this problem by arguing "that would be a different case." Supp. ER 156. n.13. To the contrary, that is *precisely* the peril the Foundation and its donors seek to forestall in *this* case. If the

Foundation were to turn over its Schedule B now, there is no telling what a subsequent Attorney General might decide to do with it.

Such uncertainty poses the exposure, the risk of retaliation and harassment, and the chill that are anathema to the First Amendment. The Supreme Court has ruled that a mandatory disclosure statute violated the First Amendment when it did "not provide that the information it requires be kept confidential," and instead left it up to a state agency "to deal with the information as it wishes." *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). Such standardless discretion is incompatible with the First Amendment where, as here, the Attorney General may exercise her discretion in a manner that threatens to chill speech. ER 12; *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940); *Doe v. Harris*, 772 F.3d at 579–80.

A "promise from the State that it will use [its disclosure] power appropriately is not sufficient: '[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.'" *Doe v. Harris*, 772 F.3d at 580–81 (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)). Indeed, this Court has explicitly held that when a government's purported confidentiality policy is "not codified in a statute" and not "promulgated in a regulation," it "does not have the force of law" and

therefore cannot be a basis for refuting a plaintiff's fear that a compelled disclosure to the government will ultimately become public. *Dole v. Service Employees Union*, 950 F.2d 1456, 1461 (9th Cir. 1991). Only by affirming the preliminary injunction can this Court ensure that the Foundation and its donors remain secure in their exercise of First Amendment freedoms.

The Attorney General counters that "this Court rejected this argument in *Center for Competitive Politics*." Op. Br. 46. That, too, misreads the opinion. In the relevant portion of *Center for Competitive Politics*, the Court simply returned to the threshold defect in proof that it deemed dispositive: "because CCP has not provided any evidence that even public disclosure would chill the First Amendment activities of its significant donor*s*, the potential for a future change in the Attorney General's disclosure policy does not aid CCP in making its facial challenge." 784 F.3d at 1316 n.9. Unlike CCP, however, the Foundation *has* provided evidence that public disclosure would chill its major donors. *See* Section I.B.1, above. As such, the "potential for a future change in the Attorney General's disclosure policy *does* . . . aid" the Foundation in making its as-applied claim. 784 F.3d at 1316 n.9 (emphasis added).

iii. The Foundation's donors face and fear harassment from state officials

Third, the Foundation and its supporters face reprisals not only from members of the public but also from California officials themselves. That prospect

is no mere bogeyman here: California officials have a demonstrated history of targeting individuals associated with the Foundation. ER 59. Consistent with that history, the district court found that the Foundation "has proffered evidence that even if donors[']identities were disclosed only to the State that such disclosure would result in potential harassment." ER 25. Accordingly, if the Foundation submits its Schedule B to California, donations will decrease, irrespective of whether donor names and addresses are made public. ER 55. In these circumstances, even if the Attorney General did credibly guarantee to keep the Foundation's Schedule B confidential forever (which she does not), that would neither eliminate the real, legitimate prospect of reprisal and corresponding chill that loom, nor obviate the need to enjoin the Attorney General's disclosure demand. ER 12–13; *see Shelton*, 364 U.S. at 486–87 (holding that compelled disclosure to the government itself violated the First Amendment).

The Attorney General contends that the Foundation must "submit evidence establishing a *pattern* of government harassment or *pervasive* governmental hostility." Op. Br. 34 (emphasis added). This argument is belied by this Court's decision in *Center for Competitive Politics*, which held that a plaintiff bringing an as-applied challenge need only show a "*reasonable probability*" of "reprisals from . . . Government officials"—not a pattern of government harassment or pervasive governmental hostility. 784 F.3d at 1317 (emphasis added). Moreover, at the

preliminary-injunction phase, the Foundation's burden is even lower: it need only show a *likelihood* of establishing a *reasonable probability* of reprisals from Government officials. *See Winter*, 555 U.S. at 20.

The Attorney General simply disregards the procedural posture of this appeal. She cites *Brown*, 459 U.S. 87, as emblematic of the "considerable proof" of government harassment the Foundation supposedly must adduce to prevail. Op. Br. 34–37. But *Brown* was decided after "extensive discovery" and a "trial" on the merits. 459 U.S. at 91. The present appeal arises from a preliminary injunction, which "is customarily granted on the basis of . . . evidence that is less complete than in a trial on the merits." *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Only at summary judgment or trial can the Foundation be equipped with factual discovery and proof sufficient to satisfy the standard then applicable—which, again, is merely a reasonable probability of government reprisal. For now, the declarations and exhibits the Foundation has submitted should amply suffice.

The Attorney General further contends that the "vast majority of 'California officials' have no access to Schedule B information," and that the Foundation has not established a reason to legitimately fear the "approximately" 53 individuals who currently do have access. Op. Br. 37. That submission is spurious. Because the Attorney General did not specify the identities of these "approximately" 53 individuals, *see* ER 73–74, there would have been no way to ascertain whether

someone with a grudge against the Foundation is among them.[11] Moreover, there is no law limiting who has access, ER 12, so there is no telling which other state officials might obtain the keys to the Schedule B file cabinet in the future. Nor does precedent or common sense support the Attorney General's peculiar notion that those whom the government has persecuted have nothing to fear unless they can identify, by name, the specific governmental officials out to persecute them.

Contrary to the Attorney General's assertions (Op. Br. 38–42), the Foundation's donors' fear of harassment and reprisal from both the public and from California officials is far from "speculative" or "subjective." It is instead grounded in lived experience and the stated views of policymakers in California. ER 53–65. Notably, the Attorney General does not deny the fact that donations to the Foundation have *already* been chilled. ER 55. Instead, she just dismisses such chilling as "subjective" and unreasonable. Prudent outside observers of California politics, and where the Foundation stands relative to them, would not be so dismissive of donors' fear of exposure—or so trusting that California officials bear them no ill will. In *Center for Competitive Politics*, this Court ruled "it is certainly true that non-public disclosures can still chill protected activity where a plaintiff

[11] On April 7, 2015, the Foundation submitted a discovery request to the Attorney General for the names of these 53 or so individuals, but so far the Attorney General has failed to provide an answer.

fears the reprisals of a government entity." 784 F.3d at 1316. That is precisely the situation here. ER 12–13, 55–56.

C. Additionally, the Attorney General's Disclosure Demand Does Not Substantially Relate to a Compelling Interest

Under the classic test of exacting scrutiny, the Attorney General bears the burden of establishing "a substantial relationship between the information sought and an overriding and compelling state interest." *Brown*, 459 U.S. at 92 (brackets, citation, and quotation marks omitted).

