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NEWSLETTER

Political Privacy Update: Solicitor General Supports Certiorari in California Donor Privacy Cases

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Privacy in Focus®

Privacy in Focus has been tracking (see here and here) three petitions for certiorari pending in the U.S. Supreme Court in cases challenging California's mandate for nonprofit organizations to disclose their donors to the state Attorney General as a condition of soliciting contributions in the state. Earlier this year the Court requested the view of the United States Solicitor General. The Solicitor General filed a Brief Amicus Curiae in the case in late November, which can be read here.

Notably, the United States supports the grant of certiorari, arguing that the decision of the Ninth Circuit is fundamentally incorrect and doctrinally inconsistent with decades of jurisprudence protecting associational privacy. The United States also argues that the issue of donor disclosure in the states and nationally is "of substantial national importance." Like the petitioners, the United States agrees that compulsory donor disclosure implicates First Amendment protection. This is so, the United States argues, whether the mandated disclosure is to the public or to a government office. Although California has argued disclosure solely to the state Attorney General does not amount to a First Amendment harm, the United States cites *NAACP v. Alabama*. The United States goes on to argue for a high-bar "exacting scrutiny" standard for judicial review of laws invading associational privacy.

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Would Distinguish the IRS

From there, however, the United States diverges in significant, if subtle, respects from the position of the petitioners Institute for Free Speech, Thomas More Society, and Americans for Prosperity Foundation. The United States appears to labor under a concern about potential legal challenges to the donor disclosure mandated by the IRS for Section 501(c)(3) charities, educational and religious organizations. Its brief goes to lengths to distinguish IRS donor reporting by charities on the basis that charities accept special tax benefits – tax exemption and donor income deductions that amount to public subsidies of resources that otherwise would have been paid to the federal government. The government can condition this subsidy upon the surrender of an association's privacy. Alternatively, an association could forego the special tax benefits and maintain its privacy. The United States argues that this conditioned benefits argument removes IRS disclosures from the First Amendment protection afforded organizations in other contexts.

Although that argument is understandable coming from the IRS's legal counsel, it would not clarify the First Amendment jurisprudence. Under that rationale, all a state like California would need to do is point to certain voluntary "benefits" it offers to associations in order to eliminate First Amendment protection – and perhaps other constitutional rights as well. California might simply shift its reason for mandating donor disclosure from a consumer protection rationale under its regulatory scheme for charity registrations to a state tax benefit rationale and require the same donor disclosure under its tax code. The same donor disclosures would be required to be made to the same government office, without First Amendment protection. A more doctrinally consistent approach would be to recognize the First Amendment applies to IRS donor disclosure and then require the IRS to justify such disclosure as necessary and unavoidable to administer tax law and charitable deductions. In other words, the Court should recognize the First Amendment right in all contexts, including where a benefit is afforded, and then assess the mandated disclosure under the government's justification and tailoring burdens.

The Solicitor General's argument is surprising in part because the IRS, reflecting the Trump Administration's policy preferences, recently completed a rulemaking (see here and here) relieving Section 501(c)(4) organizations from disclosing their donors, which was interpreted as a tailoring exercise acknowledging that 501(c)(4) donor disclosure is not necessary to administer the tax code. That protective policy approach might have informed the United States' approach to the First Amendment protection in the disclosure cases pending before the Court.

Exacting Scrutiny Only Where Threats Shown

Further, while the United States' brief argues for high-bar "exacting scrutiny" of donor disclosure laws, it appears to argue such scrutiny kicks in only if the plaintiff can prove, as a threshold matter, that its members have been the subject of threats or other reprisals. In other words, the United States does not appear to offer full-throated support for a facial First Amendment protection for all associational privacy. In this manner, the United States' brief conceives the First Amendment right as less protective than do the petitioners, who assert that *all* government-compelled disclosures *per se* harm inherent First Amendment rights, and shift the burden to the government to justify the harm. The Court will be called upon to address this point if it grants certiorari.

The variances between the United States' understanding of the First Amendment right and jurisprudence, as well as its obvious and awkward effort to distinguish constitutional protection at the IRS, underscores the critical need for clarification of this area of First Amendment jurisprudence, as previously discussed in *Privacy in Focus*.

Briefing in the cases is now complete, and the Court is expected to make a decision on certiorari soon.