

14-15978

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**CENTER FOR COMPETITIVE
POLITICS,**

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

Before: TASHIMA, PAEZ, Circuit Judges, and
QUIST, Senior District Judge.

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

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

**OPPOSITION TO URGENT MOTION
(CIRCUIT RULE 27-3)**

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney
General

ALEXANDRA ROBERT GORDON
State Bar No. 207650
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5509
Fax: (415) 703-5480
Email:
Alexandra.RobertGordon@doj.ca.gov
Attorneys for Defendant-Appellee

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
ARGUMENT	5
I. Plaintiff Has Not Demonstrated Grounds to Enjoin the Enforcement of State Law.....	5
A. Plaintiff has not met its burden to demonstrate likelihood of success on the merits of the appeal.	7
B. Plaintiff Has Not Shown That It Will Suffer Irreparable Injury in the Absence of an Injunction.....	8
C. The Balance of Harms and the Public Interest Weigh Heavily Against an Injunction Pending Appeal.....	11
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
CASES	
<i>A&M Records, Inc. v. Napster, Inc.</i> 239 F.3d 1004 (9th Cir. 2001)	8
<i>Am. Trucking Ass’ns v. City of Los Angeles</i> 559 F.3d 1046 (9th Cir. 2009)	7
<i>Daly-Murphy v. Winston</i> 837 F.2d 348 (9th Cir. 1987)	6
<i>Earth Island Institute v. Carlton</i> 626 F.3d 462 (9th Cir. 2010)	6
<i>Fed. Trade Comm’n v. Affordable Media, LLC</i> 179 F.3d 1228 (9th Cir. 1999)	11
<i>Golden Gate Rest. Ass’n v. City & Cnty. of San Francisco</i> 512 F.3d 1112 (9th Cir. 2008)	7, 11
<i>Goldie’s Bookstore, Inc. v. Superior Ct.</i> 739 F.2d 466 (9th Cir. 1984)	9, 10
<i>Hilton v. Braunskill</i> 481 U.S. 770 (1987).....	7
<i>Lopez v. Heckler</i> 713 F.2d 1432 (9th Cir. 1983)	7
<i>Lowry v. Barnhart</i> 329 F.3d 1019 (9th Cir. 2003)	4, 6
<i>Maryland v. King</i> 133 S. Ct. 1 (2012).....	11
<i>Preminger v. Principi</i> 422 F.3d 815 (9th Cir. 2005)	8

TABLE OF AUTHORITIES
(continued)

	Page
<i>Sampson v. Murray</i> 415 U.S. 61 (1974).....	10
<i>Sw. Voter Registration Educ. Project v. Shelley</i> 344 F.3d 914 (9th Cir.2003)	7
<i>Winter v. Natural Resources Defense Council, Inc.</i> 555 U.S. 7 (2008).....	9

STATUTES

California Code of Regulations, Title 11 § 301 (2014).....	2
California Government Code	
§ 12580	2
§ 12581	2
§ 12584	2
§ 12586	2
§ 12591	9
§ 12591.1	10
§ 12598	2

CONSTITUTIONAL PROVISIONS

United States Constitution	
Article VI, Clause 2	1, 3
First Amendment	1, 3

OTHER AUTHORITIES

Wright & Miller, <i>Federal Practice & Procedure</i> § 2948.1 (3d ed. 2014)	10
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INTRODUCTION

Plaintiff seeks an injunction pending appeal because the Attorney General is continuing to enforce a state law disclosure requirement that is constitutional and thus the district court declined to enjoin. The basis for this request is the most recent letter, one in a series of such letters it has received from the State's Registry of Charitable Trusts, informing plaintiff that its filing for fiscal year 2012 was incomplete and that it had 30 days to correct this deficiency without incurring statutory penalties. Although plaintiff has long been aware of the consequences of non-compliance, it argues that this letter provides new grounds for preliminary injunctive relief. However, nothing in the Attorney General's letter assists plaintiff in meeting its burden to justify the exceptional relief it seeks. Thus, this motion fails for the same reasons as its appeal from the denial of plaintiff's motion for a preliminary injunction: the district court correctly determined that the law requiring plaintiff to provide to a confidential state registry the exact same donor information it filed with the IRS does not violate the First Amendment or the Supremacy Clause; plaintiff has not established that complying with this limited disclosure requirement will cause it irreparable injury; and the balance of harms and the public interest weigh heavily in favor of the continued enforcement of duly-enacted state law. Accordingly, the Attorney

