wiley

NEWSLETTER

Supreme Court Reaffirms First Amendment Protection For Associational Privacy

July 2021

Privacy In Focus®

In one of its final decisions of its recent term, the U.S. Supreme Court strongly reaffirmed heightened First Amendment protection for associational privacy. The Court ruled (6-3) that government-mandated disclosure of the donors and members of private associations necessarily restricts First Amendment rights and government must satisfy a high burden to justify such restrictions. The decision has been greeted with approbation among First Amendment advocates and a diverse range of private associations.

The Court's decision resolved two challenges to a California rule compelling nonprofit organizations to disclose their major donors to the state as a condition of soliciting contributions from California residents. The cases are *Americans for Prosperity Foundation v. Bonta* (No. 19-251) and *Thomas More Law Center v. Bonta* (No. 19-255). The U.S. Court of Appeals for the Ninth Circuit had upheld California's rule. The Supreme Court's decision reversed the Ninth Circuit's rulings in both cases and struck the California disclosure rule as *facially* unconstitutional under the First Amendment.

Chief Justice Roberts' Majority Opinion

Chief Justice John Roberts authored the Court's majority opinion, which concluded that compulsory disclosure of an association's donors burdens First Amendment rights and government must prove that the burden is "narrowly tailored" to advance a "sufficiently important" governmental interest. The Roberts opinion started with the principle, first recognized in *NAACP v. Alabama* (1958), that "compelled disclosure of affiliation with groups engaged in advocacy

Authors

Lee E. Goodman
Partner
202.719.7378
lgoodman@wiley.law

Practice Areas

Election Law & First Amendment Litigation
Privacy, Cyber & Data Governance

may constitute as effective a restraint on freedom of association as [other] forms of governmental action," and quickly turned to clarifying the legal standard for judging the constitutionality of compulsory disclosure laws. Addressing the important dispute over the proper legal standard to apply, Roberts invoked the "exacting scrutiny" test set forth in *Buckley v. Valeo* (1976) and concluded that exacting scrutiny requires the government, in a facial challenge, to prove its compulsory disclosure regime is "narrowly tailored" to the government's asserted interest, though it need not be the least restrictive means of achieving that end. Even a "legitimate and substantial" governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved," the Court ruled.

Applying that standard to California's blanket disclosure rule, the Court concluded that California's disclosure scheme is not narrowly tailored to the state's asserted interest in preventing charitable fraud and self-dealing. Moreover, the Court questioned whether California's interest was less about investigating charitable fraud and more about ease or efficiency of administering a charitable registration system. Mere administrative efficiency, the Court concluded, must yield to greater First Amendment rights.

Privacy In Focus has been tracking the California cases as a timely inflection point for the Court to clarify the First Amendment jurisprudence of associational privacy. Not since the Court's 1958 unanimous opinion in *NAACP v. Alabama* has the Court had occasion to consider squarely the boundaries on state efforts to compel private nonprofit organizations to disclose their members and donors. Compulsory disclosure has been considered in the areas of political activities such as campaign contributions (*Buckley v. Valeo* (1976) and *Brown v. Socialist Workers '74 Campaign Committee* (1982)), ballot initiatives (*Doe v. Reed* (2010)), and anonymous speech about public policy (*McIntyre v. Ohio* (1996)), but not since the *NAACP* decision had the Court ruled on the right of privacy in associations in a non-political context.

Among other rules, the Court clarified and reaffirmed that:

- The principles set forth in *NAACP v. Alabama* (1958) continue to guide the Court's First Amendment jurisprudence on associational privacy in all spheres of association – charitable, religious, civic, and political – and regardless of whether the mandated disclosure is to the public or made only to a government office;
- Government-compelled disclosure of private association donors is a *per se* burden on First Amendment rights automatically triggering judicial scrutiny;
- Courts must apply a high-bar "exacting scrutiny" that imposes on government the threshold burden to justify its compulsory disclosure schemes;
- "Exacting scrutiny" requires the government to establish a "sufficiently important" governmental interest that justifies compulsory disclosure and further to prove that the disclosure scheme is "narrowly tailored" to achieve that important interest;
- Although the government need not prove its scheme is the "least restrictive" means for achieving its objectives, the existence of other less restrictive means is nevertheless relevant to the judicial inquiry into the validity of the government's asserted interest and its tailoring;

- Private associations and citizens may challenge a compulsory disclosure rule *facially*, and even if the government meets its exacting burden of justifying the scheme, the association/citizen then may assert an *as-applied* challenge by demonstrating the rule imposes special harm upon the association/citizen;
- In an as-applied challenge to an otherwise justified compulsory disclosure scheme, the plaintiff needs to demonstrate no more than a reasonable risk of harassment, threat, reprisal, or retaliation.

Concurring Opinions Prefer 'Strict Scrutiny'

Justice Thomas concurred in the judgment but wrote separately to indicate he would have reached the result by applying "strict scrutiny" rather than "exacting scrutiny." Justice Alito wrote a concurring opinion (joined by Justice Gorsuch) suggesting they also would prefer "strict scrutiny" but stating the California rule was so patently offensive ("The question is not even close.") that they did not need to choose between strict and exacting scrutiny in this case. Thus, the Chief Justice's adherence to the exacting scrutiny standard (joined by Justices Kavanaugh and Barrett) appears to be a middle ground.

Dissenting Opinion Prefers As-Applied Challenges

In dissent, Justice Sotomayor, joined by Justices Kagan and Breyer, argued that the merits of the cases should have been decided in as-applied challenges where the plaintiff associations would bear the burden of proving the California disclosure rule imposed severe harm upon their organizations and members. They believed the majority went too far and established a jurisprudence too protective of associational rights. They further expressed their opinion that these plaintiffs had not proven sufficient harm to their organizations as a result of California's rule. The real and practical hurdles faced by private plaintiffs seeking to obtain relief, as reflected in the years of litigation and Ninth Circuit's reflexively statist decision, had been a substantial focus of questioning during the Supreme Court oral argument. The dissenting opinion's absence of sympathy for the plaintiffs and their causes no doubt underscored for the majority that, absent strong Supreme Court guidance, private associations would continue to be subjected to insurmountable obstacles in their efforts to invoke the First Amendment protections of *NAACP v. Alabama,* and, therefore, broad facial protection was warranted.

Wiley's *Amicus* Briefs

Wiley filed two *amicus curiae* briefs urging reversal of the Ninth Circuit's rulings, one on behalf of the American Legislative Exchange Council and one on behalf of the U.S. Chamber of Commerce. Both *amici* requested the Court to reaffirm a requirement for heightened judicial scrutiny of compulsory disclosure rules. For additional information about Wiley's *amicus* briefs, you can listen to our podcast and read further here.

Chief Justice Roberts' opinion noted the large number and wide diversity of *amici*: "The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full range of human endeavors...."