Courthouse News Service

High Court Skeptical of California Donor Disclosure Law

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April 26, 2021

Citing California's history of failing to keep donor information secure, the U.S. Supreme Court appeared likely Monday morning to overturn the state's nonprofit donor disclosure law.

"If someone said 'I want to give a donation [to a controversial group] but I want to be sure California won't disclose it, can you guarantee the donation won't be made public?" Chief Justice John Roberts asked California's Deputy Solicitor General Aimee Feinberg during a hearing that lasted over two hours.

"I don't think any organization can guarantee perfection," Feinberg responded.

The conservative group Americans for Prosperity Foundation, or AFPF, is the charitable arm of Charles and David Koch's libertarian advocacy group, Americans for Prosperity, which has more than 2.5 million members.

Since 2014, the nonprofit has been locked in a legal battle with the California Justice Department – which was led by Vice President Kamala Harris when the case was first brought – over the office's requirement that charities seeking a tax exemption as a nonprofit file a Schedule B federal tax form.

A federal judge ruled in 2016 that AFPF donors can remain anonymous, but the San Francisco-based Ninth Circuit reversed in 2018, finding the nonprofit must reveal the names of its largest donors to the California attorney general. That decision prompted the appeal to the Supreme Court.

The state has long argued the requested information would be kept confidential, and legislative efforts aimed to beef up security. But lawyers for AFPF and the Thomas More Law Center, whose similar case was consolidated with the nonprofit's, noted the agency tasked with storing the information "negligently" published some 1,800 documents online, including a list of Planned Parenthood Affiliates of California donors.

"Once the state posts donors' personal information on the internet, it remains public forever and puts donors' and their families' privacy at risk," wrote Kristen K. Waggoner, an attorney with the conservative legal group the Alliance Defending Freedom representing the Thomas More Law Center, in an August 2019 petition asking the Supreme Court to hear the dispute.

That history of leaks plagued the state's case during oral arguments Monday.

Justice Samuel Alito, a George W. Bush appointee, asked if the state's failure to keep the data private should be used against it in perpetuity.

“There’s nothing California can do that could convince reasonable donors, in the wake of the dismal confidentiality record, would feel safe,” replied Derek L. Shaffer, a lawyer with Quinn Emanuel Urquhart & Sullivan representing AFPF.

Concerns about how protesters would use this information, and the state’s failure to keep it secret, actually date back to 2010, when AFPF and other groups were sent delinquency letters for failing to file the documents as required by state law. Lawsuits were filed in 2014, leading to the 2016 ruling from U.S. District Judge Manuel L. Real, a Lyndon B. Johnson appointee, who found the rules violated AFPF’s First Amendment rights.

“The court can keep listing all the examples of threats and harassment presented at trial; however, in light of these threats, protests, boycotts, reprisals, and harassment directed at those individuals publicly associated with the foundation, the court finds that foundation supporters have been subjected to abuses that warrant relief on an as-applied challenge,” Real wrote.

But California found a more sympathetic audience at the Ninth Circuit. U.S. Circuit Judge Raymond C. Fisher, a Bill Clinton appointee, wrote for a three-judge panel that the alleged threats lobbed against donors failed to outweigh the importance of a state’s ability to investigate possible fraud.

“Even assuming that the plaintiffs’ contributors would face substantial harassment if Schedule B information became public, the strength of the state’s interest in collecting Schedule B information reflects the actual burden on First Amendment rights because the information is collected solely for nonpublic use, and the risk of inadvertent public disclosure is slight,” Fisher wrote in September 2018.

And while the state and U.S. Department of Justice argued groups who feared disclosure could use an administrative appeals process to dodge the requirement, the mere existence of such a process raised questions about the security of the data.

“An exemption is only necessary if you’re going to make it public,” said Justice Sonia Sotomayor, a Barack Obama appointee. “Given your past breaches you have essentially turned this into a public disclosure case.”

But Feinberg said that regardless of concerns about the data being leaked, the information falls outside of usual First Amendment concerns around charitable giving. While anonymous donations are generally protected, she argue the state’s collection of the data included factual documents which changes the constitutional standard on whether its collection violated someone’s rights. Between that and the state’s interest in maintaining a healthy charitable atmosphere free of fraud, even the law’s checkered past shouldn’t preclude it from living on, Feinberg argued.

“Robust AG oversight actually promotes charitable giving because it promotes trust in the charitable sector,” she said, adding the usual methods of charity investigations, including audit letters, do more to warn possible bad actors while the pre-collection of Schedule B information helps keep groups accountable.

“In California some charities solicit billions from residents and the state has made it a priority to protect residents from deception and that’s the basis for the state’s decision in collecting this information, to further its interest,” Feinberg said.

But supporters of APF saw the nonprofit winning the day.

“The Constitution protects private, anonymous association, which can be overcome only if the government shows an interest that is both compelling and narrowly tailored,” wrote Ilya Shapiro, director of the Robert A. Levy Center for Constitutional Studies at the Cato Institute.

He pointed to questions from the conservative side of the bench that appeared to spell defeat for California, but also from the justices on the left.

“Even Justice Sotomayor queried the state’s lawyer about donors’ reasonable fear of hacking,” he added.

In an amici brief submitted ahead of Monday’s hearing, and often cited by the justices during oral arguments, the American Civil Liberties Union, Human Rights Campaign and NAACP all decried the state law.

“California cannot force nonprofit organizations and their supporters to bear the risk of the state’s demonstrated inability to maintain the confidentiality of sensitive associational information,” ACLU’ attorney Brian M. Hauss wrote in the brief.

But not everyone was as critical of the law, which was enacted to curb fraud within the state’s massive nonprofit system.

“Context matters,” wrote Tim Delaney, president and CEO of the National Council of Nonprofits, in a statement following Monday’s arguments. His group was among those who filed another amici brief in support of the law.

“Our concern is that tampering with legal standards for donor disclosure so wealthy partisans can further hide their campaign contributions from the public to secretly influence elections will erode the ability of state charity law officials to keep bad actors from masquerading as nonprofits,” he said.