

U.S. Supreme Court Rules Donor Disclosure Laws to Be Unconstitutional

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Donor transparency versus donor privacy; substantial government interest versus an undue burden. This has been the subject of debate and litigation for nearly a decade. The First Amendment – the fight to protect liberty, privacy, justice, freedom of association – our country’s highest values – were at the forefront of this landmark U.S. Supreme Court ruling.

U.S. Supreme Court Case

In [*Americans for Prosperity Foundation v. Bona, Supreme Court, U.S., No. 19-251, 7/1/21*](#), two conservative organizations victoriously challenged a California law requiring charities that solicit charitable contributions in the State of California to disclose their contributors to the State Attorney General’s Office. In a 6-3 decision, on July 1, 2021, the conservative majority of the U.S. Supreme Court held that the requirement that compelled disclosure of donor contributions by nonprofit organizations in the State of California was a violation of the First Amendment rights and the rights of donors. The case went through multiple appeals to the Ninth Circuit finally landing in the Supreme Court where it clarified the applicable “exacting scrutiny” standard and ultimately held the State of California’s donor disclosure requirement to be facially unconstitutional.

The plaintiffs, Americans for Prosperity Foundation (the Foundation) and the Thomas More Law Center (Law Center), combined resources to challenge and dismantle the State’s requirement. Both organizations are exempt under section 501(c)(3) of the Internal Revenue Code (Code) and share a common mission of advocating for human rights. The mission of the Foundation is to educate and train Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. The mission of the Law Center, a nonprofit public interest law firm, is to protect and defend religious freedom, free speech, family values, and the sanctity of human life and accomplishes its mission through litigation, education, and related activities.

Underlying Factors and Deliberations

[Schedule B \(Schedule of Contributors\)](#) of IRS Form 990 or Form 990-EZ requires organizations exempt under section 501(c)(3) of the Code to disclose the names and addresses of significant donors, generally those who contribute \$5,000 or more to the organization. Unlike the Form 990 and Form 990-EZ, Schedule B is not open to public disclosure. Most states, however, require nonprofit organizations to submit a copy of its Form 990 or Form 990-EZ as part of its annual charitable registration or renewal process.

Traditionally, the States of California, New York, and New Jersey also *explicitly* required that an unredacted copy of Schedule B accompany the federal tax return. For California, charitable organizations and certain out-of-state organizations doing business or holding property in California required to register and file an annual report (CA Form RRF-1) with the Attorney General’s Registry of Charitable Trusts were obliged to submit its Form 990 or Form 990-EZ accompanied by Schedule B.

The Court held that the blanket requirement to disclose sensitive donor information was facially unconstitutional because it was not narrowly tailored to any substantial governmental interest and it placed an undue burden on donors. New York and New Jersey were the only two other states that were

enforcing a similar requirement prior to this decision while “forty-six states today police charities *without* any such blanket demand,” as the Plaintiff’s attorney stated at the oral argument.

Three of the six justices agreed that the Court should apply an “exacting scrutiny” standard — a more flexible standard than “strict scrutiny” — which is the First Amendment standard for cases involving compelled disclosure requirements. The Court explained that the requirement must be “narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.” The Court further explained “There must be a substantial relation between the disclosure requirement and a sufficiently important governmental interest,” and “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” Exacting scrutiny requires that restrictions “be narrowly tailored to the government’s asserted interest.”

In the end, it was determined that it was not even necessary for the Court to announce a categorical standard for evaluating disclosure laws at this time because the California law at issue would fail either standard.

Though Schedule B is not open for public viewing, there have been some mishaps where confidential donor information was inadvertently disclosed. Some believe that the mandatory disclosure of such sensitive information is unsafe and dangerous as some donors have faced intimidation, death threats, hate mail, boycotts, harassment, and even physical violence. During the oral argument, it was noted that the California Attorney General’s office rarely, if ever, has used Schedule B for any purpose and there is not “a single concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General’s investigative, regulatory or enforcement efforts.” Without a substantial governmental interest, the Court also found that the disclosure requirement places a high burden on nonprofit organizations.

The Court sought to compare the State’s requirement of submitting Schedule B to be the same as that of the IRS. Arguments followed, pointing out that there were significant distinctions such as that the IRS utilizes Schedule B in a role of tax collections and that Schedule B is a reporting tool that reports contributors on a nationwide level. In 2020, the IRS did allow latitude for certain exempt organizations such as organizations described in sections 501(c)(4) and 501(c)(6) of the Code to not have to disclose the identity of their donors on their annual Form 990 filing with the IRS. The IRS shifted the process for obtaining such information from an administrative one to a process relying on audits or other enforcement actions. In its balancing test, the IRS determined that the burdens of collecting this information on Schedule B outweighed any benefit – which the IRS perceived as zero. The modification to the disclosure rules did not apply to public charities exempt under section 501(c)(3) of the Code as such organizations are required to make those disclosures under statutory law, specifically, section 6033(b) of the Code.

Closing Remarks

The U.S. Supreme Court’s decision marks a massive victory for nonprofits and their donors alike who have fought to protect their privacy. The doors have not completely closed and there will be more opportunities for future discussions with respect to disclosure requirements. By abolishing the blanket disclosure of donor information, the State of California may still require particularized or targeted requests for donor information to any organization if warranted and if it has a compelling reason to do so.

In light of the court decision, New York and New Jersey followed suit and officially declared on their websites that, effective July 1, 2021, the requirement that charities submit the IRS Form 990 Schedule B as part of their initial or annual registrations can no longer be enforced and no longer required. We expect many more state jurisdictions to rewrite their policies, rules, procedures and forms in order to comply with the U.S. Supreme Court’s decision in the near future.

Contact Us

If you have questions regarding the new developments in this U.S. Supreme Court case, please contact Garrett M. Higgins, CPA, Partner, at ghiggins@pkfod.com, Eva Mruk, CPA, EA, Partner, at emruk@pkfod.com or a member of your tax-exempt client service team at PKF O'Connor Davies LLP.

Resources

The U.S. Supreme Court case and Oral Argument (audio and transcript) can be accessed below:

[*Americans for Prosperity Foundation v. Bona, Supreme Court, U.S., No. 19-251, 7/1/21 Supreme Court of the United States, "Oral Argument - Audio," accessed April 27, 2021*](#)
[*Supreme Court of the United States, "Oral Argument - Transcript," accessed April 27, 2021*](#)

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