General respectfully requests that this Court deny plaintiff's urgent motion for an injunction pending appeal.

BACKGROUND

State law, including the Supervision of Trustees and Fundraisers for Charitable Purposes Act, California Government Code sections 12580 et seq., vests the Attorney General with broad authority to monitor and regulate charitable organizations, including the power to require charitable organizations to furnish information and reports. *See* Cal. Gov't Code §§ 12598(a), 12581, 12584, 12586. Pursuant to state regulations, charitable organizations must file, among other things, a complete copy of the IRS Form 990 as filed with the IRS, including an unredacted Schedule B that includes information about major donors. *See, e.g.*, Cal. Code Regs. tit. 11, § 301 (2014).

Plaintiff never filed with the Registry a copy of its unredacted Schedule B, as required by law, but this compliance failure was not caught until this year. *See* Appellant's Excerpts of Record (ER), Ninth Cir. ECF No. 5, 54. Plaintiff then received a letter from the Attorney General's Office dated February 6, 2014, instructing that its registration for fiscal year 2012 was incomplete and to submit a copy of its Schedule B as filed with the IRS within 30 days. ER 54, 61. In response, plaintiff sued the Attorney General

to enjoin enforcement of that demand. Plaintiff then unsuccessfully moved the district court to preliminarily enjoin the Attorney General from enforcing compliance with state law. ER 4-16.

In denying the motion for preliminary injunction, the district court determined that plaintiff had not met its burden to show a likelihood of success on the merits of its constitutional claims. ER 11, 14-15. Specifically, the district court held that plaintiff could not prevail on its First Amendment freedom of association claim because (1) it had not articulated any objective, specific harm that its members would suffer from providing its major donor information in an unredacted copy of its Schedule B, and thus had failed to establish a prima facie showing of infringement, ER 14; and (2) even if plaintiff had made a prima facie showing of infringement, the disclosure requirement would be valid because it is substantially related to the Attorney General's compelling interest in performing her regulatory and oversight function, ER 14-15. The district court also rejected plaintiff's Supremacy Clause arguments, ER 7-11, and determined that because plaintiff had failed to establish any likelihood of success on its constitutional claims, it could not establish that it was likely to suffer irreparable harm in the absence of preliminary relief or that the balance of equities tipped in its favor. ER 15. The court also held that "it was in the public interest that [the

Attorney General] continues to serve [as] chief regulator of charitable organizations in the state in the manner sought.” ER 15.

Plaintiff timely appealed and by stipulation and order dated May 28, 2014, the district court proceedings were stayed pending the resolution of the appeal and the issuance of the mandate by this Court. District Court Case No. 14-cv-00636-MCE-DAD, ECF No. 24. As plaintiff acknowledges, it previously did not seek a stay or injunction of the enforcement of state law pending appeal from either the district court or this Court. *See* Supplement to Plaintiff-Appellant’s Motion for Urgent Injunctive Relief (Mot. for Inj. Rel.), Ninth Cir. ECF No. 31. The appeal was argued and submitted to this Court on December 8, 2014. Ninth Circuit ECF No. 28.