In *Center for Competitive Politics*, this Court noted that "the Attorney General has a compelling interest in enforcing the laws of California." 784 F.3d at 1317. This interest, however, is not substantially related to her demand that the Foundation divulge its Schedule B. Indeed, the Supreme Court recently instructed—specifically in the prison context, where law-enforcement and security interests are paramount by all accounts—that the critical question is whether and to what extent the policy under challenge furthers that interest. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) (the compelling interest test requires courts "to look to the marginal interest in enforcing the challenged government action in that particular context." (internal citations omitted)).

1. The Attorney General demonstrates no specific need for the Foundation's Schedule B

When an organization faces violent protests, boycotts, and other threats like those directed at the Foundation, courts have repeatedly held that it is unconstitutional for the government to insist upon disclosure of the names and addresses of all of that group's supporters. *E.g.*, *Gibson*, 372 U.S. at 557–58; *Bates*, 361 U.S. at 524; *NAACP v. Alabama*, 357 U.S. at 463. In *Center for Competitive Politics*, this Court distinguished these Supreme Court cases as "inapposite" because they all involved as-applied challenges. 784 F.3d at 1312 n.3. Because this appeal involves an as-applied challenge, however, all of these cases are "apposite."

In fact, these cases are dispositive. They establish that, in response to an as-applied challenge, the government must supply a justification for its disclosure demand that is tailored to the specific organization at issue. *See Gibson*, 372 U.S. at 554–58; *Bates*, 361 U.S. at 525–27; *NAACP v. Alabama*, 357 U.S. at 464–65; *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 455, 457–58 (2008) (upholding a law as facially valid under the First Amendment but susceptible to an as-applied challenge where the evidentiary record does not support a particular application of the law); *Lanier v. City of Woodburn*, 518 F.3d 1147, 1152 (9th Cir. 2008) (holding a city's employee-drug-testing policy to be facially valid under the Fourth Amendment but unconstitutional

as applied to Lanier, the plaintiff, because the city "has not articulated any special need to screen Lanier").

Thus, for example, in *Gibson*, the Supreme Court held that a government body tasked with investigating unlawful conduct cannot compel disclosure of a private advocacy group's membership list when that particular group is "neither engaged in subversive or other illegal or improper activities nor demonstrated to have any substantial connections with such activities." 372 U.S. at 557–58; *accord United States v. Mayer*, 503 F.3d 740, 748 (9th Cir. 2007). Here, the Attorney General has not so much as hinted—let alone demonstrated—that the Foundation has engaged in, or is substantially connected to, any illegality or misconduct.

Nor has the Attorney General offered any other specific justification for the *Foundation's* donor information. She argues that her demand for the organization's Schedule B is justified by a *generalized* interest in ensuring that all charities (not just the Foundation) comply with the law. Op. Br. 51–54. In an as-applied challenge, such a generalized interest does not suffice. When the state demands that a particular organization disclose its roster of supporters, the state's demand can pass exacting scrutiny only if the state demonstrates a particularized interest in identifying that specific organization's membership. *See Gibson*, 372 U.S. at 557–58; *Bates*, 361 U.S. at 525–27; *NAACP v. Alabama*, 357 U.S. at 464–65. By failing to provide such a justification, the Attorney General has failed to make the

requisite showing that her disclosure demand is substantially related to a compelling state interest.

2. The Attorney General lacks statutory authority to demand donor information

The Attorney General's demand for the Foundation's Schedule Bs also exceeds the scope of her statutory authority. *See* ER 13. In *Center for Competitive Politics*, the plaintiff did "not contest that the Attorney General has the power to require disclosure of significant donor information as a part of her general subpoena power," so the Court could not issue a holding informed by adversarial contest and briefing. 784 F.3d at 1317.

In her correspondence with the Foundation, the Attorney General asserted that § 12586 of the Charities Act authorized her demand for Schedule B. *See* ER 51 ("Failure to timely file [the requested Schedule B] violates Government Code section 12586."). But this provision requires charities only to file reports about the "*nature* of the assets held for charitable purposes," not the *source* of those assets. The "nature" of assets refers to features like monetary value and classification (*e.g.*, real property, stocks, cash); it does not cover the assets' origin. *See* S. N. Maheshwari & S. K. Maheshwari, *Corporate Accounting*, Section 3, Chapter 6: Valuation of Assets, at 3.231 ("Nature of Assets") (5th ed. 2009).

Lest there be any doubt about this, the structure of the Charities Act so confirms. In the Act, the California Legislature circumscribed the Attorney

General's authority to collect the names and addresses of a charity's donors by explicitly specifying the limited circumstances in which the Attorney General could demand such donor information. California Government Code § 12599.7(a)(1), for example, authorizes the Attorney General to demand "the name and mailing address" of each noncash contributor who donates to a commercial fundraiser as a result of a solicitation campaign. Section 12586 lacks any comparable authorizing language. A legislature's decision to include language in one section of a statute but omit it from a neighboring section signifies its intent. *Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 687–88 (2012). By intentionally *not* authorizing the Attorney General to request donor names and addresses under § 12586, California's Legislature has foreclosed any argument that the Attorney General's demand for the Foundation's Schedule B is substantially related to her compelling interest in "enforcing the laws of California."

In her briefing, the Attorney General tries to switch tactics by now citing three *other* provisions of the Charities Act as the basis for her demand: §§ 12582.1, 12584, and 12585. Op. Br. 55. But the Attorney General cannot satisfy heightened scrutiny by attempting to conjure, *post hoc*, a justification different from the one that expressly drove her demand. *See United States v. Virginia*, 518 U.S. 515, 533, 535–36 (1996) (under heightened scrutiny, a state's "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation").

In any event, these provisions do not empower the Attorney General to demand the Foundation's Schedule B. Section 12582.1 simply defines "Charitable corporation"; it does not bestow any power on the Attorney General. Section 12584 authorizes the Attorney General to establish a charitable registry and to obtain information from certain sources, but not from "charitable corporations" (and thus not from the Foundation); it is §§ 12585 and 12586 alone that govern what documents a "charitable corporation" must submit to the Attorney General. Section 12585 authorizes the Attorney General to regulate a charity's "initial registration," but it has no bearing on a charity's subsequent filings, and is therefore irrelevant to the Foundation, which registered over a decade ago. *See* ER 29. More fundamentally, none of these provisions explicitly authorizes the Attorney General to demand donor information. Thus, just like § 12586, none can be read to implicitly authorize such actions, given the presence of explicit authorization in the neighboring provision of § 12599.7(a)(1). *See Pacific Operators Offshore*, 132 S. Ct. at 687–88.

