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14 PRISONER SUPPORT

15 **UNITED STATES DISTRICT COURT**
16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 LONG HAUL, INC. and EAST BAY
19 PRISONER SUPPORT,

20 Plaintiffs,

21 vs.

22 UNITED STATES OF AMERICA; VICTORIA)
23 HARRISON; KAREN ALBERTS; WILLIAM)
24 KASISKE; WADE MACADAM; TIMOTHY J.)
ZUNIGA; MIKE HART; LISA SHAFFER;)
25 AND DOES 1-25,

26 Defendants.
27
28

) Docket No. 09-00168-JSW
)
)
)

) **PLAINTIFFS' SUPPLEMENTAL**
) **BRIEFING PURSUANT TO COURT**
) **ORDER OF SEPTEMBER 14, 2009, ON**
) **FIRST AMENDMENT ISSUES RAISED BY**
) **FEDERAL DEFENDANTS MOTION TO**
) **DISMISS**

1 **I. INTRODUCTION**

2 On September 14, 2009, the Court posed the following questions to Plaintiffs in connection
3 with Federal Defendants' Motion to Dismiss:

4 (1) Are Plaintiffs bringing a First Amendment retaliation claim, *i.e.*, that Defendants
5 engaged in their search and seizure in retaliation for Plaintiffs or their members
6 exercising their rights under the First Amendment?

7 (2) If not, on what authority do Plaintiffs rely to indicate that the law demonstrating
8 that their First Amendment rights were violated was clearly established at the
9 time?

10 Plaintiffs claim that Defendants would not have searched or seized their premises, property,
11 or information if not for the fact that Plaintiffs are social justice advocates who have criticized both
12 the University and government authority over individuals. In this way, Defendants' actions were in
13 retaliation for Plaintiffs and their members exercising their First Amendment rights. *See* sec. III.A.
14 In addition, Plaintiffs claim that their First Amendment rights were violated when Defendants
15 searched and seized their associational and personally identifying information without just cause in
16 violation of Supreme Court precedent dating at least as far back as *NAACP v. Alabama*, 357 U.S.
17 449 (1958). *See* sec. III.B. Finally, Plaintiffs claim that the unlawful search and seizure has the
18 effect of chilling Plaintiffs' free speech and association. *See* sec. III.C. Without a ruling that
19 activist organizations can offer a public internet room without necessarily opening up the entire
20 organization or their co-located groups to plenary search and seizure when a member of the public
21 misuses the computers, Plaintiffs and their associates will be justifiably afraid to exercise their First
22 Amendment rights in the future.

23 **II. PLAINTIFFS' FIRST AMENDMENT ALLEGATIONS**

24 Plaintiffs have alleged that Defendants violated their First Amendment rights in three ways.
25 First, because of Plaintiffs' activism and unpopular opinions, Defendants improperly used the
26 warrant procedure to search and seize property and material for which they did not have probable
27 cause in a manner that they would not have done if the suspicious email messages had come from a
28 more less controversial public facility like a traditional library or an internet café. Second, by

1 improperly searching and/or seizing associational information such as Plaintiffs' book lending logs,
2 letters, email communications, and other private documents, Defendants have interfered with
3 Plaintiffs' First Amendment-protected right to peaceably associate anonymously and without
4 undue government interference. Third, by illegally searching Long Haul and East Bay Prisoner
5 Support ("EBPS"), Defendants have chilled Plaintiffs from freely associating and speaking in the
6 future. These allegations are supported by the following factual claims in the First Amended
7 Complaint ("FAC"):

