U.S. Supreme Court Strikes Down State Charity Donor Disclosure Requirement

By Lisa Soronen, Executive Director, State & Local Legal Center (SLLC)

In *Americans for Prosperity Foundation v. Bonta* the U.S. Supreme Court held 6-3 that California violated the First Amendment by requiring charitable organizations to disclose their major donors to the state attorney general. Only New York and Hawaii have similar requirements.

To operate and raise funds in California, charities must register annually with the Attorney General. Regulations require them to submit a copy of their Internal Revenue Service Form 990, including Schedule B, which lists the names of donors who have contributed more than $5,000 or, in some cases, more than 2 percent of an organization's total contributions. A number of charities sued California's Attorney General claiming requiring them to turn over this information violated the First Amendment.

The Supreme Court, in an opinion written by Chief Justice Roberts, agreed that being compelled to disclose this information violated the charities' First Amendment freedom of association rights. According to Roberts in the first "compelled disclosure" case the Court applied "exacting scrutiny." Per this standard, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."

While the parties argued that exacting scrutiny incorporates a "least restrictive means test" the Supreme Court disagreed. It concluded that the Court's early

compelled disclosure cases set forth that disclosure requirements must be "narrowly tailored to the government's asserted interest."

Applying exacting scrutiny, the Court held that California's "blanket demand" for Schedule Bs is facially unconstitutional.

California argued it had an interest in preventing charitable fraud and self-dealing, and that "the up-front collection of Schedule B information improves the efficiency and efficacy of the Attorney General's important regulatory efforts."

The Court did not doubt California had a substantial interest in preventing fraud. But, the Court opined, "[t]here 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." "California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. "California's interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement."

In most facial challenge cases the challenger must "establish that no set of circumstances exists under which the [law] would be valid." According to the Court, "a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." The Court had "no trouble" concluding that the Attorney General's disclosure requirement in this case is overbroad.

The Attorney General argued its disclosure requirement was unlikely to chill donors because the state keeps the Schedule Bs confidential. But the Court cited to precedent stating that disclosure requirements can chill association "[e]ven if there [is] no disclosure to the general public."

Justices Kavanaugh and Barrett joined the Chief Justice's opinion in full, including the section stating that he would apply exacting scrutiny to all compelled disclosures. Justices Alito and Gorsuch were "not prepared at this time to hold that a single standard applies to all disclosure requirements" but "California's blunderbuss approach to charitable disclosures fails exacting scrutiny and is facially unconstitutional." Justice Thomas would apply *strict* scrutiny to all compelled disclosures.

Justice Sotomayor, joined by Justices Breyer and Kagan, dissented. She concluded the First Amendment was not violated in this case because the challengers were not burdened "at all" by the disclosure requirement.

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