3. The Attorney General lacks a basis to seek nationwide donor information

The Attorney General further fails to justify her demand for names and addresses of the Foundation's *nationwide* donors. The Attorney General has argued that she collects nationwide Schedule B information "to identify possible wrongdoing and *refer matters to other state and federal agencies*." Supp. ER 155

(emphasis added). That is a wholly illegitimate aim. The jurisdiction of California and its officials is confined to California. *See* California Constitution art. V, § 13. California can have no legitimate interest, let alone a *compelling* interest, in equipping itself as the United States' police force for charities.

4. The Attorney General has less destructive alternatives available

Finally, the Attorney General could achieve the same result through alternative "measures less destructive of First Amendment interests." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636–38 (1980). The Attorney General could, for example, limit her demands for Schedule Bs to charities she chooses to audit, perhaps because she has a particular suspicion that they have engaged in fraud or illegality. Indeed, the Attorney General already conceded at oral argument in *Center for Competitive Politics* that this would be a less invasive alternative than her current disclosure regime. Oral Argument at 23:05–23:30, *Center for Competitive Politics*, No. 14-15978 (Dec. 5, 2014), *audio available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000013683. Another alternative would be to require the Foundation to complete a new form (or an amended version of the annual registration form it already must file) that poses questions that elicit the precise information the Attorney General supposedly needs (but otherwise lacks), while still stopping far short of demanding the names and addresses of all of the Foundation's major donors nationwide.

The Attorney General argues that she does not necessarily need to deploy the "least restrictive means" to satisfy exacting scrutiny. Op. Br. 56 (quoting *Chula Vista*, 782 F.3d at 541). When the government can achieve its goals through means less destructive of First Amendment interests, however, the justification for choosing the most destructive means must be correspondingly greater. *See Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 198–99 (1999); *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139–40 (9th Cir. 2000). Here the Attorney General has offered no substantial justification for rejecting any number of alternative means that do not pose the same First Amendment concerns because they do not require disclosing the names and addresses of donors across the country.

The Attorney General nonetheless asserts that these alternative means are *generally* less effective because, in her experience, "once a charity is made aware that it is under suspicion, it is more likely to hide or tamper with evidence." Op. Br. 56–57. In fact, the Attorney General need not go as far as demanding a nationwide donor list in order to avoid alerting the charity in advance. Nor does the Attorney General offer evidence that the *Foundation* itself would hide or tamper with evidence. Indeed, even if the Attorney General had a basis (and she here has none) to suspect the Foundation (or any other charity) of tampering with evidence, there is no reason to think that its Schedule B representations would be

any less suspect. In any event, it is the state's burden to "show that [an alternative] is less effective." *Ashcroft*, 542 U.S. at 669. Having failed to carry that burden with respect to the Foundation, there is simply no legitimate reason to assume in this as-applied challenge that the many alternative measures available to the Attorney General would be ineffective at obtaining from the Foundation whatever information—other than donor names and addresses—the Attorney General believes she needs to enforce the law.

D. At a Minimum, the Foundation Has Raised Serious Merits Questions

The previous sections establish that the Foundation is likely to prevail on the merits of its First Amendment claim. At a bare minimum, however, the Foundation has raised serious questions going to the merits of its claim. *See* ER 13–14 (holding that the Foundation had raised serious merits questions). This Court can affirm on that basis alone. *See Alliance for the Wild Rockies*, 632 F.3d at 1131–35; *M.R.*, 697 F.3d at 725.

II. Without A Preliminary Injunction, The Foundation And Its Donors Face Irreparable Injury

The district court was well within its discretion in ruling that the Attorney General's disclosure demand posed harm that was "likely irreparable" absent an injunction. ER 4, 14. This ruling flowed from the court's factual finding that the Foundation "has proffered sufficient evidence" to establish that disclosing its donor

information—to either the public or just the Attorney General—"would have a chilling effect on speech." ER 12–13.

Any "loss of First Amendment freedoms . . . unquestionably constitutes irreparable injury." *Elrod*, 427 U.S. at 373 *accord, e.g.*, *Doe v. Harris*, 772 F.3d at 583; *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 828 (9th Cir. 2013); *Sanders County Republican Central Committee v. Bullock*, 698 F.3d 741, 748 (9th Cir. 2012); *Farris*, 677 F.3d at 868; *Thalheimer*, 645 F.3d at 1128; *Klein*, 584 F.3d at 1207–08. In particular, the government causes "irreparable injury" when it places individuals "in fear of exercising their constitutionally protected rights of free expression, assembly, and association." *Allee*, 416 U.S. at 814–15.

A long line of precedent holds that compelling an advocacy group to identify its contributors has a "profound chilling effect" on the exercise of First Amendment rights. *Perry*, 591 F.3d at 1156. "For various reasons, including fear of reprisal or harassment, the possibility of disclosure of their party affiliations and contributions, if any, tends to inhibit citizens from exercising their right to participate meaningfully in American political life." *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark. 1968), *affirmed* 393 U.S. 14 (1968). This "deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association" is especially "immediate and substantial" when the targeted group espouses "unpopular" beliefs. *Gibson*, 372 U.S. at 557.

This record makes clear that persons perceived to be affiliated with the Foundation encounter threats, harassment, and violence, and that donors reasonably fear they will suffer the same fate if their support for the Foundation becomes known. ER 53–65.

The Attorney General does not dispute—or even address—either these facts or these governing legal principles. Instead, she argues that the district court's finding of irreparable injury is erroneous solely because the Foundation has not shown it is likely to win its First Amendment claim. Op. Br. 58–59.

The premise of the Attorney General's argument is false: the Foundation's First Amendment claim is likely to succeed. *See* Sections I.B–I.C, above. But even assuming, *arguendo*, that her premise is true, the conclusion does not follow: the Attorney General's disclosure demand is of a type that threatens irreparable injury.