- 8 • Long Haul was founded as an unincorporated association in 1979 by Alan Haber,
9 one of the founding members of the 1960's new-left group Students for a
10 Democratic Society. It is an all-volunteer collective that educates the public about
11 peace and justice and serves as a meeting space for activist groups, radical movie
12 nights, anarchist study groups, and other community meetings and events. Long
13 Haul publishes the Slingshot newspaper and has been and is highly critical of the
14 University of California and of the UC Police Department. FAC ¶¶ 24-27.
- 15 • EBPS is a prisoner rights group that collects and publishes prisoner writings,
16 information about prisoner issues, prison abolition and prison support work. FAC
17 ¶¶ 33.
- 18 • The raid team searched every room in the Long Haul space, including the Slingshot
19 and EBPS offices to which the public never had access, even though the justification
20 for the search, as set forth in the affidavit in support of the warrant, was that
21 potentially unlawful emails had been sent from the public access computers. The
22 raid team looked through Long Haul and EBPS files and documents and seized all
23 the computers in each private, locked area. FAC ¶¶ 41-42.
- 24 • The raid team searched the records and logs of book lending and sales stored inside
25 locked cabinets, went through EBPS's mail, and examined the contents of the filing
26 cabinet for Long Haul's Slingshot newspaper. These materials contained private
27 information, including the names of Long Haul supporters, members and customers.
28 FAC ¶¶ 41, 46, 51.

- 1 • Defendants continue to retain, and in some cases to search, copies of the digital
2 information from Long Haul and EBPS computers. FAC ¶¶ 53-55. The
3 government's indefinite possession of copies of data from the computers and other
4 information it seized enable it to scrutinize Plaintiffs' private communications and
5 relationships with others for reasons completely unrelated to the pending criminal
6 matter — or for no reason at all. FAC ¶¶ 55-58.
- 7 • Defendants' conduct in searching the Long Haul and EBPS premises and in seizing
8 and searching their computers and other materials has a chilling effect on the First
9 Amendment associational rights of Long Haul, EBPS, their members, and members
10 of the public who interact with them. FAC ¶ 57. Plaintiffs fear further investigative
11 action or retaliation from the continued retention and search of their computer files.
12 FAC ¶¶ 24-27, 46, 58.

13 III. ARGUMENT

14 A. Defendants Violated The First Amendment By Discriminating Against 15 Plaintiffs on the Basis of Their Political Beliefs When They Searched and 16 Seized Private Spaces, Property, and Information Wholly Unconnected With the Purported Basis for the Warrant.

17 Plaintiffs first claim that they were subjected to an illegal search and seizure of their
18 property because of their unpopular political activities and beliefs. Plaintiffs allege, for example,
19 that Defendants would not have broken down doors, reviewed private files, and seized internal
20 computers if suspicious email messages had been sent from public access computers at San
21 Francisco Public Library, a Kinko's Copy Shop, or Coffee Bar internet café – that is, if the
22 messages had been sent from facilities not associated with individuals who held controversial
23 views. It is unimaginable that, having traced suspicious emails to public access computers at one
24 of those locations, officers would think they had just cause to search through book lending logs, to
25 seize business computers, or to break down locked office doors. Yet, while Long Haul served the
26 same role as any of these other computer access providers, Long Haul and EBPS were treated as if
27 they were potentially guilty parties with no further justification.
28

1 Defendants could have lawfully served a subpoena and obtained the information they were
2 looking for with Plaintiffs' cooperation.¹ With a valid warrant, Defendants could also have seized
3 any public access computers from which the police and FBI reasonably believed the suspicious
4 emails were sent and left the rest of Plaintiffs' property alone. They chose not to pursue either of
5 these options. Plaintiffs have pled more than enough facts from which this Court can infer that
6 Defendants' improper treatment was the result of their disrespect, distaste, or suspicion for
7 Plaintiffs' activism and political dissent.

8 A search and seizure made in retaliation for associational and speech activities violates the
9 First Amendment. *See, e.g., Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986);
10 *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008). Plaintiffs adequately alleged
11 that Defendants' animus resulted in the harm suffered here. *See Skoog v. County of Clackamas*,
12 469 F.3d 1221, 1231-32 (9th Cir. 2006) (searching someone's office and seizing materials can
13 satisfy the requirement that a plaintiff prove the challenged action would chill or silence a person
14 of ordinary firmness from future First Amendment activities).²

17 ¹ *See, e.g.,* 28 CFR § 59.4 (authorized by 42 U.S.C. § 2000aa-11) ("A search warrant should not be
18 used to obtain documentary materials believed to be in the private possession of a disinterested
19 third party unless it appears that the use of a subpoena, summons, request, or other less intrusive
20 alternative means of obtaining the materials would substantially jeopardize the availability or
21 usefulness of the materials sought . . .").

