State disclosure laws suffer a setback

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Late last week, the US District Court for the Central District of California struck a blow against the California Attorney General's Office and other supporters of the state's ongoing efforts to expand the public disclosure of nonprofit donor identity data. By granting the plaintiff's permanent injunction request in the matter of *Americans for Prosperity Foundation v. Harris*, the court effectively declared unconstitutional – at least "as applied" to Americans for Prosperity Foundation ("AFPF") – the Attorney General's implementation and interpretation of a California law requiring charitable organizations to file the names and addresses of their large donors with the state's public registry. The ruling, which comes on the heels of a 2015 decision by the US Court of Appeals for the Ninth Circuit holding that the same California disclosure law was facially constitutional, may draw into question the ability of the Attorney General's Office to continue its present policy of demanding unredacted donor information from the federal tax returns of 501(c)(3) charitable organizations and other nonprofit entities.

Under California law, all "charitable corporations" registered to solicit public funds in the state (including 501(c)(4) social welfare organizations) are required to file a complete copy of their IRS Form 990, including their Schedule B, with the Attorney General's state registry.[1] Schedule B, if provided in unredacted form, lists the private name and address information for every individual donating more than $5,000 per tax year to the registered nonprofit. The constitutionality of this disclosure provision was challenged in 2015 by the Center for Competitive Politics ("CCP"), a 501(c)(3) charity, for violating CCP's "right of free association guaranteed by the First Amendment."[2] In its rejection of CCP's challenge, the Ninth Circuit held that the law did not violate the organization's First Amendment rights because the disclosure burdens placed on CCP were minor as compared to the conceivable efficiency benefits the Attorney General's office might reap when reviewing nonprofit financial information for suspicious activity. The Ninth Circuit did, however, leave open the possibility that a party could challenge the law's application in an "as applied" setting.

In *Americans for Prosperity Foundation v. Harris*, AFPF did exactly that – asking the Court to rule that public disclosure of the organization's Schedule B donor list was unconstitutional and not substantially related to a compelling state interest.[3] Observing that AFPF had failed to disclose its Schedule B for a period of ten years without triggering any adverse action by the Attorney General's Office, the District Court determined that access to the list "played no role in advancing the Attorney General's law enforcement goals."[4] In substantiating this conclusion, the Court also highlighted that the Attorney General had successfully prosecuted charities for wrongdoing on several occasions in the past without the use of unredacted Schedule Bs. In granting AFPF's injunction request, the Court also appears to have been persuaded by evidence illustrating that AFPF's donors would likely face threats, intimidation, retaliation and harassment if their financial support for the organization were made public through release of the entity's Schedule B. For the Court, the combination of donor intimidation risk and lack of a clear governmental purpose for donor disclosure, led to a finding that the state law as applied to AFPF created an undue burden on the organization's First Amendment rights.

The ability of an interest group to challenge the constitutionality of mandated public donor disclosure was first

established in 1958 by the U.S. Supreme Court in *NAACP v. Alabama*.[5] Despite this precedent, however, constitutional challenges to donor disclosure requirements are rarely, if ever, successful – mostly because challengers cannot prove actual harm. In *Citizens United v. Schneiderman*, the US District Court for the Southern District of New York, relying upon the Ninth Circuit's holding in *Center for Competitive Politics*, held that New York's mandated disclosure law was constitutional because it increased the state Attorney General's investigative efficiency while creating a modest burden on the ability of donors to remain anonymous.[6] The ruling in *Americans for Prosperity Foundation* suggests that at least some courts may be willing to break from that approach and listen to the constitutional challenges of nonprofit charity and advocacy groups that consider mandatory donor disclosure laws to be an impermissible burden on First Amendment freedoms.

[1] Cal. Code Regs. tit. 11, § 301.

[2] *Center for Competitive Politics v. Harris*, 784 F.3d 1307, 1317 (9th Cir. 2015).

[3] Case No. CV. 14-9448-R (C.D. Cal. Apr. 21, 2016).

[4] Case No. CV. 14-9448-R (C.D. Cal. Apr. 21, 2016).

[5] 357 U.S. 449 (1958).

[6] 115 F.Supp.3d 457, 465-467 (S.D. N.Y. 2015).

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