A government action might ultimately be deemed constitutional under the First Amendment but pose irreparable harm in the interim. That is because the government can in certain circumstances restrict First Amendment rights (and thereby cause the harm that is the typical concern of the First Amendment), if it demonstrates exceptional justification for the restriction. For example, in *NAACP v. Alabama*, the Supreme Court held that Alabama lacked a "controlling justification for the deterrent effect on the free enjoyment of the right to associate

which disclosure of membership lists is likely to have." 357 U.S. at 466. But simultaneously, the Court distinguished a prior case in which it upheld a statute that chilled speech because the "reasons" for that statute were "constitutionally sufficient" to warrant the intrusion on "constitutionally protected political rights." *Id.* at 461 (citing *American Communications Ass'n*, 339 U.S. at 402). The lesson is that a government action may, in certain cases, intrude upon freedom of expression and association yet still be upheld at the end of the day in court. In such a case, the plaintiff may be able to show irreparable injury from the intrusion upon First Amendment freedoms, even if success on the merits is uncertain. That is why this Court holds that a plaintiff need raise only a "*colorable* First Amendment claim"—not a *meritorious* First Amendment claim—to establish "irreparable injury sufficient to merit the grant" of a preliminary injunction. *Doe v. Harris*, 772 F.3d at 583 (emphasis added; quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1001 (9th Cir. 2005)).

Here, the Foundation proved and the district court found that the Attorney General's disclosure demand will likely cause irreparable harm by deterring the Foundation and its donors from exercising their speech and association rights. ER 13. This Court should therefore affirm irrespective of whether the Foundation has established a likelihood of success or simply raised serious questions going to the merits.

III. The Balance Of Equities And Public Interest Sharply Favor A Preliminary Injunction

Finally, the district court correctly ruled that "[w]hen, as here," government action "infringes on First Amendment rights of those 'seeking to express their views,'" both "the 'balance of equities and the public interest . . . tip *sharply* in favor of enjoining'" the government action. ER 4 (emphasis added; quoting *Klein*, 584 F.3d at 1208); *accord* ER 15 ("the balance of hardships and public interest sharply . . . favor plaintiff").

The balance of equities tips sharply in favor of the Foundation because the preliminary injunction staves off the irreparable loss of First Amendment freedoms without visiting any discernible hardship on the Attorney General. The district court crafted a carefully tailored preliminary injunction: it bars the Attorney General from obtaining donor information only from the "*Foundation*"—not from any other organization. ER 4. The Attorney General has not submitted any evidence suggesting that such a limited injunction poses problems. And the district court specifically found that the Attorney General "has not suffered from not possessing Plaintiff's Schedule B for the last decade." ER 4. Nor has the Attorney General claimed that she now has developed some sudden need for the Foundation's Schedule B. Even if she had, the injunction is temporary. It will expire when the district court "issues a final judgment," ER 4, at which time the Attorney General can reissue her disclosure demand (unless barred by some other

order or judgment). When a district court temporarily enjoins a state from enforcing a demand that would impair a plaintiff's First Amendment rights, and the state "can point to no specific instances of harm" that result, the balance of hardships tips decisively against the state. *Ebel v. City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983).

Indeed, the equities especially favor preventing the Attorney General from enforcing her disclosure demand until its constitutionality is fully adjudicated because once the Foundation's donor information is disclosed—and with it, any ensuing intimidation, harassment, and chilled speech occurs—that bell cannot be unrung. *See Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (balance of equities prevented public broadcast of court proceedings that might lead to harassment of witnesses, "for the injury likely cannot be undone once the broadcast takes place").

The Attorney General rejoins that she suffers irreparable injury, by definition, whenever she is enjoined from effectuating a "statute[]." Op. Br. 59 (quoting *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers)). But her citation to *Maryland v. King* is doubly inapposite. In that case, the Maryland Court of Appeals had struck down a Maryland statute as unconstitutional under the Fourth Amendment, 133 S. Ct. 1958, 1966 (2013) (majority opinion), and Chief Justice Roberts, sitting as a Circuit Justice, stayed the lower court's judgment to prevent irreparable harm to the state, 133 S. Ct. at 3 (Roberts, C.J., in

chambers). Unlike in *King*, the district court here did not declare a statute facially unconstitutional or forbid the general implementation of any state law or regulation. It simply enjoined the Attorney General's *nonstatutory* demand (backed by threats of draconian penalties, including personal fines) for the *Foundation's* Schedule B. Moreover, this case involves a *First* Amendment claim rather than a *Fourth* Amendment claim. When a government action infringes *First* Amendment rights, the equitable pendulum swings: courts' special solicitude for exercise of the freedoms of speech and association, and corresponding concern with preventing chill, are such that the "balance of equities . . . tip[s] sharply in favor of enjoining" the governmental threat. *Klein*, 584 F.3d at 1208.

The public interest further favors the Foundation. This Court has "consistently recognized" that there is a "*significant* public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d at 583 (emphasis added; quoting *Sammartano v. First Judicial District Court*, 303 F.3d 959, 974 (9th Cir. 2002)); *accord, e.g.*, *Thalheimer*, 645 F.3d at 1129; *Klein*, 584 F.3d at 1208.

The Attorney General responds that the preliminary injunction is "not in the public interest" because it "interferes with the Attorney General's authority to supervise and regulate charitable organizations and to enforce the law by limiting her ability to request and receive highly relevant information." Op. Br. 60. This contention grossly exaggerates the injunction's scope. Again, it bars her from

demanding donor information only from the *Foundation*, not from supervising and regulating charitable organizations generally.

In any event, it was well within the district court's discretion to conclude that the public interest in vindicating speech and associational rights outweighed the state's interest in enforcing its disclosure demand against the Foundation. *See Farris*, 677 F.3d at 868; *Thalheimer*, 645 F.3d at 1129. Indeed, the court's exercise of that discretion seems beyond reproach in the circumstances of this case—where the Attorney General had not only refused every entreaty to stand still pending orderly adjudication, but had threatened the Foundation with dire penalties, including personal fines against its officers, simply for asserting First Amendment rights and seeking adjudication of them rather than caving, *instanter*, to the Attorney General's ultimatum.

Because the balance of equities and the public interest tip "sharply" for the Foundation, a preliminary injunction is proper under both the traditional version of the preliminary-injunction test set forth in *Winter*, 555 U.S. at 20, and the "serious questions" version articulated in *Alliance for the Wild Rockies*, 632 F.3d at 1131–35, and *M.R.*, 697 F.3d at 725.

CONCLUSION

This Court should affirm the district court's preliminary injunction as a permissible exercise of its discretion.

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Respectfully submitted,

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STATEMENT OF RELATED CASES

The Foundation is unaware of any related cases currently pending in this Court.

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 13,917 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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ADDENDUM

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Cal. Const. art. V, § 13. Attorney General; law enforcement

Sec. 13. Subject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State. It shall be the duty of the Attorney General to see that the laws of the State are uniformly and adequately enforced. The Attorney General shall have direct supervision over every district attorney and sheriff and over such other law enforcement officers as may be designated by law, in all matters pertaining to the duties of their respective offices, and may require any of said officers to make reports concerning the investigation, detection, prosecution, and punishment of crime in their respective jurisdictions as to the Attorney General may seem advisable. Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney. When required by the public interest or directed by the Governor, the Attorney General shall assist any district attorney in the discharge of the duties of that office.

