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Recent Supreme Court Case Limiting Disclosure by Charitable Donors Should Have Little Impact on Campaign Finance Law

JEFF BRINDLE | July 23, 2021, 10:10 am | in **Caucus Room**

In *Americans for Prosperity Foundation (AFP) v. Bonta*, the U.S. Supreme Court ruled 6-3 on July 1,2021 that a California law requiring charitable organizations to disclose major donors to the state's Attorney General is unconstitutional.

Three dissenting Supreme Court judges, scholars and others warn that the ruling threatens the very foundation of campaign finance law. They suggest that the First Amendment holding makes it difficult for most campaign finance requirements to survive, particularly those involving disclosure.

With due respect, I disagree the *Bonta* ruling jeopardizes election-related campaign finance disclosure requirements.

Opponents of such rules may try to use the *Bonta* case to strike down campaign finance laws. That often happens after the Supreme Court issues a new ruling.

Indeed, David Keating, president of the Institute for Free Speech, which had filed its own lawsuit against California's non-profit disclosure law, said the ruling could mean his group will launch more challenges against "unreasonable" campaign finance rules.

"It definitely makes it easier for us to persuade courts that certain disclosure laws are unconstitutional,'' he told The Hill on July 5, 2021.

However, he added: "With that said, laws that require disclosure of large campaign contributions to politicians, political parties, PACs…I don't think they are in any danger from this ruling."

Under the California law, charitable organizations, when renewing annual registrations, were required to file copies of IRS Form 990. It contains schedule B, a filing that discloses the names and addresses of donors.

California argued that the law was necessary in terms of its oversight of charities and fraud investigations, stating that “the state’s upfront collection of schedule B is substantially related to important oversight and law enforcement interests.”

New Jersey was among 16 states and the District of Columbia that had filed an amicus brief defending the constitutionality of California’s charitable rule.

AFP and Thomas More Law Center, another non-profit group that filed a similar suit, maintained that compelled disclosure violated its First Amendment rights and rights of donors. They argued that their donors would be less inclined to contribute for fear of reprisal.

A District Court judge in California initially ruled in favor of AFP. He issued a preliminary injunction prohibiting the Attorney General from collecting schedule B, which disclosed charitable donors.

A three-judge panel of the U.S. Court of Appeals, 9th Circuit then disagreed with the District Court and said it was legal for the Attorney General to obtain schedule B as long as the information was not disclosed publicly.

After the case was remanded, the district judge reheard the case without a jury.

Even after taking a second look, however, he still was convinced the state failed to prove its requirement was substantially tied to its government interest and permanently prohibited the Attorney General from collecting schedule B.

He held that disclosure of schedule B is not narrowly tailored to the state’s interest in investigating charitable misconduct and represents an unwarranted burden on associational rights of donors. Further, the court maintained that California is unable to ensure confidentiality.

The Ninth Circuit, in a split decision, again ruled that California’s disclosure requirement was constitutional because it was “substantially related to an important state interest in policing charitable fraud.” This balancing of interests is required under the “exacting scrutiny” test for infringements of First Amendment rights.

A majority of the appeals court judges said the District Court erred by imposing a “narrow tailoring” requirement. That restriction has normally applied only when a law imposes heavier burdens on free speech.

Laws infringing on First Amendment rights that are subject to this more demanding “strict scrutiny” test must be narrowly tailored to further a compelling government interest.

As noted above, the U.S. Supreme Court reversed the Ninth Circuit, stating that the California requirement burdens First Amendment rights and is not narrowly tailored to an important government interest.

A dissenting opinion authored by Justice Sonia Sotomayor said it is the first time the Supreme Court has held that the exacting scrutiny test, just like the strict scrutiny test, must always require that government-mandated disclosure be narrowly tailored to government interest. She also expressed strong concern that the high court required no proof that the disclosures led to harassment of charitable donors. She contended these changes in court doctrine instantly set the bar higher for election-related disclosure laws and may put them in legal jeopardy.

"Today's analysis marks reporting and disclosure requirements with a bull's-eye,'' she wrote. "…it adopts a new rule that every reporting or disclosure requirement be narrowly tailored."

In *Buckley v. Valeo (1976)*, the Supreme Court set the precedent for future campaign finance decisions by using the exacting scrutiny standard. It requires "a substantial relation between the disclosure requirement and a sufficiently important government interest" to uphold disclosure laws.

