INSTITUTE FOR FREE SPEECH

Litigation Backgrounder: *Institute for Free Speech v. Becerra*

Ninth Circuit Decision on Privacy Threatens Nonprofits' First Amendment Speech and Associational Rights

Unless and until it is overturned by the U.S. Supreme Court, a recent decision by the U.S. Court of Appeals for the Ninth Circuit has given state officials sweepingly broad authority to indiscriminately collect information on private citizens' charitable donations. The ruling condones a practice that serves no apparent legitimate purpose other than mere official curiosity and poses a chilling threat to the speech, associational, and privacy rights of donors and the groups they support.

How Did this Case Arise?

As in many states, charities soliciting contributions in California are required to register with the state before they can begin asking for support. Each year, registered charities are required to file a copy of their IRS Form 990 tax returns with the California Attorney General's office as a condition for maintaining their constitutionally protected legal ability to solicit contributions in the state. On Schedule B of the Form 990, charities are required to report to the IRS the names, addresses, and amounts of all donors who have given at least $5,000 or more than 2% of the organization's total revenue during the year. The Schedule B is submitted to the IRS on a confidential basis and, under federal law, the agency is prohibited from releasing this information to anyone – including state officials. Similar privacy protections, including penalties for violation of the confidentiality requirements, do not exist under California's laws.

Historically, California did not require registered charities to file a copy of their confidential, unredacted Form 990 Schedule B donor lists with the state. The state only began demanding this information in recent years, and the sudden demands did not arise from any changes in – and are not specifically authorized by – the state's laws and regulations. The state also has not cited any recent change in circumstances warranting these demands. Because the state is not legally entitled to this information and has no good reason for having it, the Institute for Free Speech filed suit to stop this practice.

What Are the Parties' Legal Arguments?

The Institute argues that California's demands for its donor information are an infringement of its and its donors' First Amendment rights to free speech and association. Donors who may not necessarily wish to speak on their own about an issue may choose to exercise their right to speak by giving to an organization to speak on their behalf. This is particularly true for unpopular or controversial issues – precisely the type of speech for which the First Amendment's protections are most important. Donors to an organization also associate with each other for the purpose of making their voices louder and more effective.

Donors must be free to give to any lawful cause of their choosing without government intrusion. If government officials are looking over citizens' shoulders and scrutinizing which groups they give to, that will create a chilling effect and reduce their willingness to give to certain groups, thereby reducing their ability to speak and associate freely.

California claims it has a substantial interest in obtaining the names of nonprofits' donors to catch nonprofits engaged in self-dealing, improper loans, and other unfair practices. But the only example it has cited of the usefulness of donor information for these purposes is its review of in-kind donations to determine whether nonprofits are improperly reporting the value of such donations. (The state has not explained why this matters. Presumably, the concern is that nonprofits may inflate the value of in-kind donations to boost their stated revenues, thus making it appear that their administrative costs are lower as a percentage of their total revenues than they are.) This infinitesimally narrow concern does not justify the broad demand for such donor information, and it can be addressed by simply requiring charities to disclose information about their in-kind donations, which are relatively uncommon to begin with.

The state also claims that the default rule should be for individual charities opposing demands for their donor information to demonstrate that they will face particularized harm from turning the data over to the government. In effect, this creates a Catch-22 in which organizations and their donors can claim an exemption to harm only after they have already suffered harm or threats, but organizations and donors would have no protection against unforeseeable future harms. The First Amendment case law does not support such a rule that only looks backward.

Could Charitable Organization Donor Lists Become Public?

The short answer is, yes, this is possible. Hackers regularly access and disclose confidential government information. For example, in 2015, we learned that "U.S. government databases holding personnel records and security-clearance files exposed sensitive information about at least 22.1 million people, including not only federal employees and contractors but their families and friends," according to an article in *The Washington Post*.

- There is no clear legal authority prohibiting the California Registry of Charitable Trusts' office from making the donor lists it receives public. Indeed, the office's security procedures were so lax that this confidential information for all registered charities appeared on its public website without password protection.

- The Attorney General's Office did adopt a regulation that states the information should be kept confidential. However, there are no penalties for intentional or negligent disclosures. Additionally, such a regulation could be changed at any time, and the California Public Records Act does not "prevent[] any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." No law prohibits such disclosure.

What Are the Implications of this Decision?

Perhaps the most disturbing aspect of the Ninth Circuit's ruling is that it inverted the standard for judicial review of government-compelled disclosure of private information. Under this standard, the government must, at a minimum, have a "sufficiently important" interest, and the compelled disclosure must bear a "substantial relationship" to the government's interest. Moreover, the burden is on the government to demonstrate that its demand is appropriately tailored to its interest.

While purporting to apply "exacting scrutiny," the Ninth Circuit's decision erodes this standard of review in several ways: (1) it said that a state official's demand for supporters did not constitute a First Amendment injury; (2) it lowered the bar by accepting that California's demand is "not wholly without rationality" – a burden that is much lower than the "sufficiently important" interest standard; and (3) the court required the Institute to prove that it would suffer an "actual burden" from the compelled disclosure, instead of placing the burden of proof on the government.

In short, the Ninth Circuit's decision establishes a presumption of government entitlement to bulk collection of private information unless an organization can demonstrate particularized harm. If upheld, the Ninth Circuit's decision could:

- Allow state government officials to collect bulk information about charities' donors, instead of issuing targeted information requests that relate more precisely to legitimate law enforcement concerns.

- Subject donors to state agencies' insecure policies and procedures, thereby compromising their privacy and making them susceptible to harassment. At trial in a related case brought by Americans for Prosperity Foundation, which the U.S. Supreme Court has agreed to hear, the district court found that California posted "1,778 confidential Schedule Bs" on the charity bureau's website, "including 38 which were discovered the day before this trial." Even clearly sensitive donor lists, such as a Planned Parenthood California affiliate, were revealed online.

- Subject nonprofit advocacy organizations to government surveillance of their supporters, chilling support for groups that criticize government.

- Give corrupt state government officials a powerful tool to monitor nonprofit advocacy and watchdog organizations that criticize them or oppose their initiatives.

- Intimidate donors from giving to particular nonprofits, thereby reducing their freedom to speak and to associate.

About the Institute for Free Speech

The Institute for Free Speech is a nonpartisan, nonprofit 501(c)(3) organization that promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission.