

ARTICLES

STATE OF CONFUSION: A NON-PROFIT'S RIGHT TO WITHHOLD DONOR INFORMATION FROM STATE REGULATORS

BENJAMIN W. AKINS,* JD, LL.M.

I. INTRODUCTION

“The First Amendment . . . protect[s] the privacy of individuals who wish to support charitable educational organizations that seek to advance the public good. In derogation of these protections, California officials are pressuring Plaintiff . . . to reveal its confidences.”¹ With these words, the first shot was fired across the bow in a battle between non-profit organizations and state regulators. In March 2014, the Center for Competitive Politics (“CCP”) brought an action to “secure its rights and those of its supporters.”² Two months later, a second voice was added to the chorus nearly three thousand miles away, as Citizens United Foundation (“Citizens United”) filed a similar complaint in New York state.³

The states’ recent demands⁴ of unredacted copies of charity donor lists is at the crux of the discord, which the states are requiring before allowing

* Assistant Professor of Legal Studies & Taxation, Georgia Gwinnett College

¹ Complaint for Declaratory and Injunctive Relief, Center for Competitive Politics v. Harris, No. 2:14-cv-00636-MCE-DAD (E.D. Cal. Mar. 7, 2014).

² *Id.*

³ Complaint, Citizens United and Citizens United Found. v. Schneiderman, No. 1:14-cv-3703-SHS (S.D.N.Y. May 22, 2014). At the core of its complaint, Citizens United (along with its affiliated IRC section 501(c)(4) organization by the same name) alleged that a policy of the New York Attorney General “will chill the speech of both Plaintiffs and donors by intruding upon and destroying the promise of confidentiality when donors agree to fund Plaintiff’s advocacy efforts.” *Id.* at ¶ 4.

⁴ See Letter from Seth Perlman, attorney for N.Y. Charities Bureau, to Eric Schneiderman, Att’y Gen. (Mar. 28, 2014) (on file with author) (“The [New York Charities] Bureau has demanded unredacted copies of IRS Form 990 Schedule Bs (including, specifically, the donors’ names and addresses) from certain non-profit entities as a condition for accepting their annual charitable solicitation registration filings. The entities that have received this demand have been submitting annual filings to the Bureau for several years and, until recently, have never before received demands for their confidential donor information.”); see also Center for Competitive Politics, *CCP v. Harris*, <http://www.campaignfreedom.org/litigation/current-litigation/ccp-v-harris> (“This year, for the first time since CCP began soliciting contributions in California in 2008, the Attorney General requested an unredacted copy of CCP’s [IRS Form 990] Schedule B.”).

those charities to solicit donations.⁵ While the states claim the information is essential to their enforcement efforts, non-profits are unsurprisingly wary. Namely, there is a concern that disclosure of donor or membership lists will have a chilling effect on donor involvement—even more so if the information were to become available to the public.⁶ While the states have represented that they have no intention of making the information publicly available, the charities have their doubts.⁷

The charities' arguments have primarily focused on whether organizations can resist the states' attempts to compel disclosure on First Amendment grounds.⁸ So far, the courts have been unwilling to buy into the charities' arguments that the disclosure rules are *facially* invalid. In CCP's case, the charity suffered losses at the district and circuit court levels, and ultimately saw the Supreme Court deny its writ.⁹ It now finds itself back at square one, challenging the requirement anew. Citizens United has fared no better, suffering a loss in its fight for an injunction and then having its case dismissed altogether.¹⁰

The cause of the non-profit community, however, has not been left entirely without hope. Indeed, there are signs that its bad luck may be reversing. Americans for Prosperity Foundation ("AFP") filed suit in California in December 2014.¹¹ After a winding path through the federal courts, it received a trial on the merits and earned a ruling that the state's disclosure rule was unconstitutional *as applied*.

The current cases still linger on and likely will for the foreseeable future as procedural wrangling by the parties continues. Regardless of their final disposition, however, the bigger issue is that more states than just New York and California require charities to disclose their donor information,¹² which means there are hundreds of more organizations potentially waiting to take up the fight in the wings. Without a uniform approach among the circuits, life will be difficult for non-profit organizations who register in multiple

⁵ See N.Y. EXEC. LAW § 172(1); 13 N.Y. COMP. CODES R. & REGS. § 91.4; and 13 N.Y. COMP. CODES R. & REGS. § 91.5 (directing charities to include all Form 990 schedules along with the charities' annual filing); *see also* CAL. GOV'T CODE § 12584 (authorizing the California Attorney General to request "whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register") and CAL. CODE REGS. tit. 11 § 301 (2014) (requiring charities to include an IRS Form 990 with their annual registration filings).

⁶ Complaint for Declaratory and Injunctive Relief at ¶¶ 34-39, Center for Competitive Politics, No. 2:14-cv-00636-MCE-DAD (E.D. Cal. Mar. 7, 2014); Complaint at ¶¶ 20-22, Citizens United v. Schneiderman, No. 1:14-cv-3703-SHS (S.D.N.Y. May 22, 2014).

⁷ Ctr. for Competitive Politics v. Harris, 784 F.3d 1307, 1316 (9th Cir. 2015) (*cert. denied*, 136 S. Ct. 480 (2015)); Citizens United & Citizens United Found. v. Schneiderman, 115 F. Supp. 3d 457, 466-67 (S.D.N.Y. 2015).

⁸ See Ctr. for Competitive Politics, 784 F.3d at 1309 ("CCP argues that disclosure of its major donors' names violates the right of free association guaranteed to CCP and its supporters by the First Amendment."); *see also* Citizens United, 115 F. Supp. 3d at 462 ("First, plaintiffs contend that the policy violates their First Amendment rights of freedom of speech and association.")

⁹ Ctr. for Competitive Politics v. Harris, 136 S. Ct. 480 (2015).

¹⁰ Citizens United v. Schneiderman, 2016 U.S. Dist. LEXIS 115495 (Aug. 29, 2016).

¹¹ Complaint for Preliminary and Permanent Injunctive Relief and for a Declaratory Judgment, Americans for Prosperity Found. v. Harris, No. 2:14-cv-09448-R-FFM (W.D. Cal. Dec. 9, 2014).

¹² See Ctr. for Competitive Politics, 784 F.3d 1307, n.1 (e.g., Florida, Hawaii, Kentucky, and Mississippi).

states, including the three organizations named above. A steady approach among the circuits, however, is achievable.

In Part II, this article outlines the federal filing requirements for non-profit organizations and how that filing is relevant to state filing regimes. Part III discusses what has been learned from the courts thus far. Finally, Part IV analyzes the current landscape and offers several approaches that may bring uniformity to the issue.

II. THE STATES' BOOTSTRAPPING OF THE FEDERAL FILING REQUIREMENTS

A. FORM 990

The conflict between the states and the non-profits surrounds a perfunctory regulatory requirement. Most entities granted tax exemption under Internal Revenue Code ("IRC") section 501 are required to submit an annual filing with the Internal Revenue Service ("IRS").¹³ This filing, known as the Form 990: "Return of Organization Exempt From Income Tax," informs the IRS of the financial dealings of the filing non-profit party as well as other relevant metrics important to the administration of the tax code.¹⁴

The IRC first included the notion of an annual filing requirement for exempt organizations in the early 1940s.¹⁵ Since its humble beginnings as a two page form, the document has expanded in breadth and length.¹⁶ In its current state, the filing is twelve pages, not including schedules, and comes with roughly one hundred pages of instructions.¹⁷ Further, a host of related filing regimes have stemmed from Form 990—e.g., Form 990-N,¹⁸ Form 990-PF,¹⁹ and Form 990-EZ²⁰—all serving various types of non-profits based on their size, revenue, and status.²¹

The purpose of the Form is to facilitate the collection of information required by IRC section 6033.²² This section requires almost every tax-exempt organization to "file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information for

¹³ 26 U.S.C. 6033(a)(1) (2015).

