Proskauer

The Impact of Americans for Prosperity Foundation v. Bonta on Donor Disclosure Laws

Tax Talks Blog on **July 30, 2021**

On July 1, 2021, the Supreme Court struck down a California donor-disclosure law as facially unconstitutional in its decision in *Americans for Prosperity Foundation v. Bonta.* ***[1]*** The law required nonprofits operating or soliciting contributions in California to disclose to the Attorney General of California information about all of its donors who contribute more than $5,000 each year (generally, through a requirement that nonprofits submit a copy of their Schedule Bs from their IRS Form 990s).[2] The decision clarified the rules applicable to disclosure requirements with respect to the First Amendment, and while the decision itself addressed nonprofit disclosures, its scope could stretch significantly beyond this area.

The plaintiffs, two organizations that were tax-exempt under section 501(c)(3) of the Internal Revenue Code, successfully argued that the disclosure requirement impermissibly burdened the rights of donors to freely associate under the First Amendment because disclosure of donor information could lead to reprisal and harassment from people who disagree with their affiliations.[3] The basic First Amendment principles at issue were not new: the Court had held, in a series of decisions stretching back to the 1950s, that forced disclosures could, in some circumstances, infringe on an organization's free association and free speech rights.[4] For instance, Alabama's attempts to obtain information about the membership of the NAACP had been struck down,[5] as had Arkansas's requirement that teachers annually disclose every organization to which they belonged or contributed.[6]

Americans for Prosperity gave the Court the opportunity (which it took) to provide a more comprehensive approach to addressing the First Amendment rules applicable to disclosure obligations. In particular, the Court clarified two key points, which likely make it easier for future plaintiffs (even outside of the nonprofit context) to challenge disclosure requirements.

First, the Court held that at least some level of heightened scrutiny applied whenever a disclosure obligation could burden freedom of association.[7] In a portion of the opinion joined only by the Chief Justice (the author of the rest of the Court's opinion), Justice Kavanaugh, and Justice Barrett, these three Justices concluded that the "exacting scrutiny" standard applied to all such disclosure obligations.[8] Justice Thomas, in a separate concurring opinion, argued (as he had before) that a "strict scrutiny" standard should apply.[9] Justice Alito, in a separate concurring opinion joined by Justice Gorsuch, concluded that deciding which standard applies (or under which factual circumstances would different standards apply) was unnecessary, as it was clear that at the minimum, exacting scrutiny would apply.[10]

Importantly, the Court concluded that some form of heightened scrutiny would apply, and that disclosure laws could be facially unconstitutional, without requiring the plaintiffs to prove harms or burdens on donors' associational rights across the board.[11]

Second, the Court added to the exacting scrutiny standard typically applied to compelled disclosure laws a requirement that a compelled disclosure must be narrowly tailored to, albeit not necessarily the least restrictive means of achieving, the governmental interest it serves.[12]

In applying these principles to the California disclosure provisions at issue, the Court (relying on the district court's factual findings) first rejected arguments that California was relying on the need to enforce its rules regarding charitable organizations and to prevent fraud or mismanagement, concluding that California failed to show any actual reliance on the required disclosures for enforcement purposes—leaving mere administrative convenience as the only valid governmental interest asserted by California.[13] The Court concluded by finding that the "dramatic mismatch" between the sheer amount of donor information collected, which at the very least risks chilling donors' associational rights, and the relatively weak governmental interest in administrative convenience advanced by the law was enough to render the law unconstitutional on its face.[14]

Justice Sotomayor in her dissent argued that applying a narrow tailoring requirement reduces the flexibility of the Courts to weigh the severity of the imposed burden against the governmental interest advanced and make a determination as to whether the means fit the ends.[15] Justice Sotomayor cautions that applying narrow tailoring indiscriminately, regardless of the severity of the burden (if any) imposed, will "topple disclosure regimes that should be constitutional and that … promote important government interests."[16]

In total, the Court's holdings together provide for a relatively high standard that a disclosure requirement must meet in order not to violate the First Amendment, at least where such disclosure requirement could implicate free association or free speech rights.

Ongoing Implications

Some legal thinkers tout the Court's decision as a boon for free speech, but others warn that the lack of disclosures available for charitable oversight could lead to an increase in charitable fraud and nonprofit abuses.[17] Further, many commentators (including Justice Sotomayor in her dissent) warn that the Court's "analysis marks reporting and disclosure requirements with a bull's-eye."[18] In particular, disclosure laws pertaining to political campaigns may be at risk for challenge, such as the For the People Act, which is intended to bring transparency to donations made for the purpose of influencing elections.[19] In past decisions relating to donor-disclosure in the political sphere, the Court has assumed a substantial relation that satisfies exacting scrutiny between the disclosures and providing information to the electorate.[20] However, it's not clear the political-related disclosure laws will survive once narrow tailoring is applied to the analysis.[21]