During the pendency of the appeal, on October 15, 2014, the Attorney General sent plaintiff a second notice that its registration was deficient and again instructed it to submit a complete copy of its Schedule B within 30 days. *See* Defendant-Appellee’s Exhibit 1.¹ Plaintiff responded that this

¹ As discussed herein, plaintiff has not demonstrated that this matter presents one of the limited exceptions to the “general rule” that a party may not add to the record on appeal to include material that was not before the district court, and thus its urgent motion to supplement the record on appeal should be denied. *Lowry v. Barnhart*, 329 F.3d 1019, 1024-25 (9th Cir. 2003). However, should the Court disagree and take notice of the December 11, 2014 letter from the Attorney General, it is important to understand the
(continued...)

matter was the subject of litigation and in its view, its “filing was complete.” Defendant-Appellee’s Exhibit 2. On December 11, 2014, the Attorney General sent plaintiff a letter indicating that its registration for fiscal year 2012 was still incomplete, that it had become delinquent, and that failure to provide complete information to the Registry within 30 days would subject it to late fees and suspension. *See* Urgent Motion to Supplement the Record on Appeal (Motion), Ninth Circuit ECF. No. 29, Appendix A. The letter also informed plaintiff that the Registry would notify the California Franchise Tax Board “to disallow its tax exemption,” that the Tax Board might revoke its tax exempt status, and that it might be subject to the minimum tax penalty (by the Tax Board). *Id.*

ARGUMENT

I. PLAINTIFF HAS NOT DEMONSTRATED GROUNDS TO ENJOIN THE ENFORCEMENT OF STATE LAW

Although plaintiff originally styled its urgent motion as one to supplement the record on appeal, *see* Motion, it has become clear that what

(...continued)

history and context of that letter. Thus, in order to provide a complete record, and with no suggestion that any of this material should be considered by the Court, the Attorney General attaches the earlier correspondence between the parties regarding plaintiff’s refusal to provide an unredacted copy of its Schedule B for to the Registry. *See* Exhibits 1 & 2.

plaintiff seeks is an injunction pending appeal, *see* Supplement to Plaintiff-Appellant's Motion for Urgent Injunctive Relief (Mot. for Inj. Rel.).

Plaintiff bases this request on the fact that the Attorney General recently has repeated her demand that plaintiff comply with state law by providing a complete copy of its IRS Form 990 Schedule B to the Registry within 30 days and has indicated that the failure to do so will, pursuant to state law, subject plaintiff to late fees, suspension, and referral to the California Franchise Tax Board. *See* Mot. for Inj. Rel. As a threshold matter, plaintiff has not demonstrated that this case presents one of the few "unusual circumstances" in which an appellate court will supplement the record on appeal with material not considered by the trial court. *See Lowry*, 329 F.3d at 1024-25; *Daly-Murphy v. Winston*, 837 F.2d 348, 351 (9th Cir. 1987), and thus its request to supplement the record should be denied.² Moreover, and regardless, plaintiffs have not demonstrated, and nothing in the letter that

² At issue in this appeal is whether the district court abused its discretion in denying plaintiff's motion for a preliminary injunction based on its determination that plaintiff had not established any likelihood of success on the merits of its claims, or any of the remaining preliminary injunction factors. *See Earth Island Institute v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). The December 11, 2014 letter that plaintiff requests that this Court consider has no bearing on this question.

plaintiff seeks to introduce suggests, that it is entitled to an injunction of the enforcement of state law pending appeal.

A party seeking an injunction or stay of a state action that the district court has declined to enjoin must demonstrate: (1) a strong showing of likelihood of success on the merits of the appeal; (2) irreparable injury absent a stay; (3) that the issuance of a stay would not substantially injure the other interested parties; and (4) that the stay is in the public interest. *Golden Gate Rest. Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1115 (9th Cir. 2008); *see also Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Plaintiff has not attempted to and cannot meet its burden on any one of these factors, let alone all of them.