¹⁴ See TREAS. REG. § 1.6033-1(a)(1) (2015).

¹⁵ See Cheryl Chasin, Debra Saweck & David Jones, CPE Topic G 2002. ("Form 990 has been around for more than 50 years. The first 990 was filed for tax years ending in 1941.")

¹⁶ *Id.*

¹⁷ See I.R.S. Form 990, Return of Organization Exempt From Income Tax, and 2015 Instructions for Form 990 Return of Organization Exempt From Income Tax (2015).

¹⁸ I.R.S. Form 990-N, Electronic Notice (e-Postcard) for Tax-Exempt Organizations Not Required to File Form 990 or Form 990-EZ (2015) (filed by organizations with gross receipts not in excess of \$50,000 annually).

¹⁹ I.R.S. Form 990-PF, Return of Private Foundation (2016) (filed by organizations classified as private foundations under 26 U.S.C. § 501).

²⁰ I.R.S. Form 990-EZ, Short Form Return of Organization Exempt From Income Tax (2016) (filed by organizations with gross receipts less than \$200,000 annually or total assets less than \$500,000).

²¹ See *Which forms do exempt organizations file?*, I.R.S. <https://www.irs.gov/charities-non-profits/form-990-series-which-forms-do-exempt-organizations-file-filing-phase-in> (providing a summary overview of which form is appropriate for which entity and links to each form and its accompanying instructions).

²² I.R.S. Instructions for Form 990 Return of Organization Exempt From Income Tax (2016).

the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe.”²³ The Secretary has deemed donor information to be necessary for this purpose, and requires that the information be reported on Schedule B of Form 990. In most instances, only significant donors—i.e., those contributing at least \$5,000 of cash or property—are subject to disclosure.²⁴

At the federal level, there is little concern of the information on Schedule B being disclosed by the IRS. The tax law is specific and detailed regarding the Government’s obligation of confidentiality.²⁵ IRC section 6103—the hallmark statute of confidentiality—states, “[r]eturn and return information shall be confidential, and except as authorized . . . no officer or employee of the United States . . . shall disclose any . . . return information obtained by him in any manner in connection with his service.”²⁶ The term “disclose” is defined in sweeping terms as “the making known to any person in any manner whatever a return or return information.”²⁷

IRC section 6104 contains exceptions to the general rule of confidentiality. For instance, an organization’s application for exempt status is subject to public inspection²⁸ as well as the organization’s annual filing of the Form 990.²⁹ The statute also allows for the donor information of certain exempt organizations (e.g., IRC section 527 political organizations) to be disclosed.³⁰ While the exceptions are seemingly broad, the statute makes explicit that “the name or address of any contributor to” an IRC section 501(c) organization is not subject to public inspection.³¹ The statute goes further in protecting an IRC section 501(c)(3)³² organization’s donor

23 26 U.S.C. 6033(a)(1) (2016) (This section excludes certain religious organizations, governmental organizations, and political organizations from the filing requirement, but it explicitly includes nonexempt charitable trusts and nonexempt private foundations. 26 U.S.C. § 6033(d) (2016).)

24 See I.R.S. Instructions for Form 990 Return of Organization Exempt From Income Tax (2016). If a charity establishes it is sufficiently supported by the public, then the organization will not have to report donors contributing \$5,000 or more unless the amount of their individual contribution makes up at least 2% of the organization’s total yearly contributions. *Id.*

25 See 26 U.S.C. §§ 6103, 6104 (2016).

26 26 U.S.C. § 6103(a) (2015). In subsection (b)(1), the statute defines “return” as “any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted . . . by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.” 26 U.S.C. § 6103(b)(1) (2016). Subsection (b)(2) takes a more broadly inclusive approach in defining “return information” as “a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return.” 26 U.S.C. § 6103(b)(2)(A) (2016).

27 26 U.S.C. § 6103(b)(8) (2016) (the language is such that it prohibits the IRS from even disclosing whether or not an organization has filed a return.).

28 26 U.S.C. § 6104(a)(1)(A) (2016).

29 26 U.S.C. § 6104(b) (2016).

30 26 U.S.C. § 6104(d)(1) (2016).

31 26 U.S.C. § 6104(d)(3)(A) (2016).

32 Center for Competitive Politics, Citizens United Foundation and Americans for Prosperity—the organizations central to this paper—are all exempt under IRC section 501(c)(3).

information by providing that it is neither available for public inspection³³ nor available to state regulators.³⁴

B. THE STATES' REQUIREMENTS

Every state has statutes and rules that authorize its regulators to protect citizens from charitable solicitation activity, and several states expressly require a copy of the Schedule B as part of their process.³⁵

1. California

As a prerequisite to soliciting donations in the State of California, a non-profit must be in good standing with the Registry of Charitable Trusts.³⁶ The Registry is organized as part of the State Treasury, and it is administered by the state's Department of Justice.³⁷ As the head of the Justice Department, the attorney general has the "primary responsibility for supervising charitable trusts in California, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations."³⁸

To achieve these broad goals, the attorney general is given broad powers.³⁹ One arrow in the attorney general's quiver is the power to "obtain from public records, court officers, taxing authorities, trustees, and other sources, whatever information, copies of instruments, reports, and records [that] are needed for the establishment and maintenance of the register."⁴⁰ Specifically, state law requires non-profits to submit annual reports and gives the attorney general the power to determine what information should be reported in those annual filings.⁴¹ In exercise of these powers, California's Attorney General requires that non-profits submit their Form 990 as part of their annual filing.⁴²

Contrary to the more nuanced confidentiality laws at the federal level, California specifies that all filings exclusively related to an organization's charitable purpose are open to public inspection.⁴³ In recent months, however, and in light of the litigation that is the subject matter of this article,

33 26 U.S.C. § 6104(d)(3)(A) (2016).

34 26 U.S.C. § 6104(c)(3) (2016). ("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.").

35 See *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1316 (9th Cir. 2015).

36 CAL. GOV'T CODE § 12585 (2016).

37 CAL. GOV'T CODE § 12587.1(a) (2016).

38 CAL. GOV'T CODE § 12598(a) (2016).

39 *Id.* ("The Attorney General has broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities.").

40 CAL. GOV'T CODE § 12584 (2016).

41 CAL. GOV'T CODE §§ 12585-86 (2016).

42 CAL. CODE REGS. tit. 11 § 301 (2016).

43 CAL. GOV'T. CODE § 12590 (2016) (The vague language of the statute created much debate during litigation. The state argued that it considered the Schedule B to be protected from public disclosure under an internal policy. See *Ams. for Prosperity Found. v. Harris*, 2016 U.S. Dist. LEXIS 53679, *15-16 (C.D. Cal. April 21, 2016), and *Ctr. for Competitive Politics*, 784 F.3d 1307, 1311 (9th Cir. 2015)).

California enacted a new regulation preventing the public disclosure of IRC section 501(c)(3) organization's donor information.⁴⁴ In essence, this regulation makes confidential any donor "information exempt from public inspection pursuant to [IRC] section 6104(d)(3)(A)."⁴⁵

2. *New York*

Similar to California's regime, New York operates a Charities Bureau under the attorney general that requires non-profits to be properly registered with the state before solicitation may occur.⁴⁶ The filings include both an initial filing to gain entry into the Bureau's records and subsequent yearly filings.⁴⁷ The law allows for the attorney general to issue rules necessary for the administration of the charitable administration regime.⁴⁸

In its regulations, the attorney general specifies that non-profits must submit a unique state form (CHAR410) for their initial filing and attach a copy of their Form 1023.⁴⁹ For subsequent filings, organizations must file a different state form (CHAR500) and attach a copy of their Federal Form 990.⁵⁰ The regulations state that organizations must include all schedules along with the copy of their Form 990—including Schedule B.⁵¹

Under New York's Freedom of Information Law ("FOIL"), the public may access state agency records.⁵² Forms CHAR410 and CHAR500 are explicitly listed by the Charities Bureau as documents subject to public disclosure.⁵³ FOIL, however, states that an "agency may deny access to records or portions thereof that . . . are specifically exempted from disclosure by state or federal statute."⁵⁴ In conjunction with IRC section 6103, which mandates the confidentiality of Schedule B, the attorney general interprets FOIL to exempt the schedule from public disclosure.⁵⁵

III. CCP AND WHAT CAME AFTER

A. CENTER FOR COMPETITIVE POLITICS SOUNDS AN ALARM

On March 7, 2014, CCP became the first organization to take legal action against a state for attempting to compel disclosure of donor information.⁵⁶

44 CAL. CODE REGS., tit. 11 § 310(b) (2016).

45 *Id.*

46 N.Y. EXEC. LAW § 172 (2016).

47 N.Y. EXEC. LAW §§ 172, 172-b (2016).

48 N.Y. EXEC. LAW § 177 (2016).

49 13 N.Y. COMP. CODES R. & REGS. tit. 13 § 91.4 (2016) (The Form 1023 is required by the IRS for organizations applying for exemption under IRC § 501(c)).

50 13 N.Y. COMP. CODES R. & REGS. tit. 13 § 91.5 (2016).

51 13 N.Y. COMP. CODES R. & REGS. tit. 13 § 91.5(i)(a) (2016) (The requirement that the Form 990 and all schedules be included was first introduced into the regulations in 2006. *See* Citizens United & Citizens United Found. v. Schneiderman, 115 F. Supp. 3d 457 (S.D.N.Y. 2015).

52 N.Y. Pub. Off. Law § 87 (2016).

53 *See* CHAR410 (2015) and CHAR500 (2015).

54 N.Y. Pub. Off. Law § 87(2)(a) (2016).

55 *See* Citizens United, 115 F. Supp. 3d 457 at 466; *see also* Instructions for Form CHAR500 at 6.

56 Complaint for Declaratory and Injunctive Relief, Ctr. for Competitive Politics v. Harris, No. 2:14-cv-00636-MCE-DAD (E.D. Cal. Mar. 7, 2014).

Although CCP is based in Virginia, it was not a stranger to California or its filing requirements. Indeed, it had been filing in the state since 2008 without issue.⁵⁷ In each of the previous six years, CCP had simply redacted information related to its donors, and, in each of the previous six years, the State of California had accepted and approved the registration.⁵⁸

On January 9, 2014, CCP once more went through its routine process of filing the Annual Registration Renewal Fee Report with California's Attorney General. As with the last six years, CCP redacted donor information.⁵⁹ This time, however, the application was met with a different response. Instead of a pro forma letter announcing acceptance, this reply contained four bold-faced words in its opening paragraph announcing a change in course: "[t]he filing is incomplete because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors."⁶⁰ The letter goes on to emphasize that the state requires a carbon copy of the federal filing and offers CCP thirty days to comply.⁶¹

CCP's compliant alleged that California's compelled disclosure requirement infringed upon its freedom of association.⁶² As such, CCP sought a preliminary injunction to prevent the state from acquiring its donor information.⁶³ The district court employed the traditional four prong analysis to determine whether to grant the injunction: (1) Can CCP prove a likelihood of success on the merits? (2) Is it likely that CCP would suffer irreparable harm in the absence of an injunction? (3) Does the greater hardship rest with CCP? And, (4) is it in the public interest to grant the injunction?⁶⁴ The court ultimately decided all four factors in the state's favor and denied the injunction.⁶⁵

⁵⁷ *Id.* at ¶¶ 8-9.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at ¶ 12 (emphasis in original).

⁶¹ *Id.* at ¶ 14. (The letter further assures that the "Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers." *Id.* at ¶ 13.).

⁶² *Ctr. for Competitive Politics v. Harris*, 2014 U.S. Dist. LEXIS 66512, *3 (Alongside its First Amendment argument, CCP set forth an alternative argument that California's requirement was preempted by Federal Law. This was an argument set forth by Citizens United as well. In both cases, the courts rejected the preemption argument. *See id.* at *6-14; *Citizens United*, 115 F. Supp. 3d at 472-73.).

⁶³ *Ctr. for Competitive Politics v. Harris*, 2014 U.S. Dist. LEXIS 66512, *3 (CCP set forth a chain of logic that said it is an organization that fosters public debate, which exists because of public financial support, and the state's disclosure requirement threatened to dry up that financial support, leading it to insolvency. *Id.* at *14. In other words, donors would be reluctant to contribute to CCP if they knew they would be on file with the state as associated with the organization, and CCP would lose its funding.).

⁶⁴ *Id.* at *4-5. The court further explained the alternative standard for issuing a preliminary injunction stating that "under the so-called sliding scale approach, as long as the Plaintiffs demonstrate the requisite likelihood of irreparable harm and show that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in Plaintiffs' favor." *Id.* (citing *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-36 (9th Cir. 2011)). Both approaches, the Court reasoned "represent two points on a sliding scale, pursuant to which the required degree of irreparable harm increases or decreases in inverse correlation to the probability of success on the merits." *Id.* (citing *Roe v. Anderson*, 134 F.3d 1400, 1402 (9th Cir. 1998); *United States v. Nutri-cology, Inc.*, 982 F.2d 1374, 1376 (9th Cir. 1985)).

⁶⁵ *Id.* at *21-22. After determining that CCP failed to show a likelihood of success on the merits, the court made quick disposition of the other factors. CCP's "alleged constitutional claim is too tenuous to support" an injunction; therefore, "there is no risk of irreparable injury to Plaintiffs' contributors." With regard to the public interest, the court noted that "in light of the facts as presented to the Court at this

The Ninth Circuit affirmed the district court's opinion, clarified the correct standard for CCP's First Amendment challenge, completely dismantled CCP's constitutional argument, and most importantly, outlined a blueprint for how similar suits in the future may succeed. Conjuring language from *Citizens United v. FEC*, the Ninth Circuit made clear that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking."⁶⁶ The crucible in the eyes of the Court was whether the state's compelled disclosure requirement was substantially related to a sufficiently important interest.⁶⁷

The Court dismissed CCP's argument that sufficient harm could be established by the mere existence of a disclosure regulation.⁶⁸ The Court declared that CCP had either misread the cases it relied on in support of its contention,⁶⁹ or took them out of context. With regards to contextualization, it noted that CCP's line of precedent dealt primarily with "as-applied" challenges to state actions, which produced evidence of actual harm.⁷⁰ In this vein, the Court concluded that "CCP is incorrect when it argues that the compelled disclosure *itself* constitutes such an injury," and it "must balance the 'seriousness of the *actual* burden' on a plaintiff's First Amendment rights."⁷¹

The Court next clarified that it viewed CCP's claim as a "facial" challenge,⁷² which forced CCP into the posture of asking the Court to

stage in the proceeding, it is in the public interest that Defendant continues to serve as chief regulator of charitable organizations in the state in the manner sought." (internal citations omitted).

