

A New Lawsuit: Form 990, Schedule B, Challenged

12.13.22 | Linda J. Rosenthal, JD



On July 1, 2021, the U.S. Supreme Court issued the highly controversial decision in [*Americans for Prosperity Foundation v. Bonta*](#). There, six of the nine justices struck down California’s requirement that charities submit to the state attorney general a confidential copy of the same Form 990, Schedule B, they are required to submit each year (confidentially) to the IRS. That Schedule B information includes the names and addresses of the highest donors.

Often, the high court makes the narrowest possible decision on the particular facts and law, especially in First Amendment claims. Here, though, the 6-3 majority wrote a broad and sweeping [ruling](#), holding the California requirement both “facially” unconstitutional and “as applied.” It also ignored the Ninth Circuit’s well-reasoned reversal of the district court’s flimsy and faulty decision against California as well as the blistering dissent written by Justice Sotomayor, joined in by Stephen Breyer and Elena Kagan.

At that time, many observers speculated that the federal mandate – namely, the confidential donor disclosures of Form 990, Schedule B – might next be on the chopping block.

The consensus view has been that it’s not a matter of “if” but only “when.”

Now, eighteen months later, “when” has arrived. A lawsuit designed to test the constitutionality of the federal requirement has just entered the judicial pipeline. On December 5, 2022, [The Buckeye Institute](#), a 501(c)(3) conservative think tank that regularly undertakes a variety of legal challenges filed a [Complaint](#) in the Southern District of Ohio, District of Columbus, where it is headquartered. In this action, the organization seeks declaratory relief and an injunction prohibiting the U.S.



government from enforcing the confidential, to-the-government-only, donor-disclosure requirements of 501(c)(3) public charities on federal Form 990, Schedule B.

Based directly on the *Americans for Prosperity Foundation* holding, the group asserts that the Schedule B mandate has a chilling effect on its potential donors, and violates its and its supporters' rights to freedom of speech and association.

There can be little doubt that the plaintiffs in *The Buckeye Institute v. Internal Revenue Service et al*, Case No. 2:22-cv-04297-MHW-EPD, will ultimately prevail.

Background

In many respects, the issue in *last year's* litigation – that is, the need of a state attorney general for confidential disclosure of top donors' identities – is even more compelling than the Internal Revenue Service's. That very point was briefed and argued ably and forcefully during that earlier round. Indeed, the mountain of *amici curiae* briefs filed in the *Americans for Prosperity Foundation* litigation was among the highest ever in Supreme Court history.

We covered the 2021 litigation extensively, including a rollicking journey back to England's Statute of Charitable Uses of 1601, which happens to lay the historical foundation for the sweeping charity-oversight authority bestowed on colonial and then state attorneys general on American shores for the last several hundred years. See:

- [*Donor Disclosure: The Hottest Ticket in Town*](#) (May 25, 2021)
- [*Donor-Disclosure Hottest Ticket: Part 2*](#) (June 15, 2021)
- [*Donor-Disclosure Hottest Ticket: Part 3*](#) (June 16, 2021)

In the first of these three posts, we summarized the core issue:

"This litigation concerns a fairly simple rule adopted about a decade ago by California and a few other states including New York and New Jersey which happen to be home to lots of charities. The corporate scandals in the early 2000's – involving massive for-profit entities like Enron – jolted government regulators even in the nonprofit sector. There were significant moves at all levels of government to tighten up oversight, in part by beefing up reporting duties."

"...[F]or many decades, federal law had already required certain charities to confidentially 'report the names of their major donors to the Internal Revenue Service on form Schedule B as part of their annual [Form 990 series] return.' ...At issue here is California's requirement for 'charities operating within the State to file the exact same Schedule B form, on a confidential basis, with the California Attorney General's Registry of Charitable Trusts for similar regulatory oversight purposes."

The plaintiffs starring in the *Americans for Prosperity Foundation* saga had previously submitted copies of Form 990 with their California Registry of Charitable Trusts annual registrations. When California began to require inclusion of Schedule B, they objected and sued California, although they "... continued to file the identical document" – that, is the Form 990 and Schedule B – "with the IRS without objection."

The Buckeye Lawsuit



The plaintiff in the December 2022 lawsuit, The Buckeye Institute, is a 501(c)(3) organization founded in 1989 as “an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.” See *The Buckeye Institute Files Lawsuit Challenging IRS Collection of Donor Data* (December 5, 2022) [buckeyeinstitute.org](https://www.buckeyeinstitute.org).

It is represented by its own attorneys along with The Institute for Free Speech, a 501(c)(3) organization which “promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education.”

The December 5th press release explains that organization’s 12-page Complaint challenges “... a decades-old tax law that forces the IRS to demand that nonprofit charities hand over the private information of their largest donors every year, which violates the First Amendment and the requirement chills free speech and association.”

The organization alleges that its “work would be significantly damaged” if it could not maintain the confidentiality of its donor relationships, as Buckeye’s supporters “risk retribution from some who oppose its mission.” It also alleges that there is a risk of inadvertent leaks of confidential data in the government’s hands.

“The U.S. Supreme Court,” The Buckeye Institute alleges, “has already struck down a similar disclosure mandate in the landmark 2021 case of *Americans for Prosperity Foundation v. Bonta* because the government must consider ‘the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters.’”

What’s Not At Issue

The sole issue in the latest litigation is the Form 990, Schedule B, filing requirement by the federal government for 501(c)(3) public charities.

There are separate and distinct disclosure requirements for private foundations, for non-501(c)(3) charities – such as 501(c)(4), (5) or (6) organizations – as well as for political action committees. In particular, the Section 501(c)(4) rules have been subject to shifting political whims.

For some clarity in the fog about the various donor-disclosure rules, there are several helpful resources from the IRS. See the agency’s web page titled *Exempt Organization Public Disclosure and Availability Requirements*, which was “last reviewed or updated: July 15, 2022.”

And – not to be missed – is the *Required Disclosures Course*, cartoon-hosted by viewer favorite, the always delightful “Legal, the StayExempt Eagle.” That page was also “last reviewed or updated” on November 16, 2022.

Conclusion

We’ll, of course, monitor *The Buckeye Institute v IRS* lawsuit carefully and report back.

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