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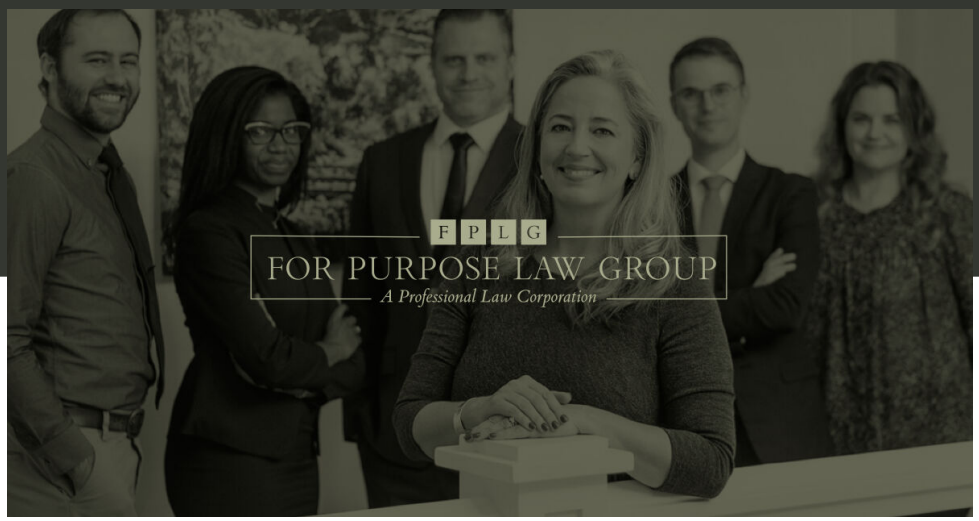
NONPROFITS: CALIFORNIA ATTORNEY GENERAL

Court Blocks Donor List Request - Again

12.14.16 | Linda J. Rosenthal, JD



Federal and state regulators want charities to disclose significant amounts of information. For the most part, these organizations are on board with the notion of full transparency.

There have, however, been giant battles and resistance from some quarters in connection with requests for disclosure of donor lists on annual information returns.

This controversy has played out at the federal level, in connection with the requirement on Form 990 to reveal donor names and other information on Schedule B. It has also erupted in New York and California, where, under state laws, charities are required to disclose these donor details.

The most recent eruption of activity took place in a California federal district court in *Thomas More Law Center v. Kamala Harris*. The judge "permanently enjoined the California Attorney General … from demanding that charitable 501(c)(3) nonprofits disclose the names of their donors by requiring the filing of unredacted Schedule B forms."

There is some history here; Judge Manuel L. Real of the Central District of California "had previously ruled the Attorney General's disclosure rule unconstitutional as an infringement of free speech, but that case was reversed on appeal and a trial ordered. In the current iteration of the case, the district court judge ruled that the disclosure requirement is unconstitutional as applied" to this plaintiff.

Donor List Disclosure Injunction

This injunction is aimed at the California mandate that charities file a Schedule B with their annual information returns. Under state regulations (Cal. Code Regs. tit. 11, section 301), a charitable organization must file a copy of its IRS Form 990, including its Schedule B, with the State Registry of Charitable Trusts.

Schedule B lists the names and addresses of every individual nationwide who donated more than $5,000 to a charity during the particular tax year in question. The key problem arises because, "while a nonprofit's IRS Form 990 must be made available to the public, an organization's Schedule B

is not publicly available. 26 U.S.C. § 6104(b), (d)(3)(A).