⁶⁶ *Ctr. for Competitive Politics*, 784 F.3d at 1312 (9th Cir. 2015) (quoting *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (internal citations and quotation marks omitted)).

⁶⁷ *Id.* (quoting *Citizens United*, 558 U.S. at 366-67 and *Buckley v. Valeo*, 424 U.S. 1 (1976)). In a footnote, the Court noted that this standard, known as "exacting scrutiny," was applicable beyond the election context, though the line of precedent that established it came almost exclusively from that context. *See Ctr. for Competitive Politics*, 784 F.3d at 1312 n.2).

⁶⁸ *Id.*

⁶⁹ *Id.* (" . . . CCP relies heavily on dicta in *Buckley v. Valeo*, in which the Supreme Court stated that 'compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.' 424 U.S. at 64. Notably, the Court said 'can' and not 'always does.'").

⁷⁰ *Id.* at 1312-13 ("[The *Buckley* court] cited a series of Civil Rights Era as-applied cases in which the NAACP challenged compelled disclosure of its members' identities at a time when many NAACP members experienced violence or serious threats of violence based on their membership in that organization." *Id.* at 1312 (footnote omitted)). The Court went on to explain that "[t]he strict test established by *NAACP v. Alabama* is necessary because compelled disclosure has the potential for substantially infringing the exercise of First Amendment rights. . . . The most logical conclusion to draw from these statements and their context is that compelled disclosure, without any additional harmful state action, can infringe First Amendment rights when that disclosure leads to private discrimination against those whose identities may be disclosed." *Id.* at 1313. (internal citations omitted)).

⁷¹ *Id.* at 1314 (quoting *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (emphasis added); citing *Chula Vista Citizens for Jobs & Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015) (en banc)).

⁷² *Id.* ("The [John Doe No. 1 court] explained that '[t]he label is not what matters.' [John Doe No. 1 v. Reed, 561 U.S. 186 at 194 (2010)]. Rather, because the 'plaintiffs' claim and the relief that would follow . . . reach[ed] beyond the particular circumstances of these plaintiffs,' they were required to 'satisfy our standards for a facial challenge to the extent of that reach.'" *Id.*).

overturn the statute entirely.⁷³ The Court found no circumstance where CCP could prevail on this argument.⁷⁴

The Ninth Circuit then found itself in the same position as the district court, namely that because CCP made no claim and brought “no evidence to suggest that their significant donors would experience threats, harassment, or other potentially chilling conduct as a result of the attorney general’s disclosure requirement,” it had “not demonstrated any ‘actual burden’.”⁷⁵ Furthermore, the Court found CCP’s fear that the state *might* inadvertently publish its donor information to be “speculative” and further found that it did not amount to “evidence that would support CCP’s claim that disclosing its donors to the attorney general for her confidential use would chill its donors’ participation.”⁷⁶

While concluding that CCP failed in all respects in proving that California’s disclosure requirement was facially invalid, the Court ended its analysis with a telling line: “we leave open the possibility that CCP could show ‘a reasonable probability that the compelled disclosure of [its] contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties that would warrant relief on an as-applied challenge.”⁷⁷ This opening would be just enough for a future challenge to find constitutional footing.

B. CITIZENS UNITED JOINS THE FRAY

In late March 2014, while California was still formulating a response to CCP’s complaint on the western front, a new campaign was underway in the East. In a letter written to the New York Attorney General, a law firm set forth the non-profit community’s concerns regarding the state’s newly minted practice of requiring Schedule B information as part of the registration process.⁷⁸ The letter, which sets forth many of the same arguments that would later be used by CCP in its litigation, ends with a call to the attorney general to “put an immediate stop to the Charities Bureau’s unlawful demands for non-profits’ confidential donor information as a condition for . . . soliciting donations in New York state.”⁷⁹

⁷³ *Id.* (“Even though CCP only seeks to enjoin the Attorney General from enforcing the disclosure requirement against itself, the Attorney General would be hard-pressed to continue to enforce an unconstitutional requirement against any other member of the registry.”) (A footnote in the case states that CCP conceded this point during oral argument. *Id.* at n.5).

⁷⁴ *Id.* at 1315. (“The least demanding of these standards is that of the First Amendment facial overbreadth challenge. Because CCP cannot show that the regulation fails exacting scrutiny in a ‘substantial’ number of cases, ‘judged in relation to [the disclosure requirement’s] plainly legitimate sweep,’ we need not decide whether it could meet the more demanding standards.” (internal citations omitted).)

⁷⁵ *Id.* at 1316 (footnote omitted).

⁷⁶ *Id.* (citing *United States v. Harris*, 347 U.S. 612, 626 (1954) (footnote omitted)).

⁷⁷ *Id.* at 1317 (citing *McConnell v. FEC*, 540 U.S. 93, 199 (2003)).

⁷⁸ Perlman, Seth. Letter to New York Attorney General Eric T. Schneiderman (Mar. 28, 2014) (on file with author). (“The Bureau has demanded unredacted copies . . . from certain non-profit entities as a condition for accepting their annual charitable solicitation registration filings. The entities that have received this demand have been submitting annual filings to the Bureau for several years and, until recently, have never before received demands for their confidential donor information.”)

⁷⁹ *Id.* (internal citation omitted).

New York had been forewarned, but it would barely have time to respond. In May, a suit was filed.⁸⁰ As with the CCP case, the suit was filed by a Virginia based non-profit—Citizens United—seeking to solicit in the state, but the plaintiffs had more than geography in common. Citizens United also had registered with the state for several years without issue even though it had never provided a Schedule B with its filings.⁸¹ It was not until an internal audit was conducted in New York’s Charities Bureau that Citizens United received word that its filing was incomplete for lacking an unredacted copy of Schedule B.⁸² Both CCP’s and Citizens United’s arguments for why such a request was inappropriate were parallel,⁸³ and both sought a preliminary injunction against their respective states.⁸⁴

Regarding Citizens United’s constitutional challenges, the district court reached much the same conclusion as the CCP court and in much the same way. In fact, the opinion, released less than three months after the Ninth Circuit’s decision, made common mention of the CCP opinion.⁸⁵ Embracing the Ninth Circuit’s view of the legal standard of whether the state “demonstrate[d] a substantial relation[ship] between the disclosure requirement and a sufficiently important governmental interest,”⁸⁶ the district court noted that the most important consideration was the showing of *actual* harm suffered by the organization.⁸⁷ The Court also determined that the complaint was best viewed as a facial challenge, concluding that the plaintiff “must demonstrate a likelihood that the [state’s] Schedule B policy fails” with regard to all such “charities that engage in solicitation, advocacy, and informational campaigns in general.”⁸⁸ Ultimately, the court decided that Citizens United had not demonstrated a likelihood of success on the merits, and it denied to grant a preliminary injunction.⁸⁹

In reaching this conclusion, the Court set forth its belief that the state’s compelled disclosure of donor information was in line with the important

⁸⁰ Complaint, *Citizens United v. Schneiderman*, No. 1:14-cv-3703-SHS (S.D.N.Y. May 22, 2014).

⁸¹ *Citizens United*, 115 F. Supp. 3d at 461. (“Plaintiffs, which first registered as charities in New York in 1995, have never filed copies of their Schedules B with the Attorney General.” (internal citation omitted).)