Cal. Gov't Code § 12582.1. Charitable corporation defined

"Charitable corporation" means any nonprofit corporation organized under the laws of this State for charitable or eleemosynary purposes and any similar foreign corporation doing business or holding property in this State for such purposes.

Cal. Gov't Code § 12584. Establishment of register of charitable corporations, unincorporated associations, and trustees

The Attorney General shall establish and maintain a register of charitable corporations, unincorporated associations, and trustees subject to this article and of the particular trust or other relationship under which they hold property for charitable purposes and, to that end, may conduct whatever investigation is necessary, and shall obtain from public records, court officers, taxing authorities, trustees, and other sources, whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register.

Cal. Gov't Code § 12585. Filing of initial registration form; registration of trustee

(a) Every charitable corporation, unincorporated association, and trustee subject to this article shall file with the Attorney General an initial registration form, under oath, setting forth information and attaching documents prescribed in accordance with rules and regulations of the Attorney General, within 30 days after the corporation, unincorporated association, or trustee initially receives property. A trustee is not required to register as long as the charitable interest in a trust is a future interest, but shall do so within 30 days after any charitable interest in a trust becomes a present interest.

(b) The Attorney General shall adopt rules and regulations as to the contents of the initial registration form and the manner of executing and filing that document or documents.

Cal. Gov't Code § 12586. Filing of additional reports as to nature of assets held and administration thereof; rules and regulations; time for filing; additional requirements concerning preparation of annual financial statements and auditing

(a) Except as otherwise provided and except corporate trustees which are subject to the jurisdiction of the Commissioner of Financial Institutions of the State of California under Division 1 (commencing with Section 99) of the Financial Code or to the Comptroller of the Currency of the United States, every charitable corporation, unincorporated association, and trustee subject to this article shall, in addition to filing copies of the instruments previously required, file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation, unincorporated association, or trustee, in accordance with rules and regulations of the Attorney General.

(b) The Attorney General shall make rules and regulations as to the time for filing reports, the contents thereof, and the manner of executing and filing them. The Attorney General may classify trusts and other relationships concerning property held for a charitable purpose as to purpose, nature of assets, duration of the trust or other relationship, amount of assets, amounts to be devoted to charitable purposes, nature of trustee, or otherwise, and may establish different rules for the different classes as to time and nature of the reports required to the ends (1) that he or she shall receive reasonably current, periodic reports as to all charitable trusts or other relationships of a similar nature, which will enable him or her to ascertain whether they are being properly administered, and (2) that periodic reports shall not unreasonably add to the expense of the administration of charitable trusts and similar relationships. The Attorney General may suspend the filing of reports as to a particular charitable trust or relationship for a reasonable, specifically designated time upon written application of the trustee filed with the Attorney General and after the Attorney General has filed in the register of charitable trusts a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports are not required for proper supervision by his or her office.

(c) A copy of an account filed by the trustee in any court having jurisdiction of the trust or other relationship, if the account substantially complies with the rules and regulations of the Attorney General, may be filed as a report required by this section.

(d) The first periodic written report, unless the filing thereof is suspended as herein provided, shall be filed not later than four months and 15 days following the close of the first calendar or fiscal year in which property is initially received. If any part of the income or principal of a trust previously established is authorized or required to be applied to a charitable purpose at the time this article takes effect, the first report shall be filed at the close of the calendar or fiscal year in which it was registered with the Attorney General or not later than four months and 15 days following the close of the calendar or fiscal period.

(e) Every charitable corporation, unincorporated association, and trustee required to file reports with the Attorney General pursuant to this section that receives or accrues in any fiscal year gross revenue of two million dollars ($2,000,000) or more, exclusive of grants from, and contracts for services with, governmental entities for which the governmental entity requires an accounting of the funds received, shall do the following:

(1) Prepare annual financial statements using generally accepted accounting principles that are audited by an independent certified public accountant in conformity with generally accepted auditing standards. For any nonaudit services performed by the firm conducting the audit, the firm and its individual auditors shall adhere to the standards for auditor independence set forth in the latest revision of the Government Auditing Standards, issued by the Comptroller General of the United States (the Yellow Book). The Attorney General may, by regulation, prescribe standards for auditor independence in the performance of nonaudit services, including standards different from those set forth in the Yellow Book. If a charitable corporation or unincorporated association that is required to prepare an annual financial statement pursuant to this subdivision is under the control of another organization, the controlling organization may prepare a consolidated financial statement. The audited financial statements shall be available for inspection by the Attorney General and by members of the public no later than nine months after the close of the fiscal year to which the statements relate. A charity shall make its annual audited financial statements available to the public in the same manner that is prescribed for IRS Form 990 by the latest revision of Section 6104(d) of the Internal Revenue Code and associated regulations.

(2) If it is a corporation, have an audit committee appointed by the board of directors. The audit committee may include persons who are not members of

the board of directors, but the member or members of the audit committee shall not include any members of the staff, including the president or chief executive officer and the treasurer or chief financial officer. If the corporation has a finance committee, it must be separate from the audit committee. Members of the finance committee may serve on the audit committee; however, the chairperson of the audit committee may not be a member of the finance committee and members of the finance committee shall constitute less than one-half of the membership of the audit committee. Members of the audit committee shall not receive any compensation from the corporation in excess of the compensation, if any, received by members of the board of directors for service on the board and shall not have a material financial interest in any entity doing business with the corporation. Subject to the supervision of the board of directors, the audit committee shall be responsible for recommending to the board of directors the retention and termination of the independent auditor and may negotiate the independent auditor's compensation, on behalf of the board of directors. The audit committee shall confer with the auditor to satisfy its members that the financial affairs of the corporation are in order, shall review and determine whether to accept the audit, shall assure that any nonaudit services performed by the auditing firm conform with standards for auditor independence referred to in paragraph (1), and shall approve performance of nonaudit services by the auditing firm. If the charitable corporation that is required to have an audit committee pursuant to this subdivision is under the control of another corporation, the audit committee may be part of the board of directors of the controlling corporation.

(f) If, independent of the audit requirement set forth in paragraph (1) of subdivision (e), a charitable corporation, unincorporated association, or trustee required to file reports with the Attorney General pursuant to this section prepares financial statements that are audited by a certified public accountant, the audited financial statements shall be available for inspection by the Attorney General and shall be made available to members of the public in conformity with paragraph (1) of subdivision (e).