A. Plaintiff Has Not Met Its Burden to Demonstrate Likelihood of Success on the Merits of the Appeal.

In order to demonstrate a “strong showing” it is likely to succeed on the merits of its appeal, plaintiff must establish that this Court will overturn the district court’s order. *See Lopez v. Heckler*, 713 F.2d 1432, 1436 (9th Cir. 1983). This Court reviews the grant or denial of a preliminary injunction for abuse of discretion. *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). A district court’s decision regarding preliminary injunctive relief is subject to “limited and deferential” review. *Sw. Voter*

Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir.2003) (en banc) (per curiam). “As long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) (quoting *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995)) (internal quotation marks omitted). As set forth in Defendant-Appellee’s Answering Brief, the district court “got the law right,” *id.*, and properly denied plaintiff’s preliminary injunction motion. *See* Answering Brief of Appellee (Ans. Br.), Ninth Circuit ECF No. 17, 15-45. Plaintiff thus cannot demonstrate likelihood of success on the merits of its appeal.

B. Plaintiff Has Not Shown That It Will Suffer Irreparable Injury in the Absence of an Injunction.

In addition to failing to show a likelihood of success on the merits of its appeal, plaintiff also has not met its burden to demonstrate irreparable injury absent an injunction. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (“The smaller the probability of a plaintiff’s success, the greater must be the showing of irreparable harm.”). To the extent that plaintiff argues that compliance with the challenged disclosure requirement violates its constitutional rights and thus constitutes irreparable harm, *see* Motion at 5,

where, as here, constitutional claims are unsupported and fail as a matter of law, they are “too tenuous” to support the requested relief. *Goldie’s Bookstore, Inc. v. Superior Ct.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also* Ans. Br. 43-44.

Insofar as plaintiff asserts that it will be injured by suspension or fines imposed pursuant to California Government Code sections 12591 et seq. if it continues to refuse to furnish a complete copy of its schedule B, plaintiff could have avoided and can still avoid these consequences by complying with state law. *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008).³ Although plaintiff contends that there is now imminent irreparable injury because the Attorney General has (yet again) provided a timeframe within which plaintiff must comply with her demand, *see* Motion 1,6; Mot. for Inj. Rel. 6, this argument fails. Plaintiff has known, at least since the inception of this lawsuit, that its failure to file complete information with the Registry could subject it to various consequences and it repeatedly has chosen to risk these consequences by not complying with

³ Accordingly, the district court did not abuse its discretion determining “based on the evidence before it” that plaintiff would not suffer irreparable injury in the absence of an injunction. ER 15.

state law. *See* ER 55-56.⁴ The fact that plaintiff has now been delinquent for a longer period of time, and the imposition of fines,⁵ suspension, or any other penalty may now be more likely to occur, does not alter the fact that any injury to plaintiff is of its own making. Accordingly, plaintiff has not established sufficient injury to warrant an injunction of state law pending appeal. *See* 11A Wright & Miller, *Federal Practice & Procedure* § 2948.1 (3d ed. 2014) (“[A] party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted.”).

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⁴ In addition to setting forth the statutory consequences of non-compliance in its Complaint, *see* ER 55-56, plaintiff argued in its motion for a preliminary injunction that it would suffer irreparable harm because, among other reasons, if it failed to disclose its Schedule B information, the Attorney General, pursuant to California Government Code section 12591.1, could issue a cease and desist order, suspend a charity from the Registry, and/or impose fines. *See* Appellee’s Supplemental Excerpts of Record, Ninth Cir. ECF No. 17, 108-09.

⁵ With respect to the various economic sanctions it might face, plaintiff has not explained how these amount to harm that is “irreparable.” *See Goldie’s Bookstore, Inc.*, 739 F.2d at 472 (“Mere financial injury ... will not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation.”); *see also Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended ... are not enough”).

C. The Balance of Harms and the Public Interest Weigh Heavily Against an Injunction Pending Appeal.

Plaintiff has not and cannot establish sufficient harm to outweigh the fact that “[a]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.” *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (citation omitted). Further, it is not in the public interest to interfere 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 relevant information. *See* ER 15; *Golden Gate Rest. Ass’n*, 512 F.3d at 1126-27 (“The public interest may be declared in the form of a statute”) (citation omitted); *Fed. Trade Comm’n v. Affordable Media, LLC*, 179 F.3d 1228, 1236 (9th Cir. 1999) (“[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.”) (citation omitted).

