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Donor Disclosure: The Hottest Ticket in Town

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There aren't many nonprofit legal issues that turn into epic battles in the United States Supreme Court.

But we've got one now.

It's two lawsuits – actually – consolidated for briefing and oral argument. It took more than seven years for two 501(c)(3)organizations to claw their way up (and back down, temporarily) through the federal-court thicket. The trial judge ruled in their favor twice, but the Ninth Circuit reversed both times; the second was a decisive win for the California Attorney General. In particular, the 3-judge appellate panel rejected the federal district judge's factual findings as "clearly erroneous" and also ruled that he was incorrect on the law.

Now it's full steam ahead for a First Amendment showdown with the California Attorney General.

The high court justices granted writs of certiorari on January 8, 2021, in *Americans for Prosperity Foundation v. Becerra* and *Thomas More Law Center v. Becerra.* These links are to the *SCOTUSBlog* history of each case, back to 2019 when the original petitions for certiorari were filed. Each document in the case file is listed and available with a handy mouse click. [The named defendant (in official capacity only) has progressed over the years from the first AG on the case, Kamala Harris, to Xavier Becerra, then on to a brief temporary placeholder, Matthew Rodriguez, and now to the newest officeholder, Rob Bonta.]

We predicted – correctly – that this "dark-money" fight would heat up considerably over this spring. See *Donor Disclosure: More Upheaval Coming* (February 2, 2021). In the few short months between the certiorari ruling and the oral argument heard on April 26, 2021 (full C-span audio and transcript),

the parties submitted their briefs as did dozens of amici curiae. Indeed, there have been so many "friend of the court" briefs (including those submitted in the earlier round in 2020 when the high court considered whether to accept the case at all), that this litigation now ranks among the top amicus-brief-filing cases – ever.

Court observers expect rulings in this consolidated docket before the end of this term in late June. There is a frenzy of speculation: Will this Court side – as seems possible from some of the questions and comments at the oral argument – with the plaintiffs/petitioners and strike down the California (confidential) donor-disclosure rule? If so, will this constitutional ruling be broad or narrow? Is there some other way for the court to get out from under this hot potato, like tossing it back to a lower court?

So what's all the fuss about anyway?

High Drama in the High Court

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.

However, for many decades, federal law had already required certain charities "to 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." Like other states, California's registration and reporting duties apply not only to organizations with headquarters in the state but also to out-of-state organizations that solicit funds from California residents.

The plaintiffs starring in this Supreme Court saga are two organizations that previously had submitted copies of Form 990 with their California Registry of Charitable Trusts annual registrations. They objected and then filed these two lawsuits when California began to require them to include the federal Schedule B, although they have continued to file the identical document with the IRS without objection.

You may be interested in knowing that the two plaintiffs are not random or unknown groups that usually fly under the radar. The first is Americans for Prosperity Foundation, the 501(c)(3) arm of Americans for Prosperity (AFP), a 501(c)(4) organization founded in 2004. Headquartered in Arlington, Virginia, it is "a libertarian conservative political advocacy group in the United States funded by David Koch and Charles Koch. As the Koch brothers' primary political advocacy group, it is one of the most influential American conservative organizations."

The second, Thomas More Law Center, is a "Christian, conservative, nonprofit, public interest law firm based in Ann Arbor, Michigan, and active throughout the United States." According to its website, its goals are to "preserve America's Judeo-Christian heritage, defend the religious freedom of Christians, restore time-honored moral and family values, protect the sanctity of human life, and promote a strong national defense and a free and sovereign United States of America." It is active in social issues such as opposing same-sex marriage, abortion, and provisions of the Affordable Care Act.

The Elephant in the Room

At no time, all up and down the federal court ladder, have these litigants or their amicus-brief-filing supporters been able to satisfactorily answer why they should be relieved of the duty to file the identical (confidential) document in California that they – to this day – continue to file with the IRS.

Perhaps the most bizarre of the amicus curiae briefs was the one filed by the United States Department of Justice in November 2020 in connection with the inquiry into whether the Supreme Court should grant certiorari in this case. (Very few cases are accepted for hearing each year.) The former Administration popped into the fray *both* to support the federal confidential disclosure requirement but to object to California's.

In a Supplemental Reply Brief, the California AG wrote: "As for the significance of the question presented, the United States principally contends that the question is important because "California is the most populous State in the union. U.S. Br. 23." AG Becerra added: "That is, of course, indisputable; but it does not distinguish this case from any case involving a California law or policy. The United States fails to identify any real-world harm to charities or their donors arising from California's requirement that charities provide the State, on a confidential basis, the same limited information they already report to the IRS."

For the record, the United States – now under new management – has withdrawn the November 2020 brief. The U.S. Supreme Court granted permission for the new Department of Justice to submit a (replacement) brief dated March 1, 2021, and to participate in the April 26th oral argument.

But – in a curious twist – the Solicitor General suggests the high court adopt what is essentially a "kick-the-can-down-the-road" approach. It's a request for "vacatur and a remand" to the Ninth Circuit for further development of … something … perhaps, the facts or maybe the law. It's not entirely clear what that something is; judging by the questions from the justices, they aren't sure what it is either.