22 ² By definition, a retaliation claim asserts that the government has targeted and injured a plaintiff
23 for past speech activities. The Supreme Court has made clear the relevant intent is governmental
24 "hostility to the content of . . . [the protected speech], rather than an intent to cause . . . harm."
25 *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998) (citation omitted); *Hartman v. Moore*, 547 U.S.
26 250, 259-60 (2006) ("[A] *Bivens* (or § 1983) plaintiff must show a causal connection between a
27 defendant's retaliatory animus and subsequent injury. . ."); *Duran v. City of Douglas*, 904 F.2d
28 1372, 1378 (9th Cir. 1990) (relevant question in retaliation case is "whether . . . [police officer
defendant] intended to hassle . . . [plaintiff] as punishment for exercising his First Amendment
rights."). Thus, *Skoog* found past harm to a plaintiff was adequate to state the claim, agreeing with
the parties that a retaliatory office search is a serious enough consequence that it could create a
chilling effect in a reasonable person. 469 F.3d at 1231-32. *Skoog* phrases the plaintiff's burden
in terms of showing a chilling effect, but what is required is some showing of non-trivial harm,
where "non-trivial" means that the injury must be of a magnitude that would cause a person of
ordinary firmness to refrain from speaking out, not that it would cause this individual to refrain
from speaking in the future. *Id.* Plaintiffs here have stated a First Amendment claim since police
conducted an unreasonable search of their offices because of Long Haul's protected speech and
views and since the search and seizure has an ongoing chilling effect. *See* Section III.C., *infra*.

1 **B. Defendants Violated Plaintiffs' First Amendment Rights by Improperly**
2 **Searching the Long Haul Premises and Seizing Property, Communications,**
3 **Member Information, and Other Associational Materials.**

4 Plaintiffs also claim that Defendants violated their First Amendment rights by unlawfully
5 accessing private associational information, including (among other things) documentation about
6 who uses Long Haul, who borrows books from the library, who writes for Slingshot, and the
7 prisoners with whom EBPS communicates, without just cause in violation of the First Amendment.
8 There is a "vital relationship between freedom to associate and privacy in one's associations,"
9 especially for activist groups like Plaintiffs that seek social change or adhere to unorthodox
10 political beliefs. *NAACP*, 357 U.S. at 462. Defendants thus violated Plaintiffs' First Amendment
11 rights by intentionally and illegally searching and seizing information about the Plaintiffs and with
12 whom they associate.

13 It is clearly established that the First Amendment protects Plaintiffs' right to associate
14 privately, free from unwarranted government surveillance or interference. The U.S. Supreme
15 Court has long held that associational privacy is intimately connected to First Amendment
16 freedoms. At least as far back as 1958, the Court has secured First Amendment freedoms by
17 prohibiting improper surveillance as well as other forced disclosures of private membership or
18 identifying information. For example, in *NAACP v. Alabama*, the Supreme Court invalidated an
19 Alabama order that would have required the NAACP to disclose its membership lists because
20 protecting First Amendment interests hinges on keeping private membership information out of the
21 hands of government. In that case, the Supreme Court wrote:

22 It is hardly a novel perception that compelled disclosure of affiliation with groups
23 engaged in advocacy may constitute as effective a restraint on freedom of
24 association as the forms of governmental action in the cases above were thought
25 likely to produce upon the particular constitutional rights there involved. This Court
26 has recognized the vital relationship between freedom to associate and privacy in
27 one's associations. . . . Inviolability of privacy in group association may in many
28 circumstances be indispensable to preservation of freedom of association,
 particularly where a group espouses dissident beliefs.