⁸² *Id.*

⁸³ As with CCP, Citizens United brought a litany of alternative arguments to bear that are not the focus of this manuscript. Specifically, Citizens United claimed that (1) The state deciding to enforce its Schedule B requirement after years of non-enforcement violated due process; (2) The state never intended to require the Schedule B in its existing regulation, so its decision to do so now required a formal rulemaking process; and (3) The state is preempted by federal law from requesting the Schedule B. *Id.* at 462. The third of these arguments bore a substantial resemblance to CCP’s preemption argument.

⁸⁴ Complaint, *Citizens United v. Schneiderman*, No. 1:14-cv-3703-SHS (S.D.N.Y. May 22, 2014).

⁸⁵ The *Citizens United* opinion references the CCP opinion twenty-one times. See *Citizens United*, 115 F. Supp. 3d at 466-67, 472-74.

⁸⁶ *Id.* at 463 (quoting *Citizens United v. F.E.C.*, 558 U.S. 310, 366-67, (2010) (internal quotation marks and citation omitted).

⁸⁷ *Id.* (quoting *Ctr. for Competitive Politics*, 784 F.3d at 1312 (9th Cir. 2015)).

⁸⁸ *Id.* at 464 (internal citations omitted). In its complaint, Citizens United appears to ask the court to view its challenge as facial at one point, but as-applied at other points. The court, in addressing this inconsistency, saw no need to rely on labels or the plaintiff’s rhetoric. Rather, the court determined that since the plaintiff was seeking relief applicable to all similarly situated organizations, it would proceed under a facial challenge analysis.

⁸⁹ *Id.* at 474.

interest of protecting its citizens.⁹⁰ Dismissing Citizens United's fears of the possible harms it would face, the Court would not be pulled from its stance that only proven instances of harm were of consequence to showing an actual burden.⁹¹

Citizens United's main concern throughout seemed to be the likelihood of its donor information being leaked to the public, and the Court was unconvinced of this risk.⁹² The Court reasoned that New York has "a long-standing policy of keeping donor information confidential, and it does not disclose Schedule B under [FOIL]" and further, that "[t]he Instructions for Form CHAR500 expressly state that Schedule B is 'exempt from FOIL disclosure to the public'."⁹³ In short, the "plaintiffs' fears of public backlash and financial harm are speculative and fail to support their contention that the Schedule B policy chills donors' association with, and contributions to, charities."⁹⁴

With federal courts in both California and New York signaling that anything short of actual harm is insufficient to prove the unconstitutionality of states compelling disclosure of Schedule B, charities started shifting their strategy from the abstract to the concrete. As such, Citizens United welcomed another round with the state of New York in district court—only this time, they sought to show the specific instances of harm the Court deemed necessary.⁹⁵

In a preemptive move, the state filed a motion to dismiss Citizens United's claim before discovery. The state was successful, and the district court dismissed the case, holding that none of its claims were plausible.⁹⁶ The Court found that the organization had failed once more to recall any

⁹⁰ *Id.* at 464. The Court reasoned that the state is charged with regulating the activities of charities soliciting funds within its borders for the purpose of protecting its citizens. The Schedule B was necessary to this purpose, for example, in order for the state "to identify organizations that may be operating fraudulently or without a proper charitable purpose" or to "disclose that a single donor has consistently served as its primary source of funding." A specific instance offered by the state occurred when it was able to use a charity's donor information "to determine that close relatives of a major donor were the recipients of jobs with, and expenditures by, a charity." *Id.* This anecdote helped convince the Court that of the necessity of the disclosure and the importance of the state's purpose. *Id.* at 465.

⁹¹ Citizens United towed the line that CCP had laid down. It maintained that the policy encroached on donors' privacy, causing them to fear reprisal from the state or the public, which would lead to diminished financial support to the charity. The result of these harms would be "a concomitant reduction in charities' ability to speak." The plaintiff argued that all of these concerns represented First Amendment violations regardless of any "actual" harm that could be proved. *Id.* at 466.

⁹² *Id.*

⁹³ *Id.* (internal citation omitted) (The Court enunciated in a footnote that even if the protections of FOIL were inadequate, the record was still bereft of any evidence that public disclosure would occur. *Id.* at n.5).

⁹⁴ *Id.* at 467 (citing *Ctr. for Competitive Politics*, 784 F.3d at 1316 n.9 (9th Cir. 2015)). Citizens United had also argued that disclosure to the Attorney General alone would be harmful, regardless of whether or not the state made the information available to the public. The organization cited to its public criticism of the New York Attorney General as evidence its donors may fear a backlash. The Court deconstructed this argument on two grounds. First, since it was viewing Citizens United's complaint as a facial challenge, it needed evidence that all other affected charities "share plaintiffs' fears of retaliation by the Attorney General." Second, even if all affected charities shared a general fear of their donors losing their anonymity, the court still had no evidence that a policy of compelled disclosure resulted in reduced donor participation. *Id.* (internal citations omitted).

⁹⁵ See First Amended Complaint, *Citizens United v. Schneiderman*, No. 1:14-cv-3703-SHS (S.D.N.Y. October 21, 2015).

⁹⁶ *Citizens United v. Schneiderman*, 2016 U.S. Dist. LEXIS 115495, *30 (Aug. 29, 2016).

specific instances of harm.⁹⁷ Even with its dismissal, the Court did not entirely shut the door, leaving Citizens United the opportunity to amend its complaint and start anew.⁹⁸

C. CALIFORNIA'S CHANGE IN FORTUNES

After CCP, AFP was the second organization to sue the attorney general in California for compelling the disclosure of its Schedule B.⁹⁹ With CCP, the court noted that it saw no evidence of First Amendment violations on the facts before it *at that time*.¹⁰⁰ In that case, though, there was no trial and no thoroughly established evidentiary record. There was only a hearing before the court on the possibility of First Amendment violations. AFP would remedy this.

While CCP and Citizens United were unsuccessful, AFP saw immediate victory at the district court level. It began its case by seeking a preliminary injunction from the state compelling disclosure of its Schedule B.¹⁰¹ This action commenced in late 2014,¹⁰² seven months after this same district court had ruled against CCP, but still four months before the Ninth Circuit would offer its guidance.¹⁰³ During this window of precedential purgatory, the district court would rule on AFP's request.¹⁰⁴ While acknowledging that the "district court in [the CCP] case denied preliminary injunctive relief on the basis that a prima facie showing of a First Amendment violation had not been attempted," it noted that "the Ninth Circuit effectively reversed the district court's denial by issuing an injunction pending appeal" in the CCP case.¹⁰⁵

The injunction (pending appeal) was issued in January 2015 and forbade the state from taking any action against CCP until the Ninth Circuit could sort out its own legal conclusions.¹⁰⁶ Having interpreted the circuit court to have constructively granted CCP's preliminary injunction by putting the district court's order on hold, the AFP court proceeded with an eye toward

⁹⁷ *Id.* at *20 ("These allegations fail to approach either the requisite specificity or severity . . . Plaintiffs provide no factual background or support for their conclusory assertions. And their pledge to adduce evidentiary support in the future to substantiate the alleged 'fears' of their donors is useless in the plausibility-pleading era." (internal citations omitted)).

⁹⁸ *Id.* at *30

⁹⁹ The Ninth Circuit's opinion references another organization, Thomas More Law Center, which filed a similar challenge against the Attorney General. *See* *Ams. for Prosperity Found. v. Harris*, 809 F.3d 536, 537 (9th Cir. 2015). This organization is referenced only in the circuit court's opinion, and is not discussed in this manuscript as the issue is more fully developed through AFP's legal journey.

