



Could Looming US Supreme Court Ruling Upend Campaign Finance Law?

JEFF BRINDLE | May 03, 2021, 10:48 am | in [Edward Edwards](#)

On Monday, April 26, the U.S. Supreme Court heard arguments in the First Amendment case Americans for Prosperity Foundation (AFP) v. Bonta. This case, merged with Thomas More Law Center v. Bonta, could be a potential game-changer, according to campaign finance experts.

The case involves a challenge to a California law that requires charities to turn over names and addresses of their largest contributors to the California Attorney General. The names are not supposed to be made public but lax practices in the past have led to many inadvertent public disclosures. California officials insist those names are now being kept strictly confidential.

Under the California law, the thresholds for determining which donors are to be disclosed is based on IRS criteria. Different charities face differing thresholds for reporting based on what they are required to list on schedule B of their tax filings.

For example, for the 2018 tax year, Thomas More Law Center was required to disclose donors contributing a minimum of \$35,000 whereas AFP needed to report donors giving more than \$341,000.

In March, New Jersey Attorney General Gurbir S. Grewal was among attorneys general representing 16 states and the District of Columbia that in 2021 filed an amicus brief defending the constitutionality of California's charitable rules. New Jersey also requires charities to privately disclose their major contributors to the Attorney General's office.

The California case dates to 2014 when AFP challenged the law on Freedom of Association grounds, contending that the law violates the First Amendment by discouraging contributors from donating to the group.

On February 23, 2015, a federal district court judge in California ruled in favor of AFP and issued a preliminary injunction preventing the California Attorney General from requiring the disclosure of their donors. Two months later, Thomas More Law Center filed a lawsuit seeking similar relief. In 2016, the

same federal district judge issued permanent injunctions in favor of both AFP and Thomas More Law Center.

In 2018, a three-judge panel of the U.S. Court of Appeals, 9th Circuit unanimously reversed the district court's injunctions and upheld the California law. In March 2019, the same court refused to rehear the case before an 11-member "en banc" panel. Even so, there were five dissenters, including Judge Sandra Segal Ikuta.

"Controversial groups often face threats, public hostility and economic reprisals if the government compels the organization to disclose its membership and contributor lists," Judge Ikuta wrote in the dissent. "The Supreme Court has long recognized this danger and held that such compelled disclosures can violate the First Amendment right to association."

The case was subsequently taken up by the U.S. Supreme Court, which will render a decision before the end of its current term in June.

Insisting that a rigorous constitutional standard- strict scrutiny- should apply to its constitutional challenge, the plaintiffs maintained that in doing so, the Court would be consistent with its previous ruling in NAACP v. Alabama in 1958.

"Affording States wide latitude to enforce sweeping demands for donor information simply because a law enforcement agency speculates (rather than proves) that such collection might improve investigative efficiency would be tantamount to abdicating NAACP v. Alabama," says an AFP brief submitted to the court on February 22, 2021.

In its 1958 decision, the Supreme Court found that the NAACP did not have to disclose the names of their supporters predicated upon the concern that its supporters might face "substantial harassment."

California and the federal government on the other hand, both argued that a lesser constitutional standard, exacting scrutiny, should be applied in this case.

California argued that the law is necessary in terms of its oversight of charities and potential investigations of fraud.

"The Petitioner's evidence centered only on their own organization. They did not show that California's confidential collection of the same information that charities already provide to the IRS chills associational interest in general or for a substantial number of charities in the state. At the same time, the state's upfront collection of Schedule B is substantially related to important oversight and law enforcement interests," said Deputy Attorney General Aimee Feinberg.

The federal government contended that the case should at least be returned to the court of appeals to consider the issue of Freedom of Association and to determine the extent of any potential harm the disclosure of contributor's identity might cause.

Placing these arguments aside, many campaign finance law pundits have a larger concern, one that goes beyond the immediate question of whether donors to charities in California must be disclosed to the State's Attorney General.