(g) The board of directors of a charitable corporation or unincorporated association, or an authorized committee of the board, and the trustee or trustees of a charitable trust shall review and approve the compensation, including benefits, of the president or chief executive officer and the treasurer or chief financial officer to assure that it is just and reasonable. This review and approval shall occur initially

upon the hiring of the officer, whenever the term of employment, if any, of the officer is renewed or extended, and whenever the officer's compensation is modified. Separate review and approval shall not be required if a modification of compensation extends to substantially all employees. If a charitable corporation is affiliated with other charitable corporations, the requirements of this section shall be satisfied if review and approval is obtained from the board, or an authorized committee of the board, of the charitable corporation that makes retention and compensation decisions regarding a particular individual.

Cal. Gov't Code § 12590. Public inspection of register and reports

Subject to reasonable rules and regulations adopted by the Attorney General, the register, copies of instruments, and the reports filed with the Attorney General shall be open to public inspection. The Attorney General shall withhold from public inspection any instrument so filed whose content is not exclusively for charitable purposes.

Cal. Gov't Code § 12599.7. Recordkeeping by commercial fundraisers

(a) A commercial fundraiser for charitable purposes shall maintain during each solicitation campaign and for not less than 10 years following the completion of each solicitation campaign records, including any electronic records, containing the following information, which shall be available for inspection upon demand by the Attorney General:

(1) The date and amount of each contribution received as a result of the solicitation campaign and, for noncash contributions, the name and mailing address of each contributor.

(2) The name and residence address of each employee, agent, or other person involved in the solicitation campaign.

(3) Records of all revenue received and expenses incurred in the course of the solicitation campaign.

(4) For each account into which the commercial fundraiser deposited revenue from the solicitation campaign, the account number and the name and location of the bank or other financial institution in which the account was maintained.

(b) If a commercial fundraiser for charitable purposes sells tickets to an event and represents that tickets will be donated for use by another, the commercial fundraiser shall maintain for not less than 10 years following the completion of the event records containing the following information, which shall be available for inspection upon demand by the Attorney General:

(1) The number of tickets purchased and donated by each contributor.

(2) The name and address of all organizations receiving donated tickets for use by others, including the number of tickets received by each organization.

Cal. Code Regs. tit. 11, § 301. Periodic Written Reports.

Except as otherwise provided in the Act, every charitable corporation, unincorporated association, trustee, or other person subject to the reporting requirements of the Act shall also file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by such corporation, unincorporated association, trustee, or other person. Except as otherwise provided in these regulations, these reports include the Annual Registration Renewal Fee Report, ("RRF-1" 3/05), hereby incorporated by reference, which must be filed with the Registry of Charitable Trusts annually by all registered charities, as well as the Internal Revenue Service Form 990, which must be filed on an annual basis with the Registry of Charitable Trusts, as well as with the Internal Revenue Service. At the time of the annual renewal of registration filing the RRF-1, the registrant must submit a fee, as set forth in section 311.

A tax-exempt charitable organization which is allowed to file form 990-PF or 990-EZ with the Internal Revenue Service, may file that form with the Registry of Charitable Trusts in lieu of Form 990.

A charitable organization that is not exempt from taxation under federal law shall use Internal Revenue Service Form 990 to comply with the reporting provisions of the Supervision of Trustees and Fundraisers for Charitable Purposes Act. The form shall include, at the top of the page, in 10-point type, all capital letters, "THIS ORGANIZATION IS NOT EXEMPT FROM TAXATION."

Registration requirements for commercial fundraisers for charitable purposes, fundraising counsel for charitable purposes, and commercial coventurers are set forth in section 308.

Cal. Code Regs. tit. 11, § 310. Public Inspection of Charitable Trust Records.

The register, copies of instruments and the reports filed with the Attorney General, except as provided in Government Code section 12590, shall be open to public inspection at the Registry of Charitable Trusts in the office of the Attorney General, Sacramento, California, at such reasonable times as the Attorney General may determine. Such inspection shall at all times be subject to the control and supervision of an employee of the Office of the Attorney General.

26 U.S.C. § 6104. Publicity of information required from certain exempt organizations and certain trusts

(a) Inspection of applications for tax exemption or notice of status.--

(1) Public inspection.--

(A) Organizations described in section 501 or 527.--If an organization described in section 501(c) or (d) is exempt from taxation under section 501(a) for any taxable year or a political organization is exempt from taxation under section 527 for any taxable year, the application filed by the organization with respect to which the Secretary made his determination that such organization was entitled to exemption under section 501(a) or notice of status filed by the organization under section 527(i), together with any papers submitted in support of such application or notice, and any letter or other document issued by the Internal Revenue Service with respect to such application or notice shall be open to public inspection at the national office of the Internal Revenue Service. In the case of any application or notice filed after the date of the enactment of this subparagraph, a copy of such application or notice and such letter or document shall be open to public inspection at the appropriate field office of the Internal Revenue Service (determined under regulations prescribed by the Secretary). Any inspection under this subparagraph may be made at such times, and in such manner, as the Secretary shall by regulations prescribe. After the application of any organization for exemption from taxation under section 501(a) has been opened to public inspection under this subparagraph, the Secretary shall, on the request of any person with respect to such organization, furnish a statement indicating the subsection and paragraph of section 501 which it has been determined describes such organization.

(B) Pension, etc., plans.--The following shall be open to public inspection at such times and in such places as the Secretary may prescribe:

(i) any application filed with respect to the qualification of a pension, profit-sharing, or stock bonus plan under section 401(a) or 403(a), an individual retirement account described in section 408(a), or an individual retirement annuity described in section 408(b),

(ii) any application filed with respect to the exemption from tax under section 501(a) of an organization forming part of a plan or account referred to in clause (i),

(iii) any papers submitted in support of an application referred to in clause (i) or (ii), and

(iv) any letter or other document issued by the Internal Revenue Service and dealing with the qualification referred to in clause (i) or the exemption from tax referred to in clause (ii).

Except in the case of a plan participant, this subparagraph shall not apply to any plan referred to in clause (i) having not more than 25 participants.

(C) Certain names and compensation not to be opened to public inspection.--In the case of any application, document, or other papers, referred to in subparagraph (B), information from which the compensation (including deferred compensation) of any individual may be ascertained shall not be open to public inspection under subparagraph (B).