¹⁰⁰ *Ctr. for Competitive Politics v. Harris*, 2014 U.S. Dist. LEXIS 66512 (e.g., "based on the evidence before the Court at this time . . . in light of the facts as presented to the Court at this stage in the proceeding").

¹⁰¹ *Ams. for Prosperity Found. v. Harris*, 2015 U.S. Dist. LEXIS 21365, *1 (C.D. Cal., Feb. 23 2015).

¹⁰² *Complaint for Preliminary and Permanent Injunctive Relief and for a Declaratory Judgment, Ams. for Prosperity Found. v. Harris*, No. 2:14-cv-09448 (C.D. Cal. Dec. 9, 2014).

¹⁰³ *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015).

¹⁰⁴ *Ams. for Prosperity Found. v. Harris*, 2015 U.S. Dist. LEXIS 21365 (C.D. Cal., Feb. 23 2015).

¹⁰⁵ *Id.* at *2.

¹⁰⁶ *Id.* ("[O]n January 6, 2015, the Ninth Circuit effectively reversed the district court's denial by issuing an injunction pending appeal in CCP. That injunction prohibits the Attorney General from taking 'any action against [CCP] for failure to file an un-redacted IRS Form 990 Schedule B pending further order of this court.' (internal citation omitted)).

granting the charity's request.¹⁰⁷ Indeed, the Court granted the preliminary injunction, but AFP's win was short lived.¹⁰⁸

By the time AFP's injunction went through the appeals process, the circuit court had one advantage that was not available to the district court—its own opinion in the CCP case.¹⁰⁹ Issued in May, the CCP opinion was in the annals of federal jurisprudence by the time the circuit court ruled on AFP in December.¹¹⁰ Viewing the AFP case as cut from the same cloth, the Court stated, “[w]e are bound by our holding in [CCP]—that the Attorney General's nonpublic Schedule B disclosure regime is facially constitutional.”¹¹¹

The Court's reasoning parroted the CCP and Citizens United cases. Regarding the charity's claim that disclosure to the state would deter donor support, the Court held that AFP had merely stated possible harms and unproven outcomes.¹¹² Not only had AFP failed to demonstrate that any donor had been subjected to reprisal, it had also been unable to prove that there was even a real possibility of harassment by the state.¹¹³ The Court was also nonplussed with AFP's fear that “technical failures or cybersecurity breaches are likely to lead to inadvertent public disclosure.”¹¹⁴ The Court found that accidental disclosure may, indeed, be harmful, but it found little evidence that it would occur.¹¹⁵

The latter half of the opinion dealt more specifically with whether California's disclosure exemptions were adequate to protect Schedule B information from the public.¹¹⁶ The Court conceded that there was a concern that California law allowed for an avenue where donor information could be available for public inspection, and, therefore, it did not disturb the district court's enjoining the state from publicly disclosing Schedule B

107 *Id.* at *3 (“Because the four factor test for evaluating a preliminary injunction pending appeal appears to be identical to that for a preliminary injunction and no prima facie showing is necessary, the Ninth Circuit's issuance of injunctive relief in the CCP case is instructive.” (citing *Humane Soc'y of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008))).

108 *Id.* at *4-5. (The Court found that AFP had “serious questions going to the merits and demonstrated that the balance of hardships sharply favor Plaintiff. It further noted that AFP had been persuasive in questioning the state's need or ability to require donor information and that the state's means of compelling the disclosure were overly intrusive. In concluding that the balance of hardships fell in AFP's favor, the court pointed out that the state had not been harmed “for the last decade” without the donor information, but that the burden AFP “would face from disclosure . . . is far greater and likely irreparable.”).

109 *See* *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307 (9th Cir. 2015).

110 *Ams. for Prosperity v. Harris*, 809 F.3d 536 (9th Cir. 2015).

111 *Id.* at 538 (citing *Ctr. for Competitive Politics*, 784 F.3d at 1317).

112 *Id.* at 539 (AFP has “not shown the demand for nonpublic disclosure of their Schedule B forms to the Attorney General has actually chilled protected conduct or would be likely to do so.” (citing *Ctr. for Competitive Politics*, 784 F.3d at 1314)).

113 *Id.* at 540. (The charity had put forth an example involving the state's public misstatements about organizations connected to Charles and David Koch, which it believed showed the potential for harassment in its case because its close relationship with the Koch brothers. The court dismissed this argument as a “single, isolated incident, directed not against [AFP] but against prominent public figures.” *Id.* at 541.).

114 *Id.* at 541.

115 *Id.* (The Court reiterated that the Attorney General “has no interest in public disclosure” and took judicial notice of a proposed regulation in California that would further assure confidentiality of sensitive information. *Id.* at 538.).

116 *Id.* at 542. (AFP has “raised serious questions, however, as to whether Schedule B forms collected by the state could be available for public inspection under California law, notwithstanding the Attorney General's good faith policy to the contrary.”).

information.¹¹⁷ Ultimately, the Court called for a full trial, where the charity could develop a record of demonstrated harm and abuse by the state.¹¹⁸

After a trial had been conducted, the district court considered anew whether AFP had carried its burden in proving it suffered actual harms that outweighed the state's interest of compelling disclosure of its donor information. The district court started with a discussion on the importance of the state's interest. The attorney general had argued that donor information allows her to determine "whether an organization has violated the law, including laws against self-dealing, improper loans, interested persons, or illegal or unfair business practices."¹¹⁹ In response, the district court found that "the attorney general was hard pressed to find a single witness who could corroborate the necessity of Schedule B" and that "even assuming arguendo that this information does genuinely assist in the attorney general's investigations, its disclosure demand of Schedule B is more burdensome than necessary."¹²⁰

The district court justified its departure from the conclusions drawn by the circuit court in CCP by stating that it, "unlike the Ninth Circuit, had the benefit of holding a bench trial in the matter and was left unconvinced that the attorney general actually needs Schedule B forms to effectively conduct its investigations."¹²¹ After all, the Court reasoned, AFP had registered without providing its Schedule B for a decade, so how can the state claim that it needs or uses such information in its daily operations?¹²²

The Court further relied on the support of witnesses affiliated with the state's Charitable Trusts Section, who verified that Schedule B information was seldom used by the state in audits or investigations. The Court recited a state employee's testimony: "out of the approximately 540 investigations conducted over the past ten years in the Charitable Trusts Section, only five instances involved the use of a Schedule B."¹²³ In sum, the record made it clear to the Court that the compelled disclosure of Schedule B "demonstrably played no role in advancing the attorney general's law enforcement goals for the past ten years."¹²⁴

The next phase of the opinion addressed what none of the charities had been able to show so far—demonstrated, actual harm by the disclosure rule.

117 *Id.* at 542-43.

118 *Id.* at 543.

119 *Ams. for Prosperity Found. v. Harris*, 2106 U.S. Dist. LEXIS 53679, *5 (C.D. Cal. April 21, 2016).

120 *Id.*

121 *Id.* at *6.

122 *Id.* (In support of this conclusion, the Court referenced the testimony of the Registrar of the Registry of Charitable Trusts.)

123 *Id.* at *7. (The Court further stated that "as to those five investigations identified, the Attorney General's investigators could not recall whether they had unredacted Schedule Bs on file before initiating the investigation. And even in instances where a Schedule B was relied on, the relevant information it contained could have been obtained from other sources." *Id.* (internal citation omitted).)

124 *Id.* (noting that the record "lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General's investigative, regulatory or enforcement efforts," the court concluded that if "heightened scrutiny means anything, it at least requires the Government to convincingly show that its demands are substantially related to a compelling interest, including by being narrowly tailored to achieve that interest.").

In all three cases, thus far, the main criticism was that the plaintiffs had done nothing but allude to *potential* harms that disclosure would bring. At trial, however, AFP was afforded the opportunity to pivot its argument from the abstract to the concrete.

AFP filled the record with tales of fear and retaliation against its donors. At the end, “the Court heard ample evidence establishing that AFP, its employees, supporters and donors face public threats, harassment, intimidation, and retaliation once their support for and affiliation with the organization becomes publicly known.”¹²⁵ In one instance, the organization’s CEO testified that a former insider boasted of being able to “slit his throat” and could be seen taking pictures of employees’ license plates inside the parking garage for the presumable purpose of posting the information online.¹²⁶ Another donor testified that protesters instigated a physical altercation with AFP donors at an event in Washington, D.C., culminating in a disabled woman being trapped in the building by a mob.¹²⁷ On and on the tales went: the CEO endured slurs and insults, supporters were trapped in a tent by protesters using box-cutters and knives, death threats became common place against donors and their families, pickets were held in front of donors’ businesses.¹²⁸ After reprising the list of examples of demonstrated abuses against AFP, the Court found “that AFP supporters have been subjected to abuses that warrant relief on an as-applied challenge,” concluding that it “is not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members.”¹²⁹

The Court ended its discussion with a probe into the attorney general’s argument that it only sought the Schedule B information for *nonpublic* use.¹³⁰ The Ninth Circuit had signaled its concern over whether the state’s nonpublic disclosure rules were adequate, and the subsequent trial had persuaded the district court that “the Attorney General has systematically failed to maintain the confidentiality of Schedule B forms.”¹³¹ Noting that the Charitable Registry receives in excess of sixty thousand filings per year (most of them paper filings), the Court found that “the amount of careless mistakes made by the Attorney General’s Registry is shocking.”¹³² Specifically “shocking” was that a search of the state’s website before trial revealed that fourteen hundred Schedule Bs had been posted publicly.¹³³ AFP later discovered even more Schedule Bs, bringing the total to almost two thousand, with nearly forty found the day prior to trial.¹³⁴ The Court found that such a “pervasive,

125 *Id.* at *12.

126 *Id.*

127 *Id.* at *12-13. (The witness stated that he “attempted to help a woman in a wheelchair exit the building; however the protestors had blocked their path . . . [o]nce they finally exited the building, they still had to go through a hostile crowd that was shouting, yelling and pushing.” *Id.* at *13 (internal citation omitted).)

128 *Id.* at *13-14.

129 *Id.* at *14-15.

130 *Id.* at *15.

131 *Id.* at *16.

132 *Id.*

133 *Id.* (The Court noted that the state removed these documents the day after they were discovered by the plaintiff).

134 *Id.* at *17.

recurring pattern of uncontained Schedule B disclosures—a pattern that has persisted even during this trial—is irreconcilable with the attorney general's assurances and contentions as to the confidentiality of Schedule Bs collected by the Registry."¹³⁵

The attorney general retorted that though the Registry “is underfunded, understaffed, and underequipped when it comes to the policy surrounding Schedule Bs,” it now had adequate procedures “in place to prevent negligent disclosures of Schedule Bs.”¹³⁶ The Court was unconvinced, stating, “[o]nce a confidential Schedule B has been publically disseminated via the internet, there is no way to meaningfully restore confidentiality.”¹³⁷ Thus, under the alternative ground that the state had proven a propensity for unauthorized disclosures, the district court once more found in favor of AFP.¹³⁸ On every argument, the Court had found in the charity's favor, which led it to grant a permanent injunction against the state from collecting Schedule Bs.¹³⁹

IV. UNTANGLING THE RHETORIC

While the current line of cases continue to ebb and flow, a new wave of organizations will inevitably take up the call in every state that requires disclosure of Schedule B. Whether this means more legal actions in California and New York, or in other states, the litigation will continue until the issue is resolved by the courts or Congress. If a common thread can be found among the three cases above, it is that the courts stand ready to protect a charity from compelled disclosures of donor information, but only on an as-applied basis and only after a complex journey through the appellate process allows the charity a full trial to tell its story. This is more than just judicial inefficiency—it is an unmanageable burden on the court system, especially given the volume of affected charities and the number of states where compelled disclosure is part of the registration process. For an effective, administrable solution to exist, it needs to be a formula that can be applied across states and organizations with certainty on both sides. There are three possible arguments: compelled disclosure of donor information should be fully prohibited, fully allowable, or allowable only if state confidentiality laws are adequate.

135 *Id.*

136 *Id.* at *17-18.

137 *Id.* at *18.

138 *Id.*

139 *Id.* at *18-19 (The Court recited the standard for a permanent injunction as requiring the plaintiff to show: “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).)

A. OPTION 1: COMPELLED DISCLOSURE OF DONOR INFORMATION SHOULD BE FULLY PROHIBITED

One option is to prohibit states from collecting any information on Schedule B whatsoever. This would be the equivalent of ruling that any such compelled disclosure is facially invalid—something the courts have been unwilling to do so far. While an apparent bold step against the interests of state regulators, this approach is nothing more than a codification of how the registration process has worked historically. In the cases explored here, the charities had been registering in their respective states without supplying donor information for years. Neither the record nor the arguments in these cases indicate anything except that the states had been fulfilling their obligations and administering their charity registration regimes without the Schedule B information.¹⁴⁰

This approach is also softened by the fact that the charities never seriously questioned the rights of the states to demand their donor information as part of their audit function.¹⁴¹ Rather, the charities' argument was that the states had no right to it as part of the *registration* process. In other words, once an audit has begun, the states are able to request the Schedule B if it is necessary and relevant. The states' logical counter would be that requesting donor information on a case-by-case basis is inefficient and insufficient to uncover issues that would give rise to an investigation in the first place.

What the AFP trial showed, however, was that the state was overstating the usefulness of such information in uncovering audit issues. Indeed, in California, Schedule B information had been involved in less than one percent of its audits over the last decade.¹⁴² While perhaps premature to extrapolate this data to other states, it is safe to say that such a small percentage of use by most states would abrogate the argument that donor information was "sufficiently important" to their interest in regulating charitable activity.

Even at the federal level, such a measure to prohibit the gathering of donor information has been the zeitgeist among some, as legislators have proposed eliminating Schedule B.¹⁴³ The discussion became relevant in Washington, D.C., in the wake of the IRS' inappropriate scrutiny of right-wing organizations in 2013.¹⁴⁴ Should such a measure ever be codified in the IRC, it would likely lead to a reformulation of what is appropriate or permissible at the state level.

¹⁴⁰ See, e.g., *supra*, text accompanying notes 58 and 81.

¹⁴¹ See, e.g., *Ctr. for Competitive Politics*, 784 F.3d at 1317 ("CCP does not contest that the Attorney General has the power to require disclosure of significant donor information as a part of her general subpoena power.").

¹⁴² See, *supra*, text accompanying note 123.

¹⁴³ Preventing IRS Abuse and Protecting Free Speech Act, H.R. 5053, 114th Cong. (2d Sess. 2016).

¹⁴⁴ See Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review* (May 14, 2013).

B. OPTION 2: COMPELLED DISCLOSURES OF DONOR INFORMATION IS FULLY ALLOWABLE

Allowing states full rights to charity donor information as part of the registration process would be the nuclear option from the charities' perspective. Its effect, however, would not be dire. Such a rule would merely place state regulators in the same position as their federal counterparts. IRC Section 6033 grants the Secretary of the Treasury broad discretion as to what information can be collected from charities, and the IRS has collected donor information for years without issue.