CONCLUSION

For the forgoing reasons, the Court should deny the urgent motion for an injunction pending the preliminary injunction appeal.

Dated: December 30, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DOUGLAS J. WOODS
Senior Assistant Attorney General
TAMAR PACHTER
Supervising Deputy Attorney General

/s/ Alexandra Robert Gordon
ALEXANDRA ROBERT GORDON
Deputy Attorney General
Attorneys for Defendant-Appellee

DECLARATION OF ALEXANDRA ROBERT GORDON

Pursuant to 28 U.S.C. § 1746, Alexandra Robert Gordon hereby declares:

1. I am a Deputy Attorney General at the California Department of Justice and serve as counsel to Appellee in the above-entitled appeal.

2. A true and correct copy of a letter dated October 15, 2014, sent from the Attorney General by the Registry of Charitable Trusts to plaintiff Center for Competitive Politics is attached hereto as Exhibit 1.

3. A true and correct copy of a letter dated November 7, 2014, received by the Attorney General through the Registry of Charitable Trusts is attached hereto as Exhibit 2.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 30, 2014.

/s/ Alexandra Robert Gordon
Alexandra Robert Gordon

EXHIBIT 1

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE



1300 I Street
P. O. Box 903447
Sacramento, CA 94203-4470
Telephone: (916) 445-2021
Fax: (916) 444-3651
E-Mail Address: RCT @doj.ca.gov

October 15, 2014

CENTER FOR COMPETITIVE POLITICS
124 S. WEST STREET, #201
ALEXANDRIA VA 22314

CT FILE NUMBER: CT0149998

RE: SECOND NOTICE: IRS Form 990, Schedule B, Schedule of Contributors

We have received the IRS Form 990, 990-EZ or 990-PF submitted by the above-named organization for filing with the Registry of Charitable Trusts (Registry) for the fiscal year ending **12/31/2012**. The filing is **incomplete** because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors.

The copy of the IRS Form 990, 990-EZ or 990-PF, including all attachments, filed with the Registry must be identical to the document filed by the organization with the Internal Revenue Service. The Registry retains Schedule B as a confidential record for IRS Form 990 and 990-EZ filers.

Within 30 days of the date of this letter, please submit a **complete** copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service. Please address all correspondence to the undersigned.

Sincerely,

Registry of Charitable Trusts

For

KAMALA D. HARRIS
Attorney General

EXHIBIT 2



November 7, 2014

Registry of Charitable Trusts
1300 I Street
Post Office Box 903447
Sacramento, CA 94203-4470

Dear Registry of Charitable Trusts:

I write to acknowledge receipt of your letter, dated October 15, 2014, averring that the Center for Competitive Politics's Registry filing is incomplete "because the copy of Schedule B, Schedule of Contributors, does not include the names and addresses of contributors."

As you are likely aware, the Registry's demand is presently the subject of active litigation in the federal courts. *Center for Competitive Politics v. Harris*, No. 14-15978 (E.D. Cal.). The Center maintains that the privacy of its contributors is protected by both the Internal Revenue Code (2 U.S.C. § 6104(c)(3)) and the First Amendment to the Constitution of the United States.

Accordingly, the Center asserts that its filing is complete.

Very truly yours,

Allen Dickerson
Legal Director

RECEIVED
Attorney General's Office

NOV 12 2014

Registry of
Charitable Trusts

CERTIFICATE OF SERVICE

Case Name: **Center for Competitive Politics** No. **14-15978**
v. Kamala Harris

I hereby certify that on December 30, 2014, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

OPPOSITION TO URGENT MOTION (CIRCUIT RULE 27-3)

DECLARATION OF ALEXANDRA ROBERT GORDON

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 30, 2014, at San Francisco, California.

N. Newlin
Declarant

/s/ N. Newlin
Signature