

Calif. Donor Info Law Unnecessary, 14 States Tell High Court

By **Daniel Tay**

Law360 (September 25, 2019, 8:51 PM EDT) -- California's law requiring charitable organizations to disclose donor information is unnecessary to regulate such organizations and should be blocked, 14 states supporting a conservative advocacy group affiliated with billionaire activist Charles Koch told the U.S. Supreme Court on Wednesday.

California's required "blanket and preemptive" disclosures are not sufficiently related to state Attorney General Xavier Becerra's law enforcement interests and cannot survive First Amendment scrutiny, according to the states' brief. The brief was filed — by the attorneys general for Arizona, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia and counsel for Republican Mississippi Gov. Phil Bryant — in support of the Koch-affiliated Americans for Prosperity, a group that has asked the Supreme Court to consider its challenge of the law.

The disclosure requirement would chill associational rights by placing membership information at risk of public disclosure, the states said, adding that California's law would also impair other states' ability to protect their own citizens' associational rights.

"This disclosure is unnecessary, exposes donors to retaliation and jeopardizes the First Amendment rights of citizens across the nation," the states said, adding that "this is just one more reason why California's infringement on associational rights is grossly disproportionate to the interest served."

In addition to the brief filed by the states, 17 other briefs were filed Wednesday in support of Americans for Prosperity. Filers include the U.S. Chamber of Commerce and the U.S. Chamber of Commerce Foundation, the Council on American-Islamic Relations and the American Center for Law and Justice.

Americans for Prosperity, which has been funded in part by Koch and his late brother David, takes issue with the California attorney general's Form 990, Schedule B requirement. That provision obliges charities to turn over tax information provided to the Internal Revenue Service related to their largest contributors. The Ninth Circuit's decision that the law **does not violate** the First Amendment creates precedential conflict with the Supreme Court, the group said in its August petition to the high court.

The Thomas More Law Center **has challenged** the measure in a related suit, and several of Wednesday's amicus briefs were filed in both suits. Both the Thomas More Law Center and Americans for Prosperity **failed to garner** the needed votes for an en banc rehearing before the Ninth Circuit in March.

The states said their lack of donor disclosure requirements had not prevented them from effectively regulating nonprofit organizations, saying this showed that California's

disclosure requirements were “not appropriately correlated” to the state’s law enforcement interests. The states said that besides California, only Hawaii and New York required disclosure of unredacted Schedule Bs. That other states had effectively prosecuted fraudulent nonprofit organizations showed California’s law was not “narrowly tailored,” the states said.

The Ninth Circuit had found in its September 2018 opinion that the state was not required to choose the “least restrictive” means of monitoring nonprofit organizations.

Further, the collected donor information was at increased risk of public disclosure, the states said, noting that California had previously posted more than a thousand unredacted Schedule Bs online. The states said the danger of such exposure is why most states “pursue their law enforcement interest without demanding that every charity surrender a list of this sensitive information.”

The states also said California’s law undermined First Amendment protections in 48 other U.S. jurisdictions that do not require blanket disclosure. If a resident in one of those jurisdictions donates to a California-registered organization, their identity would be put at risk, the states said.

The Chamber of Commerce and the Chamber of Commerce Foundation and the Council on American-Islamic Relations said in their briefs that the Ninth Circuit had incorrectly eliminated the narrow tailoring requirement. The chamber and the foundation said the judges who dissented from the Ninth Circuit’s decision to deny an en banc rehearing had said the circuit court’s analysis would allow governments to “put the First Amendment associational rights of members and contributors at risk for a list of names it does not need.”

Additionally, the Pacific Research Institute said that beyond the risk of public exposure, the blanket disclosures could result in nonprofit organizations being targeted by the government itself.

According to two other briefs by the American Center for Law and Justice and the Public Interest Legal Foundation, the IRS’ “targeting scandal,” in which organizations associated with the Tea Party movement were subjected to heightened scrutiny, demonstrated how donor disclosures have been used to personally attack donors.

J. Christian Adams, president of the Public Interest Legal Foundation, told Law360 Wednesday that donor anonymity was a “bedrock American value.”

“This tradition led to the creation of civil society institutions that worked for the betterment of the country,” Adams said. “Hopefully, the court will find a way to uphold that tradition.”

Mike DeGrandis, attorney for the New Civil Liberties Alliance, which also filed an amicus brief, told Law360 Wednesday that Becerra’s “ad hoc decree” regarding Schedule B disclosures was concerning.

“Not only could Americans lose their right to privacy in the associations we choose, but we might lose them to bureaucrats who violate the doctrine of separation of powers with impunity,” DeGrandis said.

The California Attorney General’s Office did not respond to requests for comment. The office has until Oct. 25 to file a response.

Americans for Prosperity is represented by Derek L. Shaffer, Kathleen M. Sullivan, William A. Burck and Jonathan G. Cooper of Quinn Emanuel Urquhart & Sullivan LLP.

The California Attorney General's Office is represented by Aimee Feinberg.

The states are represented by Mark Brnovich, Oramel Skinner and Rusty Crandell of the Office of the Arizona Attorney General.

The American Center for Law and Justice is represented by Jay Alan Sekulow, Stuart J. Roth, Colby M. May and Laura B. Hernandez of the American Center for Law and Justice.

The New Civil Liberties Alliance is represented by in-house counsel Philip Hamburger, Mark Chenoweth, Michael DeGrandis and Margaret Little.

The U.S. Chamber of Commerce and the Chamber of Commerce Foundation are represented by Caleb Burns, Stephen Obermeier, Jeremy Broggi and Boyd Garriott of Wiley Rein LLP and John Wood, Steven Lehotsky, Ryan Meyers and Tara Morrissey of the U.S. Chamber Litigation Center.

The Public Interest Legal Foundation, Center for Constitutional Jurisprudence, Foundation for Michigan Freedom and Texas Public Policy Foundation are represented by J. Christian Adams and Kaylan Phillips for Public Interest Legal Foundation.

The Council on American-Islamic Relations is represented by Lena Masri, Gadeir Abbas and Carolyn Homer of the CAIR Legal Defense Fund.

The cases are Americans for Prosperity Foundation v. Xavier Becerra, case number 19-251, and Thomas More Law Center v. Xavier Becerra, case number 19-255, in the U.S. Supreme Court.

--Additional reporting by Hailey Konnath. Editing by Neil Cohen.