(D) Withholding of certain other information.--Upon request of the organization submitting any supporting papers described in subparagraph (A) or (B), the Secretary shall withhold from public inspection any information contained therein which he determines relates to any trade secret, patent, process, style of work, or apparatus, of the organization, if he determines that public disclosure of such information would adversely affect the organization. The Secretary shall withhold from public inspection any information contained in supporting papers described in subparagraph (A) or (B) the public disclosure of which he determines would adversely affect the national defense.

(2) Inspection by committees of Congress.--Section 6103(f) shall apply with respect to--

(A) the application for exemption of any organization described in section 501(c) or (d) which is exempt from taxation under section 501(a) for any taxable year or notice of status of any political organization which is exempt from taxation under section 527 for any taxable year, and any application referred to in subparagraph (B) of subsection (a)(1) of this section, and

(B) any other papers which are in the possession of the Secretary and which relate to such application, as if such papers constituted returns.

(3) Information available on Internet and in person.--

(A) In general.--The Secretary shall make publicly available, on the Internet and at the offices of the Internal Revenue Service--

(i) a list of all political organizations which file a notice with the Secretary under section 527(i), and

(ii) the name, address, electronic mailing address, custodian of records, and contact person for such organization.

(B) Time to make information available.--The Secretary shall make available the information required under subparagraph (A) not later than 5 business days after the Secretary receives a notice from a political organization under section 527(i).

(b) Inspection of annual returns.--The information required to be furnished by sections 6033, 6034, and 6058, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe. Nothing in this subsection shall authorize the Secretary to disclose the name or address of any contributor to any organization or trust (other than a private foundation, as defined in section 509(a) or a political organization exempt from taxation under section 527) which is required to furnish such information. In the case of an organization described in section 501(d), this subsection shall not apply to copies referred to in section 6031(b) with respect to such organization. In the case of a trust which is required to file a return under section 6034(a), this subsection shall not apply to information regarding beneficiaries which are not organizations described in section 170(c). Any annual return which is filed under section 6011 by an organization described in section 501(c)(3) and which relates to any tax imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc., organizations) shall be treated for purposes of this subsection in the same manner as if furnished under section 6033.

(c) Publication to State officials.--

(1) General rule for charitable organizations.--In the case of any organization which is described in section 501(c)(3) and exempt from taxation

under section 501(a), or has applied under section 508(a) for recognition as an organization described in section 501(c)(3), the Secretary at such times and in such manner as he may by regulations prescribe shall--

(A) notify the appropriate State officer of a refusal to recognize such organization as an organization described in section 501(c)(3), or of the operation of such organization in a manner which does not meet, or no longer meets, the requirements of its exemption,

(B) notify the appropriate State officer of the mailing of a notice of deficiency of tax imposed under section 507 or chapter 41 or 42, and

(C) at the request of such appropriate State officer, make available for inspection and copying such returns, filed statements, records, reports, and other information, relating to a determination under subparagraph (A) or (B) as are relevant to any determination under State law.

(2) Disclosure of proposed actions related to charitable organizations.--

(A) Specific notifications.--In the case of an organization to which paragraph (1) applies, the Secretary may disclose to the appropriate State officer--

(i) a notice of proposed refusal to recognize such organization as an organization described in section 501(c)(3) or a notice of proposed revocation of such organization's recognition as an organization exempt from taxation,

(ii) the issuance of a letter of proposed deficiency of tax imposed under section 507 or chapter 41 or 42, and

(iii) the names, addresses, and taxpayer identification numbers of organizations which have applied for recognition as organizations described in section 501(c)(3).

(B) Additional disclosures.--Returns and return information of organizations with respect to which information is disclosed under subparagraph (A) may be made available for inspection by or disclosed to an appropriate State officer.

(C) Procedures for disclosure.--Information may be inspected or disclosed under subparagraph (A) or (B) only--

(i) upon written request by an appropriate State officer, and

(ii) for the purpose of, and only to the extent necessary in, the administration of State laws regulating 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.

(D) Disclosures other than by request.--The Secretary may make available for inspection or disclose returns and return information of an organization to which paragraph (1) applies to an appropriate State officer of any State if the Secretary determines that such returns or return information may constitute evidence of noncompliance under the laws within the jurisdiction of the appropriate State officer.

(3) Disclosure with respect to certain other exempt organizations.--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.

(4) Use in civil judicial and administrative proceedings.--Returns and return information disclosed pursuant to this subsection may be disclosed in civil administrative and civil judicial proceedings pertaining to the enforcement of State laws regulating such organizations in a manner prescribed by the Secretary similar to that for tax administration proceedings under section 6103(h)(4).

(5) No disclosure if impairment.--Returns and return information shall not be disclosed under this subsection, or in any proceeding described in paragraph

(4), to the extent that the Secretary determines that such disclosure would seriously impair Federal tax administration.

(6) Definitions.--For purposes of this subsection--

(A) Return and return information.--The terms "return" and "return information" have the respective meanings given to such terms by section 6103(b).

(B) Appropriate State officer.--The term "appropriate State officer" means--

(i) the State attorney general,

(ii) the State tax officer,

(iii) in the case of an organization to which paragraph (1) applies, any other State official charged with overseeing organizations of the type described in section 501(c)(3), and

(iv) in the case of an organization to which paragraph (3) applies, the head of an agency designated by the State attorney general as having primary responsibility for overseeing the solicitation of funds for charitable purposes.

(d) Public inspection of certain annual returns, reports, applications for exemption, and notices of status.--

(1) In general.--In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501(a) or an organization exempt from taxation under section 527(a)--

(A) a copy of--

(i) the annual return filed under section 6033 (relating to returns by exempt organizations) by such organization,

(ii) any annual return which is filed under section 6011 by an organization described in section 501(c)(3) and which relates to any tax imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc., organizations),

(iii) if the organization filed an application for recognition of exemption under section 501 or notice of status under section 527(i), the exempt

status application materials or any notice materials of such organization, and

(iv) the reports filed under section 527(j) (relating to required disclosure of expenditures and contributions) by such organization,

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and, if such organization regularly maintains 1 or more regional or district offices having 3 or more employees, at each such regional or district office, and

(B) upon request of an individual made at such principal office or such a regional or district office, a copy of such annual return, reports, and exempt status application materials or such notice materials shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

The request described in subparagraph (B) must be made in person or in writing. If such request is made in person, such copy shall be provided immediately and, if made in writing, shall be provided within 30 days.

(2) 3-year limitation on inspection of returns.--Paragraph (1) shall apply to an annual return filed under section 6011 or 6033 only during the 3-year period beginning on the last day prescribed for filing such return (determined with regard to any extension of time for filing).