357 U.S. at 462.

 Here, Plaintiffs allege that Defendants improperly searched and seized information that
reveals who visits Long Haul, holds meetings in the Infoshop, writes for Slingshot or the EBPS
newsletters, sends letters to EBPS from prison, and borrows books from the library. Here, as in

1 NAACP, it is “hardly . . . novel” to conclude that keeping these matters private from improper
2 government surveillance is indispensable to the preservation of First Amendment rights, especially
3 for activist groups like Plaintiffs. *Id.*

4 Again in 1972, in *United States v. United States District Court for the Eastern District of*
5 *Michigan*, 407 U.S. 297 (1972) (hereinafter “*Keith*”), the Supreme Court drew a powerful
6 connection between rights protected by the Fourth Amendment and First Amendment:

7 History abundantly documents the tendency of Government -- however benevolent
8 and benign its motives -- to view with suspicion those who most fervently dispute
9 its policies. Fourth Amendment protections become the more necessary when the
10 targets of official surveillance may be those suspected of unorthodoxy in their
11 political beliefs. The danger to political dissent is acute where the Government
12 attempts to act under so vague a concept as the power to protect ‘domestic security.’
13 Given the difficulty of defining the domestic security interest, the danger of abuse in
14 acting to protect that interest becomes apparent.”

15 *Id.* at 314. While unlawful surveillance particularly threatens First Amendment rights in national
16 security cases, the Supreme Court has clearly stated that such improper government activity also
17 threatens speech and association when misused in a more traditional criminal context. “Official
18 surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks
19 infringement of constitutionally protected privacy of speech.” *Id.* at 320. For this reason, *Keith*
20 required a warrant for electronic surveillance in domestic security cases. Here, as recognized in
21 *Keith*, Defendants’ improper investigatory actions imperil Plaintiffs’ First Amendment interests in
22 peaceful activism and dissent.

23 *NAACP* and *Keith* are by no means unique. In *Gibson v. Florida Legislative Investigation*
24 *Committee*, 372 U.S. 539, 544 (1963), the Supreme Court held that the state was not entitled to
25 compel a local race relations association to produce the association’s membership records in order
26 to determine whether any alleged Communists were also members of the association. *See also*
27 *Brown v. Socialist Workers ‘74 Camp. Committee*, 459 U.S. 87, 91 (1982) (quoting *Buckley v.*
28 *Valeo*, 424 U.S. 1, 64 (1976)) (“compelled disclosure of political associations and beliefs. . . . ‘can
seriously infringe on privacy of association and belief guaranteed by the First Amendment.’”);
Shelton v. Tucker, 364 U.S. 479, 485-86 (1960). A wide range of courts have similarly found a
connection between the right to privacy and fundamental First Amendment freedoms in cases

1 dealing with registration statutes,³ grand jury subpoenas,⁴ government subpoenas *duces tecum*,⁵ and
2 civil discovery requests between private parties.⁶

3 The search and seizure here also implicates the First Amendment right to anonymous
4 speech because Defendants improperly obtained information identifying contributors to Slingshot
5 and the EBPS newsletter, both of which sometimes publish articles without reporter bylines.
6 Individuals have the right to speak anonymously and pseudonymously, and governmental search
7 and seizure of materials identifying speakers without due cause violates the First Amendment's
8 protection of anonymous speech. "Anonymity is a shield from the tyranny of the majority . . .
9 [that] exemplifies the purpose . . . of the First Amendment . . . to protect unpopular individuals
10 from retaliation . . . at the hand of an intolerant society." *McIntyre v. Ohio Elections Commission*,
11 514 U.S. 334, 357 (1995). *See also, e.g., id.* at 342 ("[A]n author's decision to remain anonymous,
12 like other decisions concerning omissions or additions to the content of a publication, is an aspect
13 of the freedom of speech protected by the First Amendment."); *Talley v. California*, 362 U.S. 60,
14 64 (1960) (finding a municipal ordinance requiring identification on hand-bills unconstitutional,
15 noting that "[a]nonymous pamphlets, leaflets, brochures and even books have played an important
16 role in the progress of mankind."); *See also Highfields Capital Management, L.P. v. Doe*, 385 F.
17 Supp. 2d 969, 971 (N.D. Cal. 2005) (First Amendment considerations require imposing limitations
18 on enforcement of subpoenas seeking identity of online posters).

19 These cases reinforce the long-established principle that where the government pries into
20 the membership lists and other private information of an association without sufficient cause, it
21 violates the First Amendment, no matter what investigative means it uses. Search warrants, even
22

23 ³ *See, e.g., Bates v. City of Little Rock*, 361 U.S. 516 (1960).

