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NO JS-6

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

AMERICANS FOR PROSPERITY	)	CASE NO. 2:14-CV-09448-R
FOUNDATION,	)	
	)	
Plaintiff,	)	ORDER REGARDING MOTION TO
	)	CROSS-EXAMINE DEFENDANT’S
v.	)	DECLARANTS
	)	
KAMALA D HARRIS,	)	
	)	
Defendant.	)	
_____	)	

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20           Before the Court is Plaintiff Americans for Prosperity Foundation’s (“Plaintiff” or

21 “Foundation”) request to cross-examine two of Defendant Kamala D. Harris’ (“Defendant” or

22 “Harris”) declarants, Ms. Kevis Foley (“Foley”) and Mr. Steve Bauman (“Bauman”) (collectively,

23 “Declarants”). (Dkt. No. 24). Plaintiff brings such a request pursuant to Local Rule 7-8, which

24 permits a plaintiff to request to cross-examine witnesses at a hearing for a preliminary injunction.

25 *See* L.R. 7-8. Defendant objected to Plaintiff’s request. (Dkt. No. 25). Both Plaintiff’s request

26 and Defendant’s objection were timely. *See* L.R. 7-8. The declarations at issue are mere

27 assertions of fact asserted under penalty of perjury. (*See* Dkt. Nos. 23-4, 23-5). Neither

28 declaration attaches any exhibits supporting or corroborating the assertions therein.

1 Plaintiff claims such cross-examination is warranted here because Defendant heavily relied  
2 on the Declarants testimony in their opposition brief. (Dkt. No. 24 at 2). Plaintiff argues that  
3 because the Declarants’ testimony is crucial to establishing whether Defendant has satisfied the  
4 exacting scrutiny due here, such testimony is relevant to evaluating Plaintiff’s likelihood of  
5 success on the merits. (*Id.* at 3). To demonstrate the areas of testimony which would be relevant  
6 to such a determination, Plaintiff listed five examples of topics for cross examination, including  
7 the Declarants’ testimony as to: “(1) the Attorney General has consistently required charities to  
8 file Schedule Bs . . . ; (2) chronic underfunding is why the Attorney General first began enforcing  
9 this supposedly uniform, preexisting requirement only in 2010, . . . ; (3) the Attorney General has  
10 a regime in place for treating Schedule B as a confidential document . . . ; (4) the Attorney General  
11 has relied upon Schedule B to investigate misconduct, . . . ; and (5) the use of targeted subpoenas  
12 is less effective than a blanket requirement that all charities file Schedule B.” (*Id.* at 4).

13 Defendant argues that such cross-examination is irrelevant as the Court need not reach the  
14 issue of exacting scrutiny until the Plaintiff has made a prima facie showing of a First Amendment  
15 violation. (Dkt. No. 25 at 5). Even if the Court were to find such a prima facie case had been set  
16 out, Defendant argues, the Declarants’ testimony is still irrelevant because Plaintiff has failed to  
17 identify why the proffered evidence is insufficient and has not identified any disputed issues of  
18 material fact regarding credibility that further testimony would resolve. (*Id.*)

19 First, without determining that such a showing is necessary, the Court finds the cross-  
20 examination of Foley to be warranted because the record before the Court is insufficient to  
21 determine whether Plaintiff has made such a prima facie showing of a First Amendment violation.

22 Plaintiff has proffered sufficient evidence<sup>1</sup> demonstrating that public disclosure of its  
23 Schedule B, and thus the names and addresses of its donors, would open those persons up to  
24 harassment, retaliation, and chilling of free speech. For example, those members whose identities

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<sup>1</sup> At this juncture the Court may consider proffered evidence regardless of its admissibility. *Flynt Dist. Co.*  
*v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (“The trial court may give even inadmissible evidence some weight,  
when to do so serves the purpose of preventing irreparable harm before trial.”).

1 are known have been subject to threats of harassment and violence. (*See* Dkt. No. 15-4 ¶¶ 2-4, *id.*  
2 at Ex. A). Defendant's objections to such evidence, such as those based on hearsay, are  
3 misplaced. Rather than use direct testimony of those who wish to remain anonymous, Plaintiff has  
4 used directors and officers of the Foundation to attest to their personal experiences. Indeed, to  
5 satisfy Defendant, Plaintiff would need to proffer evidence from individuals on the list and offer  
6 their testimony attesting to the fact that they fear retribution or would not contribute funds to  
7 Plaintiff again if their name was disclosed. As Plaintiff rightfully points out, such argument is a  
8 Catch-22, which would require Plaintiff to disclose some persons identities off the Schedule B list  
9 in order to prevent disclosing the rest of those persons names and addresses as they appear on  
10 Schedule B. It cannot be that the First Amendment of some must be sacrificed to protect the First  
11 Amendment of most. Thus, the Court rejects Defendant's argument that Plaintiff need proffer  
12 individualized testimony from those persons seeking to not have their identifying information  
13 disclosed.

