

Supreme Court Holds California's Donor Disclosure Law Facially Unconstitutional

August 19, 2021

Americans for Prosperity Foundation v. Bonta, No. 19-251, consolidated with Thomas More Law Center v. Bonta, No. 19-255. The Court's opinion is available [here](#).

On July 1, 2021, the Supreme Court held (6-3) that California's requirement that charities operating or fundraising in the state file Schedule B to their IRS Form 990, which discloses the names and addresses of their major donors, with the state Attorney General (AG) unconstitutionally infringes on charities' and donors' free speech and association rights in violation of the First Amendment.

Background

Currently, charities operating or fundraising in California must register with the California AG and renew their registrations annually by filing with the California AG their IRS Form 990, including Schedule B thereto. Schedule B contains the names and addresses of donors who have contributed more than \$5,000 or 2% of an organization's total contributions in a particular tax year. The State claimed that the disclosure requirement furthers its interest in policing misconduct by charities. It is worth noting that the AG does not publish this information publicly, but, in at least one instance, inadvertently posted this information publicly on a massive scale.

In 2018, Americans for Prosperity Foundation, a public charity, and Thomas More Law Center, a public interest law firm, each challenged the disclosure requirement in federal court in the Central District of California, alleging that the AG had violated their and their donors' First Amendment rights.

In each case, the District Court granted a preliminary injunction prohibiting the AG from collecting their Schedule B information. The Ninth Circuit reversed, holding that "exacting scrutiny," and not the more stringent "strict scrutiny" standard applied; and that California's disclosure requirement satisfied the exacting scrutiny standard because it was sufficiently related to an important government interest in policing charitable fraud, and that it promoted investigative efficiency and effectiveness.

Supreme Court Holding

In an opinion by Chief Justice John Roberts, the Supreme Court reversed the Ninth Circuit, finding California's disclosure requirement unconstitutional, and effectively prohibiting the AG from collecting Schedule B information.

The Court considered the following two issues: (1) whether the exacting scrutiny or strict scrutiny standard applies to disclosure requirements—such as the one in California—that burden nonelectoral, expression association rights; and (2) whether California's disclosure requirement is unconstitutional on its face (i.e., it violates all charities' and their donors' freedom of association and speech) or solely as applied to the petitioners in this particular case.

Regarding the first issue, in a part of his opinion joined by Justices Kavanaugh and Coney Barrett, Roberts rejected the petitioners' argument that the most stringent constitutional test, strict scrutiny, should apply. The three-Justice plurality stated that courts should instead use exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important government interest. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be "narrowly tailored to the government's asserted interest."

Roberts acknowledged that California has an important interest in preventing wrongdoing by charitable organizations, but noted the dramatic mismatch between the desire to prevent fraud and California's donor-disclosure requirement: the state requires nearly all 60,000 charities that do business in the state to file their IRS Form 990s, including Schedule B, but that information "will become relevant in only a small number of cases." Because the state does not rely on those forms to initiate investigations, Roberts concluded, California's "interest is less in investigating fraud and more in ease of administration."

Regarding the second issue, the Chief Justice concluded that the disclosure requirement was invalid in all circumstances, rather than only in the petitioners' case. In First Amendment cases, he explained, the Court has allowed challengers to seek to invalidate a law in its entirety if a substantial number of its applications are unconstitutional. Roberts concluded that that was the case here as the problems in the State's disclosure requirement would be present in every scenario. Every demand for information that might "chill association," Roberts concluded, is therefore unconstitutional.

Implications

- The Court's ruling protects sensitive donor information from compelled disclosure. Charities operating or fundraising in California will no longer be required to file an unredacted version of Schedule B to their Form 990s with the AG.
- The decision continues the Court's trend of affording robust constitutional protection to non-profit organizations, but leaves some uncertainty around the standard of review for compelled disclosure cases.
- Outside of the context of charities and donor disclosure, the Court's holding suggests that other compelled disclosure regimes that lack narrow tailoring could be challenged under the First Amendment. In her dissent, Justice Sotomayor asserted that the ruling placed a "bull's eye" on reporting and disclosure requirements. How the Court will apply this decision to other compelled disclosure contexts remains unclear.
- Several other states' AGs collect Schedule B information from charities, and this ruling calls into question the constitutionality of the laws of those states. New York and New Jersey are now facing a similar legal challenge to their Schedule B collection. On July 14, 2021, the Liberty Justice Center sued the New York and New Jersey AGs, arguing that the states' laws that require nonprofits to disclose tax documents that contain private information about their donors is unconstitutional. The suits were filed in the U.S. District Court for the Southern District of New York (available [here](#)) and the U.S. District Court for the District of New Jersey (available [here](#)). Effective July 30, 2021, the New York AG's Charities Bureau suspended its collection of Schedule B to IRS Form 990 so that it may review possible amendments to its forms, policies, or procedures that may be necessary in order to comply with the decision in *Americans for Prosperity Foundation v. Bonta*. The [notice](#) posted to the Charities Bureau's website stated that "charities' annual filings will no longer require disclosure information that identifies donors. Any notices that charities have received regarding any deficiency due to missing or incomplete Schedule Bs are no longer operative as to such deficiency, and annual filings will no longer be considered deficient in such regard."

Unless indicated otherwise, all quotations are from Americans for Prosperity Foundation v. Bonta, No. 19-251, consolidated with Thomas More Law Center v. Bonta, No. 19-255.

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