24 ⁴ *See, e.g., Ealy v. Littlejohn*, 569 F.2d 219, 230-31 (5th Cir. 1978); *Burse v. United States*, 466
25 F.2d 1059 (9th Cir. 1972) (abrogated by statute on other grounds).

26 ⁵ *See, e.g., Gibson*, 372 U.S. 539 (legislative subpoena and subpoena duces tecum ("SDT")); *In re*
27 *Grand Jury Proceeding*, 842 F.2d 1229 (11th Cir. 1988) (grand jury SDT); *International*
28 *Longshoremen's Ass'n v. Waterfront Commission of New York Harbor*, 667 F.2d 267 (2d Cir. 1981)
(government commission SDT); *Pollard v. Roberts*, 283 F. Supp. 248 (W.D. Ark. 1968), affirmed
per curiam, 393 U.S. 14 (1968) (prosecutor SDT).

⁶ *Britt v. Superior Court*, 20 Cal.3d 844 (1978); *Adolph Coors Co. v. Wallace*, 570 F. Supp. 202
(N.D. Cal. 1983); *Savola v. Webster*, 644 F.2d 743 (8th Cir. 1981).

1 when properly issued, endanger First Amendment rights as much as other investigatory tools
2 because they allow the police to examine and seize private materials before the owner has any
3 opportunity to move to quash. *See* Smolla and Nimmer, Freedom of Speech § 25:36 (“The stylized
4 draconian efficiency of the modern police search is inherently chilling” when it intrudes into areas
5 protected by the First Amendment.) If facially valid registration statutes, subpoenas, and discovery
6 requests for associational information violate the First Amendment, certainly an unlawful search
7 that gives law enforcement access to this same information also violates the First Amendment.

8 In a case similar to this one, the Tenth Circuit held that, under clearly established law,
9 federal agents violated both the First and Fourth Amendments by procuring and using an overbroad
10 warrant to seize membership lists and other materials from a nonprofit tax-protestor organization.
11 *National Commodity & Barter Ass’n v. Archer*, 31 F.3d 1521, 1527-31, 1533-34 (10th Cir. 1994)
12 (denying qualified immunity on First and Fourth Amendment *Bivens* claims where agents used
13 overbroad warrant to seize membership list from controversial nonprofit organization’s offices).
14 The case at bar is indistinguishable: Defendants had no justification to discover Plaintiffs’
15 membership information, the identity of visitors who borrowed books from the lending library,
16 with which prisoners EBPS corresponds, or any other associational information. Because this
17 improper search intentionally gave law enforcement access to Plaintiffs’ membership and private
18 communications, it clearly violates not only the Fourth Amendment, but the First as well.

19 *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), does not suggest otherwise. *Zurcher* held
20 that *if* the government scrupulously complies with the Fourth Amendment in applying for a warrant
21 to search a newspaper office, then it also satisfies the First Amendment’s requirements. But this
22 can be true only “if the requirements of specificity and reasonableness are properly applied,
23 policed, and observed.” *Id.* at 566. Moreover, courts must “apply the warrant requirements with
24 particular exactitude when First Amendment interests would be endangered by the search.” *Id.* at
25 565. Where, as here, the warrant and the search fail to meet those requirements, and the police fail
26 even to inform the magistrate that a requested warrant implicates First Amendment concerns, the
27 resulting search may violate the First, as well as the Fourth, Amendment. “Certain wrongs affect
28 more than a single right and, accordingly, can implicate more than one of the Constitution's

1 commands. Where such multiple violations are alleged . . . we examine each constitutional
 2 provision in turn.” *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49-50 (1993)
 3 (citation omitted); *see Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) (stop without
 4 reasonable suspicion would violate First, as well as Fourth, Amendment if done in retaliation for
 5 protected speech). Defendants are not entitled to dismissal of the First Amendment claims against
 6 them simply because their conduct also violated the Fourth Amendment.

