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Supreme Court Holds That California's Donor Disclosure Law Violates The First Amendment

***Americans for Prosperity Foundation v. Becerra*, No. 19-251, consolidated with *Thomas More Law Center v. Becerra*, No. 19-255**

Decided July 1, 2021

Today, the Supreme Court held 6-3 that California's requirement that non-profit organizations disclose their donor lists unconstitutionally burdens those organizations' expressive association rights, in violation of the First Amendment.

Background:

The California Attorney General requires private charities that operate or fundraise in California to register annually with the state. Registration entails filing various tax forms, including Schedule B to IRS Form 990—which requires charitable organizations to list the names and addresses of contributors that donated more than $5,000 or 2% of the organization's budget during the tax year. California informed charities that their Schedule B disclosures would be kept confidential; in reality, however, California law required public disclosure of these documents until 2016. The state's asserted justification for the disclosure requirement is a law-enforcement interest in regulating non-profit activity. Two non-profit organizations challenged the disclosure requirement as unconstitutional, arguing that it chills expressive association by exposing donors to harassment and that less-restrictive means are available to California to further its asserted interest. The Ninth Circuit upheld the disclosure requirement, holding that "exacting" scrutiny—not "strict" scrutiny—applied, and the requirement was sufficiently related to an important government interest.

Issues:

(1) Whether exacting scrutiny or strict scrutiny applies to disclosure requirements that burden nonelectoral, expressive association rights;

"There is a dramatic mismatch . . . between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end."

Chief Justice Roberts, writing for the Court

Gibson Dunn submitted an *amicus* brief on behalf of the Center for Equal Opportunity in support of petitioners

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and (2) whether California's disclosure requirement violates charities' and their donors' freedom of association and speech facially or as applied to Petitioners.

Court's Holding:

(1) The Court's holding on the standard of review was fractured: A three-Justice plurality stated that disclosure laws like California's must satisfy exacting scrutiny. While one Justice in the majority would have applied strict scrutiny, two others declined to resolve the issue. (2) A majority of the Court held that California's law is facially unconstitutional under exacting scrutiny. California's interest in administrative convenience is weak, and a blanket disclosure requirement for organizations not suspected of wrongdoing is not narrowly tailored to this interest.

What It Means:

- The Court's ruling protects the sensitive donor information of non-profit organizations, ensuring that individuals may contribute to charitable organizations without fear of harassment from compelled disclosure. The ruling also calls into question the constitutionality of similar donor disclosure requirements in the federal "For the People Act" reintroduced in January 2021, and which has passed in the House and currently awaits a vote in the Senate.

- Today's decision may have implications for mandatory disclosure requirements beyond the associational context. In writing for the Court, the Chief Justice emphasized that "[t]he 'government may regulate in the [First Amendment] area only with narrow specificity,' . . . and compelled disclosure regimes are no exception." Op. 10. The Court's holding suggests that other compelled disclosure regimes that lack narrow tailoring could be challenged under the First Amendment. It remains to be seen how the Court will apply today's decision to other compelled disclosures.

- The Court's decision continues its trend of affording robust constitutional protection to non-profit organizations, but leaves the standard of review for compelled-speech cases undefined. The Court has often employed strict scrutiny in assessing other First Amendment free-speech and religious liberty-challenges brought by non-profit organizations, and the Court could find only a plurality for the "exacting scrutiny" standard of review applied here. Other members of the Court indicated that government regulation of a wide range of protected First Amendment activity generally must pass strict scrutiny.

- A plurality of the Court applied *Buckley v. Valeo*, 424 U.S. 1 (1976)—which applied exacting scrutiny to limits on expenditures by political campaigns—to the broader context of compelled speech, and did not cabin it to the context of elections.

- In an opinion by Justice Sotomayor, three Justices dissented on the ground that California's disclosure requirement did not burden the donors' First Amendment rights, and so no tailoring of the law was required.

The Court's opinion is available here.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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