Nonprofit clients should also keep an eye on changes to donor disclosure laws in other states. In particular, the disclosure laws in New York, New Jersey and Hawaii are very similar to the one struck down in *Americans for Prosperity Foundation*, and may be at particular risk for challenge.[22] The Court indicated that even if such states are able to show that their true purpose for the requirements is to deter fraud, such purpose still may not be important enough to justify excessively broad disclosure requirements.[23]

Another potential path for states to preserve their donor-disclosure requirements may be to make donor disclosure a requirement for maintaining state tax-exemption.[24] In its decision, the Court briefly acknowledged and accepted that donor disclosure requirements as a condition of tax-exempt status and as part of the enforcement of tax laws with respect to tax-exempt qualification may be supported by different and more important governmental interests, and those disclosure requirements might be more likely to satisfy the requirements set forth in *Americans for Prosperity Foundation* in the context of the tax laws.[25] If true, the IRS's disclosure requirements (and perhaps similar state requirements) might satisfy the Court's tests. It should be noted, however, that the Court did not give blanket approval to such disclosure regimes, so at the very least taxing authorities may need to prepare to defend disclosure obligations under the Court's tests.

Given that disclosure obligations may be constitutional under various different enforcement regimes, nonprofit organizations should be sure to continue maintaining sufficient records of all donors (as such disclosures are still required annually by the IRS and other states) and keep their ears to the ground for additional changes to donor-disclosure requirements.

---

[1] 141 S.Ct. 2373 (2021).

[2] *Id.* at 2380. Form 990s are subject to public inspection as required by IRC section 6104 and Treasury Regulations Section 301.6104(a)-1. However, the names and addresses of contributors to organizations are not required to be disclosed unless the organization is a private foundation or a political organization exempt from tax under IRC Section 527. IRC Section 6104(b) and Treas. Reg. Section 301.6104(d)-1(b)(4)(ii).

[3] *Id.* at 2388.

[4] *See, e.g.*, McCullen v. Coakley, 573 U.S. 464 (2014); McCutcheon v. Federal Election Commission, 572 U.S. 185 (2014); Citizens United v. Federal Election Comm'n, 558 U.S. 310 (2010); Doe v. Reed, 561 U.S. 186 (2010); Davis v. Federal Election Comm'n, 554 U.S. 724 (2008); Buckley v. Valeo, 424 U.S. 1 (1976); Baird v. State Bar of Ariz., 401 U.S. 1 (1971); Bates v. Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

[5] *NAACP*, 357 U.S. at 466.

[6] *Shelton*, 364 U.S. at 488.

[7] *Americans for Prosperity Foundation*, 141 S.Ct. at 2383.

[8] *Id.*

[9] *Id.* at 2390 (Thomas, J., concurring).

[10] *Id.* at 2391-92 (Alito, J., concurring).

[11] *Id.* at 2388.

[12] *Id.* at 2385-86.

[13] *Id.* at 2385-87.

[14] *Id.*

[15] *Id.* at 2396 (Sotomayor, J., dissenting); see also Supreme Court Rules that California Can No Longer Require Charities To Submit a List of Contributors, EY Tax Alert (July 13 ,2021).

[16] *Americans for Prosperity Foundation,* 141 S.Ct. at 2399 (Sotomayor, J., dissenting).

[17] Fred Stokeld, *Ruling on California Donor Disclosure Law Draws Divided Reaction*, Tax Notes Today (July 7, 2021).

[18] *Americans for Prosperity Foundation*, 141 S.Ct. at 2392 (Sotomayor, J., dissenting).

[19] Kimberly Robinson and Greg Stohr, *Supreme Court Strikes Down California Donor-Disclosure Rule*, Bloomberg Law News (July 2, 2021).

[20] Lloyd Mayer, *Justices Open the Door Wider for Donor Info Law Challenges,* Law360 (July 1, 2021).

[21] Lloyd Mayer, *Justices Open the Door Wider for Donor Info Law Challenges,* Law360 (July 1, 2021).

[22] Brief for States of New York, et al. as Amici Curiae in Support of Respondent, *Americans for Prosperity Foundation v. Bonta* , No. 19-251 (July 1, 2021), at 9-11; Lloyd Mayer, *Justices Open the Door Wider for Donor Info Law Challenges,* Law360 (July 1, 2021).

[23] *Americans for Prosperity Foundation,* 141 S.Ct. at 2387 ("California does not rely on [disclosures] to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain [donor] information after initiating an investigation.")

[24] Joseph Mead, *Summary of Today's Americans for Prosperity Foundation v. Bonta Decision*, Nonprofit Law Prof Blog (July 1, 2021) https://lawprofessors.typepad.com/nonprofit/2021/07/summary-of-todays-americans-for-prosperity-foundation-v-bonta-decision.html; Jeffery Leon and Aysha Bagchi, *New York, Other State Donor Rules Imperiled By High Court Ruling*, Bloomberg Law (July 2, 2021).

[25] *Americans for Prosperity Foundation*, 141 S.Ct. at 2389.

View Original

Related Professionals

- **Amanda H. Nussbaum**
  Partner
- **Richard M. Corn**
  Partner