7 **C. Defendants Violated Plaintiffs’ First Amendment Rights Because Their Actions**
 8 **Have the Practical Effect of Chilling Plaintiffs’ Exercise of Their Freedoms of**
 9 **Speech and Association.**

10 Plaintiffs finally claim that Defendants’ illegal search of Plaintiffs’ material and property,
 11 which centers on their political activism and other efforts to oppose the policies of, among others,
 12 the Defendants, chilled First Amendment protected activity of the Plaintiffs and their members.
 13 The Defendants have violated the First Amendment, whether or not they intended to chill
 14 Plaintiffs’ protected activities: if a governmental action has “the practical effect of discouraging
 15 the exercise of constitutionally protected political rights . . . even if any deterrent effect . . . arises . . .
 16 . as an unintended but inevitable result of the government’s conduct in requiring disclosure,” then
 17 the action violates the First Amendment unless justified by a compelling government need.
 18 *Waterfront Commission of New York Harbor*, 667 F.2d 267, 270-71 (2nd Cir. 1981). *See also, e.g.,*
 19 *Shelton*, 364 U.S. at 486 (1960) (striking down a state law requiring the teachers of Arkansas to
 20 disclose all organizations to which they belonged on First Amendment grounds, noting that “the
 21 pressure upon a teacher to avoid any ties which might displease those who control his professional
 22 destiny would be constant and heavy.”); *Archer*, 31 F.3d at 1530-31; *Pollard*, *supra* note 4, (though
 23 there was no evidence of past reprisals against contributors to the Republican Party of Arkansas, it
 24 would be “naive” not to recognize that disclosure would impermissibly discourage the exercise of
 25 constitutional rights given the unpopularity of the Party at that time);⁷ *Skoog*, 469 F.3d at 1231-32
 26 (evidence that office was searched and material seized satisfies requirement that plaintiff prove
 27 challenged action would chill or silence a person of ordinary firmness from future First

27 ⁷ The Supreme Court’s per curiam affirmation means that the holding, if not the reasoning, of
 28 *Pollard* is binding on this court. *See, e.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

1 Amendment activities); *Britt v. Superior Court*, *supra* note 5, at 852-56. Thus, Plaintiffs need not
 2 allege that Defendants intended to chill Plaintiffs' First Amendment activities in order to prevail on
 3 the claim.

4 Plaintiffs have alleged that Defendants improperly sought and obtained associational
 5 information – indeed, that was the obvious effect of extending the search beyond the public access
 6 computers to private offices and files. This allegation satisfies Plaintiffs' pleading requirement
 7 without more. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Merely to summon
 8 a witness and compel him, against his will, to disclose the nature of his past expressions and
 9 associations is a measure of governmental interference in these matters.”). *See also, e.g., Baird v.*
 10 *State Bar of Arizona*, 401 U.S. 1 (1971) (finding that questioning a bar applicant about membership
 11 in any organization “that advocate[d] overthrow of the United States Government by force or
 12 violence” infringed on freedom of association).⁸

13 IV. CONCLUSION

14 For the above reasons, Defendants' Motions to Dismiss should be denied.

15 DATED: September 29, 2009

_____/s/ Matthew Zimmerman

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20 _____
 21 ⁸ *See also, e.g., Archer*, 31 F.3d at 1530 (“the chilling effect of obtaining such membership records
 22 “has been said to be ‘readily apparent.’”) (citation omitted); *In re First National Bank*, 701 F.2d
 23 115, 118 (10th Cir. 1983) (finding that First Amendment was implicated by grand jury subpoena to
 24 bank for account records of two anti-taxation groups because “the constitutionally protected right,
 25 freedom to associate freely and anonymously, will be chilled equally whether the associational
 26 information is compelled from the organization itself or from third parties”); *International*
 27 *Longshoremen’s Ass’n*, 667 F.2d at 272 (2d Cir. 1981) (concluding that subpoena for list of
 28 contributors to political committee violated First Amendment because “compelled disclosure of the
 Fund’s contributors under the circumstances of this case would give rise to a chilling effect similar
 to the one recognized by the Supreme Court in *Shelton v. Tucker* . . .”); *United States v. Citizens*
State Bank, 612 F.2d 1091, 1094 (8th Cir. 1980) (finding that anti-tax group’s allegations that
 subpoena to bank for account records caused “adverse effects . . . on [its] organizational and
 fundraising activities . . . [established] a prima facie showing of arguable First Amendment
 infringement”).