The Solicitor General acknowledges that if the California rule is struck down, the identical federal rule may not long survive. It could also be the death-knell for similar requirements in other states. The vacatur/remand solution is reportedly a "middle-ground proposal backed by President Joe Biden's administration to uphold the state policy but send the case back to lower courts to explore whether the groups could pursue a challenge based on how California applied the rules to them." (First Amendment cases can be decided on a facial-invalidity basis that strikes down a law for everyone, or on an "as applied" basis which grants relief only to the litigants.)

Historically, the justices tend to make the narrowest ruling possible. So this proposal may be the way that the Supreme Court wiggles out of this messy and controversial case.

Who Should Win

"There's a lot of yakety-yak that this would disclose donor names and donor information," according to Jan Masoka, chief executive of the California Association of Nonprofits (CalNonprofits) in an interview just ahead of the oral argument. See *Supreme Court Poised to Hear Landmark Case Involving Donor Privacy* (April 25, 2021) Dan Parks, *The Chronicle of Philanthropy*. "That is simply 100 percent not true."

The amicus brief of CalNonprofits (3/31/21) is one of several that do excellent jobs of presenting the California position, each adding a critical piece of the persuasion puzzle to supplement the Attorney General's (respondent's) brief filed on March 25, 2021 (as well as the earlier California briefs from the extensive pre-certiorari phase.)

The full picture of the depth and breadth of the "yakety-yak" supplied by petitioners and their allies is explained – perhaps most masterfully and comprehensively (including on the correct First Amendment law) in the brief on behalf of four nonprofit, nonpartisan organizations all subject to this California reporting requirement; see Brief of Campaign Legal Center, Citizens for Responsibility and Ethics in Washington, Common Cause, and League of Women Voters of California in Support of Respondent (4/17/21).

Point by point, these amici curiae state the correct applicable law under the facts here, supported by voluminous legal and other citations. Then, almost as an afterthought, they add a description of what's incorrect about the other side's facts or law – although these points have already been implicitly demolished.

The same can be said of the other excellent amici curiae briefs that address many key points, including the history of how attorney-general-type officials have, from Elizabethan days and earlier, been granted the lead role in the oversight of charitable assets and funds on behalf of the public. After the founding of our nation, this role continued in the states in the office of the attorney general.

It was not until the early twentieth century and the enactment of the federal income tax that U.S. charities looked to the Internal Revenue Service as an important – and perhaps preeminent – regulating body. But in recent years, the IRS has been decimated by budget cuts. That has paved the way for the attorneys general of the states with the greatest number of charities and highest amounts of charitable dollars to step into the limelight again.

In particular, see the amici curiae briefs by:

- States of New York, Colorado, Connecticut, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, and Virginia, and the District of Columbia (3/31/21)
- Scholars of the Law of Nonprofit Organizations (4/6/21)

See also the excellent contributions in the briefs by:

- National Council of Nonprofits (3/31/21)
- Charity Watch (3/31/21)
- Public Citizen and Public Citizen Foundation (3/31/21)

These, of course, are in addition to the excellent Ninth Circuit opinions over the long years of this drama. The most recent is the one now before the Supreme Court to be affirmed or reversed. See 903 F.3d 1000 (9th Cir. 2018). Subsequently, the three-judge panel denied a motion for rehearing, and the full Ninth Circuit also denied a hearing en banc. The Order Denying Petitions for Rehearing En Banc on March 29, 2019, includes the dissents of five judges, and the rebuttal by the three-judge panel.

Conclusion

Depending on how broadly or narrowly the Supreme Court rules – and in whose favor – these cases may have serious and possibly troubling implications for the nonprofit sector.

In a follow-up post or two, we'll briefly point out some of the major "yakety-yak" stubbornly held onto and regurgitated repeatedly by these two petitioner-organizations, their counsel, and their many "friends" (of the court). Like the insurance TV commercial from a few years back – "That's Not How Any of This Works" – litigants and their allies may not cherry-pick and recite over and over again "findings of fact" from the trial round that were tossed out by the appellate court as "clearly erroneously." You have to mention that they were discredited and deal with them accordingly.

A similar principle – which every lawyer learns in the first few weeks of law school – is that you don't cite legal precedent that is significantly distinguishable on the facts. That's not how it works.

In particular, we'll explain (with easy hyperlinks to portions of a few of the outstanding court decisions and briefs filed in this case) a few major *misunderstandings* of facts and law that persist in this litigation, including:

- That state attorneys general have only a minor role in the oversight of charitable organizations in the U.S.;
- That, if many jurisdictions conduct only limited regulatory activity, then the robust oversight efforts of the states with the largest number of charities and charitable dollars are misguided and unnecessary;
- That California doesn't need or use the Schedule B forms; and
- That the California Attorney General's Office "leaked like a sieve."

That last point about California's supposed (mis)handling of confidential information has been entirely debunked, yet it continues to be asserted over and over and is seriously mucking up the common and correct understanding of this litigation as it heads into the final stretch.

— Linda J. Rosenthal, J.D., FPLG Information & Research Director