



Supreme Court to debate whether nonprofits must reveal donors despite threat of violence

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WASHINGTON – More than a decade after the Supreme Court upended campaign finance rules in a landmark case, the justices Monday hear arguments in a challenge to disclosure requirements that could make it easier for donors to spend anonymously.

At issue is a California mandate that nonprofits disclose their top contributors to state regulators. Two conservative groups, including one tied to Republican megadonor Charles Koch, say the state's requirement violates the Constitution by subjecting the donors to threats of violence from political opponents and, thereby, chilling the exercise of their First Amendment rights.

The groups point to a landmark 1958 civil rights case in which the Supreme Court struck down a request by Alabama that the NAACP reveal its membership, a decision that required governments to weigh their need for information against the potential that its disclosure could make people nervous to join an advocacy group.

Though the case turns on a technical question about how to apply that standard, groups working to reduce the influence of money in politics fear a broad ruling by the high court in favor of privacy could weaken disclosure requirements in elections, making it easier for big donors to influence the outcome of political campaigns anonymously.

"Even though they're saying the case had nothing to do with elections and is not about public transparency, if there's a bad ruling here it could be leveraged to expand these exemptions from transparency in election spending," said Beth Rotman, national director of money in politics and ethics at Common Cause.

The Americans for Prosperity Foundation, founded by Koch, and the conservative Thomas More Law Center say Americans should be able to donate to causes – especially controversial ones – without having to disclose their identity. They question California's need for the donor lists. And they argue the case has nothing to do with campaign disclosure requirements, which the Supreme Court has recognized serve a legitimate government function.

California says it uses the donor lists for fraud investigations. The groups say the state should ask for the lists once an investigation is underway, not beforehand.

"There's no need for them to be asking for tens of thousands of confidential donor names and amounts in advance," said John Bursch, vice president of appellate advocacy with Alliance Defending Freedom, which is representing the law center. "They testified that they never once had a problem getting it after the fact."

It would be easy to read the case through a partisan political lens. The initial suit was filed in 2014 against then-California Attorney General, now-Vice President Kamala Harris. Americans for Prosperity, a sister organization to the foundation, is a major player in conservative politics – so much so that several Democratic lawmakers demand Associate Justice Amy Coney Barrett recuse herself in the case because the group spent more than a million dollars supporting her confirmation last year.

"They're pursuing a substantive constitutional right to secret election and political spending that has not existed before," said Sen. Sheldon Whitehouse, D-R.I., one of the lawmakers calling for Barrett's recusal who has raised questions about the transparency of the groups and their funding. "The question is, will the Supreme Court reach that far and do that kind of damage?"

Barrett hasn't said whether she will take part in the case.

While the appeal has drawn support from many conservative organizations, it has also been joined by organizations like the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund and the LGBTQ advocacy group Human Rights Campaign. All of them say they fear the potential for retaliation against donors if their names are disclosed.

Several experts supporting the challenge said they doubt the Supreme Court, even with its relatively new 6-3 conservative majority, will hand down a body blow to transparency so far-reaching that it undermines disclosure requirements for political campaigns.

That's partly because the court has defended the government's interest in regulating campaign finance. In California's case, the groups say, that government interest is less obvious because 46 other states don't require nonprofits to disclose donors.

"You're supposed to attack this with a scalpel, not a sledgehammer," said Trevor Burrus, editor-in-chief of the libertarian Cato Institute's Supreme Court Review. "It's kind of hard for California to say 'we have to do this' when a bunch of states don't do it."

Donor threats

From sabotaged tents to death threats, the groups point to a litany of incidents they say show their donors' safety would be jeopardized if their names were revealed. During a 2012 rally in Michigan, for instance, protesters tore down an Americans for Prosperity event tent, trapping several elderly attendees inside, the group said.

A year earlier, protesters surrounded an Americans for Prosperity Foundation event in Washington, D.C., blocking exits and causing several injuries.

Disclosing donors' names, the groups say, would give people pause about contributing out of fear of similar reprisals. And that, they have told the court, would lead to a chill on the First Amendment freedom of association. A federal district court in California agreed in its 2016 decision, noting it was "not prepared to wait until an AFP opponent carries out one of the numerous death threats made against its members."

Opponents counter that most nonprofits, including the groups involved in the case, are already required to disclose donors to the Internal Revenue Service for tax purposes. At both the federal and state level, they say, the information is used only for investigations and is not supposed to be released to the public – though past slip-ups have occurred.

The California-based U.S. Court of Appeals for the 9th Circuit reversed the lower court's decision, finding that the groups never really demonstrated that a potential donor actually decided against giving money because of the past incidents. Without that concrete proof of harm, the court ruled, the case collapses.

"The plaintiffs have failed to demonstrate any actual burden on First Amendment rights," the court wrote.

Others point to a 2010 opinion from the late conservative Associate Justice Antonin Scalia, who wrote that requiring people to be held accountable for their public views fosters civic courage "without which democracy is doomed."

Legal standards

The nonprofits rely on a civil rights case from 1958 in which Alabama demanded the NAACP reveal its membership, a dangerous request in the Jim Crow South. The Supreme Court blocked it, finding governments must show a "substantial relation" between the information they seek and an "overriding and compelling state interest."

In the current case, the appeals court said California satisfied the requirement, but the groups want the Supreme Court to read another condition into the standard. If the government is going to abridge the freedom of association, they told the court, then the requirement should be "narrowly tailored" to accomplish the goal.

If the justices agree, they argue, then California's disclosure requirement must go.

"When the government is infringing a right, they need to try to do so through the narrowest means possible," Bursch said. "And the reason for that...is because if they do it more narrowly it violates less rights."

If the court applies that heightened standard groups advocating for stricter campaign finance laws fear the next lawsuit will challenge disclosure requirements for elections as well.

"If you're going to expand those exemptions so broadly, then you're going to really take away a lot of the transparency that we have in political disclosure laws," Rotman said.

A decision in the case is expected in June.