(3) Exceptions from disclosure requirement.--

(A) Nondisclosure of contributors, etc.--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. In the case of an organization described in section 501(d), paragraph (1) shall not require the disclosure of the copies referred to in section 6031(b) with respect to such organization.

(B) Nondisclosure of certain other information.--Paragraph (1) shall not require the disclosure of any information if the Secretary withheld such information from public inspection under subsection (a)(1)(D).

(4) Limitation on providing copies.--Paragraph (1)(B) shall not apply to any request if, in accordance with regulations promulgated by the Secretary, the organization has made the requested documents widely available, or the Secretary determines, upon application by an organization, that such request is part of a harassment campaign and that compliance with such request is not in the public interest.

(5) Exempt status application materials.--For purposes of paragraph (1), the term "exempt status application materials" means the application for recognition of exemption under section 501 and any papers submitted in support of such application and any letter or other document issued by the Internal Revenue Service with respect to such application.

(6) Notice materials.--For purposes of paragraph (1), the term "notice materials" means the notice of status filed under section 527(i) and any papers submitted in support of such notice and any letter or other document issued by the Internal Revenue Service with respect to such notice.

(7) Disclosure of reports by Internal Revenue Service.--Any report filed by an organization under section 527(j) (relating to required disclosure of expenditures and contributions) shall be made available to the public at such times and in such places as the Secretary may prescribe.

(8) Application to nonexempt charitable trusts and nonexempt private foundations.--The organizations referred to in paragraphs (1) and (2) of section 6033(d) shall comply with the requirements of this subsection relating to annual returns filed under section 6033 in the same manner as the organizations referred to in paragraph (1).

26 U.S.C. § 7213. Unauthorized disclosure of information

(a) Returns and return information.--

(1) Federal employees and other persons.--It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any former officer or employee, willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction 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, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

(2) State and other employees.--It shall be unlawful for any person (not described in paragraph (1)) 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 subsection (d), (i)(3)(B)(i) or (7)(A)(ii), (k)(10), (l)(6), (7), (8), (9), (10), (12), (15), (16), (19), (20), or (21) or (m)(2), (4), (5), (6), or (7) of section 6103 or under section 6104(c). 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.

(3) Other persons.--It shall be unlawful for any person to whom any return or return information (as defined in section 6103(b)) is disclosed in a manner unauthorized by this title thereafter willfully to print or publish in any manner not provided by law any such return or return information. 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.

(4) Solicitation.--It shall be unlawful for any person willfully to offer any item of material value in exchange for any return or return information (as defined in section 6103(b)) and to receive as a result of such solicitation any such return or return information. 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.

(5) Shareholders.--It shall be unlawful for any person to whom a return or return information (as defined in section 6103(b)) is disclosed pursuant to the provisions of section 6103(e)(1)(D)(iii) willfully to disclose such return or return information in any manner not provided by law. Any violation of this paragraph shall be a felony punishable by a fine in any amount not to exceed $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution.

(b) Disclosure of operations of manufacturer or producer.--Any officer or employee of the United States who divulges or makes known in any manner whatever not provided by law to any person the operations, style of work, or apparatus of any manufacturer or producer visited by him in the discharge of his official duties shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution; and the offender shall be dismissed from office or discharged from employment.

(c) Disclosures by certain delegates of Secretary.--All provisions of law relating to the disclosure of information, and all provisions of law relating to penalties for unauthorized disclosure of information, which are applicable in respect of any function under this title when performed by an officer or employee of the Treasury Department are likewise applicable in respect of such function when performed by any person who is a "delegate" within the meaning of section 7701(a)(12)(B).

(d) Disclosure of software.--Any person who willfully divulges or makes known software (as defined in section 7612(d)(1)) to any person in violation of section 7612 shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(e) Cross references.--

(1) Penalties for disclosure of information by preparers of returns.--

For penalty for disclosure or use of information by preparers of returns, see section 7216.

(2) Penalties for disclosure of confidential information.--

For penalties for disclosure of confidential information by any officer or employee of the United States or any department or agency thereof, see 18 U.S.C. 1905.

26 U.S.C. § 7431. Civil damages for unauthorized inspection or disclosure of returns and return information

(a) In general.--

(1) Inspection or disclosure by employee of United States.--If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(2) Inspection or disclosure by a person who is not an employee of United States.--If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 or in violation of section 6104(c), such taxpayer may bring a civil action for damages against such person in a district court of the United States.

(b) Exceptions.--No liability shall arise under this section with respect to any inspection or disclosure--

(1) which results from a good faith, but erroneous, interpretation of section 6103, or

(2) which is requested by the taxpayer.

(c) Damages.--In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of--

(1) the greater of--

(A) $1,000 for each act of unauthorized inspection or disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of--

(i) the actual damages sustained by the plaintiff as a result of such unauthorized inspection or disclosure, plus

(ii) in the case of a willful inspection or disclosure or an inspection or disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action, plus

(3) in the case of a plaintiff which is described in section 7430(c)(4)(A)(ii), reasonable attorneys fees, except that if the defendant is the United States, reasonable attorneys fees may be awarded only if the plaintiff is the prevailing party (as determined under section 7430(c)(4)).

(d) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce any liability created under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized inspection or disclosure.

(e) Notification of unlawful inspection and disclosure.--If any person is criminally charged by indictment or information with inspection or disclosure of a taxpayer's return or return information in violation of--

(1) paragraph (1) or (2) of section 7213(a),

(2) section 7213A(a), or

(3) subparagraph (B) of section 1030(a)(2) of Title 18, United States Code,

the Secretary shall notify such taxpayer as soon as practicable of such inspection or disclosure.

(f) Definitions.--For purposes of this section, the terms “inspect”, “inspection”, “return”, and “return information” have the respective meanings given such terms by section 6103(b).

(g) Extension to information obtained under section 3406.--For purposes of this section--

(1) any information obtained under section 3406 (including information with respect to any payee certification failure under subsection (d) thereof) shall be treated as return information, and

(2) any inspection or use of such information other than for purposes of meeting any requirement under section 3406 or (subject to the safeguards set forth in section 6103) for purposes permitted under section 6103 shall be treated as a violation of section 6103.

For purposes of subsection (b), the reference to section 6103 shall be treated as including a reference to section 3406.

(h) Special rule for information obtained under section 6103(k)(9).--For purposes of this section, any reference to section 6103 shall be treated as including a reference to section 6311(e).

CERTIFICATE OF SERVICE

I hereby certify that, on June 24, 2015, I electronically filed the foregoing brief and addendum 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.

/s/ Derek L. Shaffer
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