"Recognizing that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," the Court nevertheless ruled that the Act's reporting and disclosure provisions were justified by governmental interest in (1) helping voters to evaluate candidates by informing them about the sources and uses of campaign funds, (2) deterring corruption and the appearance of it by making public the names of major contributors, and (3) providing information necessary to detect violations of the law." Federal Election Commission analysis of Buckley: https://www.fec.gov/legal-resources/court-cases/buckley-v-valeo/

More recent Supreme Court rulings, particularly *Citizens United V. FEC (2010)*, have strongly upheld election-related disclosure laws.

"Disclosure is the less-restrictive alternative to more comprehensive speech regulations. Such requirements have been upheld in *Buckley and McConnell*…Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, …and "do not prevent anyone from speaking," *McConnell*. The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" government interest."

Just last year on August 28, 2020, a District Court judge in Rhode Island in *Gaspee Project & Illinois Opportunity Project v. Mederos* upheld a state law that requires those who engage in election-related spending, including nonprofit groups, to disclose their donors. One requirement includes listing the top five donors to the group on their electioneering ads.

“The Act’s disclosure and disclaimer requirements are justified by the sufficiently important state interest of an informed electorate and any burdens on political speech that they may cause are substantially related to that state interest” states the ruling, which has been appealed.

What set the California case apart, at least to the majority in Bonta, was that “California’s regulation lacks any tailoring to the State’s investigative goals and the State’s interest in administrative convenience is weak.” Thus, the Court deemed that California’s law does not meet the standard of a “sufficiently important” government interest.

Disclosure limits in the context of elections usually have been viewed as having a substantial relation to an important government interest under the exacting scrutiny test. California’s law, which required donors to charitable organizations to be disclosed to the state Attorney General, did not meet that standard.

While the Supreme Court generally has applied exacting scrutiny to campaign finance disclosure laws, it invoked strict scrutiny in the 1995 *McIntyre v Ohio Elections Commission*. That ruling struck down as unconstitutional an Ohio law that required an elderly taxpayer to identify herself on pamphlets she distributed in opposition to a ballot question raising school taxes.

Since that case, most disclosure laws have set a dollar threshold- currently $300 in New Jersey- below which political donors do not have to identify themselves.

The Bonta ruling, with its focus on charitable organizations, no more opens the door to eliminating campaign finance law in general than previous decisions.

The influence of legal precedent, so embedded in our common law tradition, will play an important role in any future Supreme Court rulings involving campaign finance law.

Buckley, Citizens United and related rulings not only indicate strong support for disclosure in terms of election-related activity, but the doctrine of precedent will hold sway over the current Supreme Court headed by Chief Justice Roberts.

AFP itself stated in its *Bonta* brief;

“the rationale for disclosure in campaign finance cases is wholly inapplicable here…Recognizing the unique interests at play in the electoral context, this court explained in Buckley that public disclosure of campaign–related donors is generally the least restrictive means of curbing the evils of campaign ignorance and corruption.”

On the day of the *Bonta* ruling, Tara Malloy, senior director of appellate litigation and strategy for the Campaign Legal Center, said she doubts it poses a major threat to campaign finance laws.

Campaign Legal Center has been one of the main legal defenders of such laws.

“We do not believe it is going to go much beyond the facts of this very case. Campaign finance laws are supported by very different governmental interests than the California law and are justified by the desire to ensure that our electorate is well informed when it goes to the polls. So there’s really no reason to believe that the Americans for Prosperity ruling will have a broad or lasting impact on electoral transparency measures because such measures are so different from the California law that was struck down today,” said Malloy.

From a practical, political point of view, the court is unlikely, during this divisive time in our history, to undo disclosure laws when it was reluctant to do so even in *Citizens United*.

Particularly considering talk of federal legislation that would increase the number of justices on the Supreme Court from nine to thirteen.

While the Robert’s Court has issued several earlier rulings that have led to major changes in campaign finance laws, rolling back election-related disclosure laws would be a radical step.

In my opinion, the *Bonta* decision will be limited to prohibiting the broad disclosure to state officials of the names and addresses of charitable donors and will not reach into campaign finance law, which in the context of elections has been found to be a sufficiently important governmental interest.

Jeff Brindle is the Executive Director of the New Jersey Election Law Enforcement Commission.

The opinions presented here are his own and not necessarily those of the Commission.