The state rationale for requiring this information is as follows:

> *The Attorney General argues that there is a compelling law enforcement interest in the disclosure of the names of significant donors. She argues that such information is necessary to determine whether a charity is actually engaged in a charitable purpose, or is instead violating California law by engaging in self-dealing, improper loans, or other unfair business practices. See Cal. Corp.Code §§ 5233, 5236, 5227. At oral argument, counsel elaborated and provided an example of how the Attorney General uses Form 990 Schedule B in order to enforce these laws: having significant donor information allows the Attorney General to determine when an organization has inflated its revenue by overestimating the value of "in kind" donations. Knowing the significant donor's identity allows her to determine what the "in kind" donation actually was, as well as its real value. Thus, having the donor's information immediately available allows her to identify suspicious behavior. She also argues that requiring unredacted versions of Form 990 Schedule B increases her investigative efficiency and obviates the need for expensive and burdensome audits.*

This New Donor List Decision

This plaintiff is a 501(c)(3) that "funds its activities by raising charitable contributions from donors throughout the country, including California." TMLC is –

> *an advocate for issues which arouse intense passions by its supporters and its opponents. The Law Center represents clients who are in the midst of intense public scrutiny and often times on the receiving end of extremely negative criticism and insults. These positions taken by TMLC have led to threats, harassing calls, intimidating and obscene emails, and even pornographic letters ….Members and donors of TMLC obviously share the same views as TMLC. Thus, the evidence of threats and harassment directed toward TMLC because of their views indicates a high likelihood of similar treatment towards donors.*

Among other claims, this plaintiff argued that the California law requiring disclosure of its Schedule B to the Attorney General is "facially unconstitutional." It also "brought an as-applied challenge against the disclosure requirement." In an earlier round, this judge ordered injunctive relief.
This case went up to the Ninth Circuit on appeal. That court held that this (District) Court –

> *is bound by its previous decision in Center for Competitive Politics v. Harris, 784 F.3d 1307, 1317 (9th Cir. 2015)—that the Attorney General's nonpublic Schedule B disclosure regime was not facially unconstitutional. Americans for Prosperity Found., 809 F.3d at 538. The Ninth Circuit did, however, instruct this Court to have a trial on the as-applied challenge. Id. at 543.*

Accordingly, the Court in the latest case focused on TMLC's as-applied challenge.
The heightened standard under which a court reviews 1st Amendment challenges to disclosure requirements is the "exacting scrutiny" standard. *John Doe No. 1 v. Reed,* 561 U.S. 186, 196 (2010); *Citizens United v. FEC,* 558 U.S. 310, 366 (2010). Under this test, there must be shown a "substantial relation" between the disclosure mandate and a "sufficiently important governmental interest." *Center for Competitive Politics,* 784 F.3d at 1312 (citations omitted)
The decision here involves a balancing test; "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *John Doe No. 1,* 561 U.S. at 196. After a lengthy, thoughtful analysis, including whether the state had made its case under the balancing test, District Judge Real concluded it had not:

> *The Court finds that as applied, the disclosure of the Schedule B form is not substantially related to the Attorney General's interest in monitoring and investigating charitable organizations. First, the Attorney General's arguments that Schedule B is necessary is undercut by the fact that she has only recently determined a need for the information and has access to the same information from other sources. Second, 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.*

On the issue of the plaintiff's rights to freedom of association under the First Amendment, Judge Real concluded that

> *even though the governmental purpose [may] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. Louisiana v.* NAACP, 366 U.S. 293, 296 (1961)*....This Court does not hold the Attorney General to a least-restrictive-means standard. However, the Attorney General is limited to pursuing its interest in protecting the public from illegal charitable organizations by means which do not 'broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'*

In addition, "[s]etting aside the Attorney General's failure to establish a substantial relationship between her demand for [the] Schedule B and a compelling governmental interest, [plaintiff] would independently prevail on its as-applied challenge because it has proven that disclosing its Schedule B to the Attorney General would create a burden on its First Amendment rights."

Conclusion

Note that the injunctive relief granted in this case is specifically with regard to this plaintiff; "...the Attorney General is permanently enjoined from requiring the Thomas More Law Center to file with the registry a periodic written report containing a copy of its Schedule B to IRS Form 990. TMLC shall no longer be considered deficient or delinquent in its reporting requirement because it does not file its confidential Schedule B with the Attorney General."