Their concern is that the current conservative leaning court might apply the "strict scrutiny" standard as suggested by the plaintiffs and thereby impact campaign finance disclosure laws, possibly leading to a massive increase in "Dark Money" expenditures by independent groups.

According to Center for Responsive Politics, independent groups spent a record of nearly \$3 billion in the 2020 federal election. Of that amount, \$119 million was done by committees that were able to completely hide their contributors even under current laws. In 2000, only \$11 million was spent anonymously in federal elections.

During oral arguments, Justice Stephen Breyer asked a blunt question.

"I'd like to know what you think of the argument raised in several of the amici briefs ... that this case is really a stalking horse for campaign finance disclosure laws. What's the difference?"

An April 19, 2021 article by Shannon Roddel quotes University of Notre Dame Law School professor Lloyd Hitoshi Mayer as follows:

"Even though the case does not involve campaign finance disclosure laws, it could have significant ramifications for dark money in elections . . . But if a majority of the court adopts a stricter constitutional standard in this case, it is likely that majority would also eventually apply it to campaign finance disclosure laws. That in turn would limit the ability of both states and the federal government to require public disclosure of donor information for politically active nonprofits, PACs and even political parties and candidates."

Scott Lemieux, a University of Washington political science professor, believes it is likely California's law will be struck down and contends "a broad First Amendment holding would make it difficult for most campaign finance requirements to ever survive judicial review."

While not suggesting that California's law should be struck down, I do believe based on observing the Supreme Court in recent cases that the California law, with its narrower focus involving charitable organizations, will be found unconstitutional.

On the other hand, I respectfully disagree with the concern that the Court's decision will undo campaign finance law, particularly as it applies to disclosure.

There is no question that some groups, conservative and progressive, would like to see disclosure requirements go by the wayside, and in so doing scuttle campaign finance law. I don't think this Court, despite its conservative leanings, including the openly anti-disclosure position of Justice Clarence Thomas, is ready to go that far.

The influence of legal precedent and practical politics leads me to that conclusion. Members of the Supreme Court, and Chief Justice John Roberts in particular, place a high premium on legal precedent. Major precedents including *Buckley v. Valeo* (1976), *Citizens United v. FEC* (2010), *Doe v. Reed* (2010) and subsequent rulings indicate strong support for election-related disclosure, both of contributions and expenditures involving election-related activity.

This contention is bolstered by comments by Justice Roberts during the April 26 oral arguments. Noting that political speech is measured under "exact scrutiny," a lower test, he stated "doesn't it seem strange that when it's- you're talking about charitable association- you would apply a more rigorous test than we apply to political association?"

Indeed, in a brief submitted to the US Supreme Court on February 22, 2021, Americans for Prosperity Foundation itself contends the challenge to California's disclosure rules for charitable groups is unrelated to disclosure required by campaign finance law.

"...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.' 424 U.S. at 68."

From a practical, political point of view, the Court is not likely, at this polarizing point in our history, to dramatically upend campaign finance law even though it has not hesitated to do so with past decisions like *Citizens United*. Completely overturning campaign finance disclosure laws would be viewed as radical.

Imagine the reaction of the five U.S. Senators, including Senator Cory Booker of New Jersey, who submitted an amicus brief in favor of upholding disclosure in the California law and against further protecting dark money groups.

"The court should firmly resist a broad ruling that can be used by petitioner and its ilk to tighten dark moneys hold over our politics, policy and public discourse. American faces enough challenges without

further eroding the public's confidence in government's ability to perform an essential function: to represent the people fairly, regardless of their influence or net worth," their brief states.

Moreover, the Court will be deciding this case with the shadow of legislation looming in Congress that would increase the number of justices on the Supreme Court to 13 from the current nine.

If history is a guide, the current Roberts court will act similarly to the President Franklin Roosevelt-era court, which backtracked on different court matters to forestall Roosevelt's own plan to increase the court to 13 members.

The Roberts court is likely to curb donor disclosure by charities without undoing previous precedents involving campaign finance disclosure.

Though no one has a crystal ball in terms of what the Supreme Court will do, it is my guess that disclosure involving campaign finance law is safe for now.

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.