14 Furthermore, Defendant's objections to Plaintiff's evidence of harassment and violence  
15 against known members because such events occurred in other states are similarly unavailing.  
16 Indeed, Harris does not dispute that these events occurred, nor could she. Rather, she asserts that  
17 these events are not relevant because they physically occurred in other states. Without offering  
18 explanation of why such geographical differences would have any effect on persons actions, the  
19 Court is unpersuaded that such events' importance should be discounted. Overall, Plaintiff's  
20 proffered evidence tends to show that if the Foundation's members' identities were known to the  
21 public they would face similar harassment and retaliation. These negative consequences would  
22 objectively work to chill protected First Amendment speech.

23 However, the record now before the Court is insufficient to determine whether, if  
24 disclosure is not made to the public, that Plaintiff could make a prima facie showing of a First  
25 Amendment violation if disclosure was made only to the State. Plaintiff has proffered evidence  
26 that even if donors identities were disclosed only to the State that such disclosure would result in  
27 potential harassment. For example, there have been actions brought against groups erroneously  
28 thought to be associated with the Foundation's co-founders. (*See* Dkt. No. 15-4 ¶ 5; *see also*,

1 California Fair Political Practices Commission, *FPPC Announces Record Settlement in \$11*  
2 *Million Arizona Contribution Case* (October 24, 2013), <http://www.fppc.ca.gov/press>  
3 [release.php?pr id=783](http://www.fppc.ca.gov/press); Elizabeth Harrington, Official: Kochs Not Involved in California  
4 Campaign Finance Violation, *Washington Free Beacon* (Nov. 4, 2013),  
5 <http://freebeacon.com/politics/official-kochs-not-involved-in-california-campaign-finance->  
6 [violation/.](http://freebeacon.com/politics/official-kochs-not-involved-in-california-campaign-finance-)). Defendant’s argument that no such disclosure would occur is premised solely on  
7 Foley’s testimony—the very testimony Plaintiff seeks to probe, here. Thus, Defendant’s argument  
8 demonstrates the necessity for the cross-examination to occur. Furthermore, Defendant’s claim  
9 that the information will not be disseminated lacks credibility where, as here, Defendant  
10 simultaneously maintains that the Schedule B information is used to “identify possible  
11 wrongdoing and refer matters *to other state and federal agencies.*” (Dkt. No. 23 at 17 (emphasis  
12 added)). Thus, Plaintiff has demonstrated more than a “subjective fear of reprisal[.]” *See Dole v.*  
13 *Local Union 375, Plumbers Int’l Union of Am.*, 921 F.2d 969, 974 (9th Cir. 1990). Indeed, on the  
14 record before the Court, no evidence of an official policy, save Foley’s assertions, has been  
15 proffered. Thus, cross-examination of such testimony is required to determine whether a prima  
16 facie showing of a First Amendment violation has occurred.

17 Thus, to determine whether a prima facie showing has been made here, the cross-  
18 examination of Foley is necessary.

19 Additionally, if the Court finds that a prima facie showing of a violation has occurred here,  
20 cross-examination would be necessary to evaluate whether Plaintiff is likely to succeed on the  
21 merits. Both Declarants speak to issues relevant to the Court’s evaluation of Plaintiff’s likelihood  
22 of success on the merits as well as potential harm to Plaintiff absent injunction: Foley attests to  
23 facts including Defendant’s policy to keep all Schedule B’s confidential and which State  
24 employees have access to such files, (*See* Dkt. No. 23-4), and Bauman asserts that Defendant’s use  
25 of Schedule B’s is for fraud detection and oversight of the charity and asserts facts supporting  
26 Defendant’s argument that a subpoena is not as effective a means to obtain the same information  
27 (*See* Dkt. No. 23-5). These assertions speak to whether Defendant’s demand for Schedule B can  
28 withstand the applicable exacting constitutional scrutiny, and thus, Plaintiff’s likelihood of success

1 on the merits. Because Declarants’ testimony is not grounded in supporting evidence and because  
2 it goes to the very relevant element of likelihood of success on the merits, which the Court must  
3 weigh when determining whether a preliminary injunction should issue, Plaintiff’s request is  
4 proper.

5 The Court notes that Defendant does not contest that the Declarants are subject to the  
6 subpoena power of this Court. (See Dkt. No. 25). Additionally, Defendant did not argue that  
7 either Declarant is not “reasonably available to the party offering the declaration.” See L.R. 7-8.  
8 Defendant’s email communications indicated that Bauman has a conflict on the hearing date.  
9 (Dkt. No. 25-3). However, without any further showing, such conflict is not sufficient to prevent  
10 Bauman being ordered to appear for cross-examination.

11 IT IS HEREBY ORDERED that Plaintiff Americans for Prosperity Foundation’s request  
12 to cross-examine Ms. Kevis Foley and Mr. Steve Bauman, (Dkt. No. 24) is GRANTED.

13 IT IS FURTHER ORDERED that Ms. Kevis Foley and Mr. Steve Bauman appear for  
14 cross-examination at the 10:00 AM hearing on February 17, 2015.

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16 Dated: February, 11 2015.



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19 MANUEL L. REAL  
20 UNITED STATES DISTRICT JUDGE  
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