States already appropriate much of the federal filing regime in requiring certain information from Form 990. Allowing states to collect a full unredacted copy would simplify the registration process across all fifty states. While state regulators believe they already have this power, it is not express. The courts could construct such a fix, but Congress is in the best posture to act. Doing so would forestall a potential deluge of litigation and add clarity and efficiency to the process.

The simplest legislative fix is to tweak the language of IRC Section 6104(c)(3). Currently, the statute reads:

Upon written request by an appropriate State officer, the Secretary may make available for inspection or disclosure returns and return information of any organization described in section 501(c) (other than organizations described in paragraph (1) or (3) thereof) for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations.¹⁴⁵

The Secretary has the power to divulge most charities' registration information to state regulators, but the statute carves out an exception for IRC Section 501(c)(3) organizations (like AFP, CCP, and Citizens United). While making clear that states are not entitled to these organizations' information from the IRS, it is unclear whether states are allowed to require the information from the charities themselves. Such language could be read to indicate a legislative intent to protect such organizations' information from any source, and, indeed, such a preemption argument was made by CCP and Citizens United to the courts.¹⁴⁶ While this argument was rejected by the respective courts, there is still ambiguity in the language.

By simply striking the parenthetical—"other than organizations described in paragraph (1) or (3) [of IRC Section 501]"—Congress would establish that the Secretary is to provide Form 990 information of *all types* of IRC Section 501 organizations to state regulators for the "administration of State laws regulating the solicitation or administration of the charitable

¹⁴⁵ 26 U.S.C. §6104(c)(3) (2016) (emphasis added).

¹⁴⁶ *Ctr. for Competitive Politics v. Harris*, 784 F.3d 1307, 1318-19 (9th Cir. 2015); *Citizens United & Citizens United Found. v. Schneiderman*, 115 F. Supp. 3d 457, 472-73 (S.D.N.Y. 2015).

funds or charitable assets of such organizations.”¹⁴⁷ Once the states have an express right to request the information from the IRS, it follows that charities would cease their refusal to provide the information on the grounds that they have a right to keep it private. As such, states should then be able to collect the information directly from charities.

C. OPTION 3: COMPELLED DISCLOSURES OF DONOR INFORMATION IS ALLOWABLE ONLY IF STATE CONFIDENTIALITY LAWS ARE ADEQUATE

A middle ground approach would be to allow states to collect donor information after proving that adequate non-disclosure protections are in place. A chief concern in the AFP cases was that the state lacked adequate rules to prevent the sensitive Schedule B information from leaking to the public.¹⁴⁸ This fear proved true in AFP’s trial, where testimony presented convinced the judge that either California’s privacy rules were insufficient or they were applied inappropriately.¹⁴⁹ Indeed, the Court noted that the State of California had pushed through a proposed rule aimed at shoring up its non-disclosure protections—a signal from the state that such administrative protections were necessary to its compelled disclosure policy.¹⁵⁰ This rule has now become final.¹⁵¹ The laws in New York are less ambiguous. While in California, the Court expressed concerns over the adequacy and application of the law, in New York they concluded the laws were sufficient.¹⁵² If the consensus among the judiciary is that compelled disclosure to the states is allowed—like at the federal level—but disclosure to the public is disallowed, then this option may be the best approach.

The difficulty in allowing only those states with adequate non-disclosure protections to require Schedule B in the registration process is that it does not immediately end litigation. The litigation would continue along two fronts. First, charities could still argue what constitutes an *adequate* non-disclosure rule. As an initial suggestion, a state statute that expressly prohibits the public disclosure of all charity donor and membership information appears adequate to address this concern. This would fix the concern in places such as California, where there is nothing stronger than an

147 26 U.S.C. 6104(c)(3) (2016).

148 Ams. for Prosperity Found., 809 F.3d at 542 (“The plaintiffs have raised serious questions, however, as to whether Schedule B forms collected by the state could be available for public inspection under California law, notwithstanding the Attorney General’s good faith policy to the contrary.”).

149 Ams. for Prosperity Found., 2106 U.S. Dist. LEXIS 53679, *15-18 (C.D. Cal. April 21, 2016) (“Given the extensive disclosures of Schedule Bs, even after explicit promises to keep them confidential, the Attorney General’s current approach to confidentiality obviously and profoundly risks disclosure of any Schedule B the Registry may obtain from AFP. Accordingly, the Court finds against the Attorney General on the alternative grounds that her current confidentiality policy cannot effectively avoid inadvertent disclosure. *Id.* at *18.”).

150 Ams. for Prosperity Found. v. Harris, 809 F.3d 536 (9th Cir. 2015).

151 CAL. CODE REGS., tit. 11, § 310(b) (2016).

152 Citizens United & Citizens United Found. v. Schneiderman, 115 F. Supp. 3d 457, 466 (S.D.N.Y. 2015) (“Yet there is no evidence that the Schedule B policy presents a cognizable risk of public disclosure of major donor information. The Charities Bureau has consistently followed a long-standing policy of keeping donor information confidential, and it does not disclose Schedule B under [FOIL]. The Instructions for Form CHAR500 expressly state that Schedule B is ‘exempt from FOIL disclosure to the public.’ (internal citations omitted)).

administrative regulation directly addressing the matter.¹⁵³ Second, even if a state had an express non-disclosure statute, charities would take the position that the protections were not being adequately enforced. In the AFP trial, California argued that it had proper protections in place. The Court determined that, even if true, evidence existed that the state was derelict in its enforcement.¹⁵⁴

Even with this approach yielding a slower end to litigation, proper guidance from the court would begin a path of harmony between charities and states, prompting a tolerable balance of interests. On one hand, states would be forced to bolster their statutory regimes of protecting charitable organization information. They would also be entitled to the donor information they so earnestly argue they need to fulfill their obligations. On the other hand, charities would be in no worse posture as they are with federal regulators, and they would have a greater assurance that they would not face a chilling effect on participation due to publication of donor information.

V. CONCLUSION

As with most issues that wend their way through the court system, there is no easy or perfect solution to the present situation. The lack of a perfect solution, however, does not indicate a lack of good solutions. Here, good solutions do exist.

As this issue continues to develop, either the courts or Congress will realize the need for an administrable fix. They will face three paths going forward as outlined in Part IV. Allowing carte blanche authority to states to request donor information as a prerequisite to registering would be the simplest as it would harmonize the state and federal approaches. Conversely, amending the IRC to preempt states from requesting such information is the most practical, since it reflects how the states have been conducting business for years. The middle ground approach, however, may be the most amenable: allow the states to request the information only if they can demonstrate adequate laws (and compliance with those laws) to protect the sensitive information from the public. Whereas the charities complained about a chilling effect whether the government or the public had access to their donor information, the evidence presented by AFP and alleged by the others showed that it is the *public's* knowledge that creates the backlash against donors. In fact, the main concern of the state having the information was that they would reveal it to the public—a concern that would be alleviated by adequate state confidentiality statutes. The parsing of the proposals, though, tends to distract from the point. That is, any of the three solutions would represent a better path forward and bring closure to a potentially volcanic issue before it erupts.

¹⁵³ *Ams. for Prosperity Found.*, 809 F.3d at 542 (“The plaintiffs therefore have raised serious questions as to whether the Attorney General’s current policy actually prevents public disclosure.”).

¹⁵⁴ *Id.*