LAW & CIVIL LIBERTIES

Privacy and Free Speech

Government requirements that nonpolitical nonprofits disclose their donors strike at the First Amendment.

BY TIMOTHY SANDEFUR

In March 2012, then–California attorney general Kamala Harris surprised the managers of many nonprofit organizations by announcing a new rule: her office would no longer let them submit annual reports in a way that concealed personal information about their high-level donors (meaning people who gave more than $5,000). In previous years, the state had allowed nonprofits to file redacted forms to ensure against the accidental disclosure of donor names, addresses, and other personal data. But even though Harris's office still had other ways to get that information if necessary (for instance, through a subpoena), she now insisted that the paperwork be provided without redactions—a demand her successor, Xavier Becerra, kept in place.

That alarmed the nonprofits, including prominent free-market think tanks such as the Goldwater Institute and public interest law firms such as the Thomas More Law Center. Although Harris's office promised to keep this information private, government officials often release such data accidentally, or put it into online databases that can be hacked. Public disclosure can be dangerous because it exposes people to harassment or retaliation by others who disagree, sometimes violently, with the policies advanced by the organizations to which people donate.

That became clear in the wake of California's ballot proposition banning same-sex marriage, which was adopted in 2008. That law was declared unconstitutional two years later, but the controversy didn't end there. Under state law, anyone donating $100 to an initiative campaign must turn over his name, address, and employer's information to the government, which places it on a website. A 2009 report by the Heritage Foundation documented dozens of cases in which the initiative's supporters were targeted for everything from boycotts to physical attacks when their personal information was publicized by the state. Some militant opponents of the ban even used publicly available information to create maps of the home addresses of the initiative's donors, facilitating harassment, vandalism, and violence.

Free-market groups across the nation have experienced similar blowback. In 2008, a left-wing group called Accountable America used government-mandated donor disclosure information to send threatening letters to conservative donors because it said it hoped to "create a chilling effect that will dry up contributions." The directors of organizations such as the Kansas Policy Institute, Mackinac Center in Michigan, and Freedom Foundation in Washington state have experienced threatening phone calls, warnings left on their front lawns, and even being spat upon. But people on the left have been targeted, too. Planned Parenthood offices have sometimes been violently attacked. Members of Black Lives Matter and other progressive organizations have been subjected to everything from personal threats to online hacking. In 2013, an IRS official reported that she and her children were stalked by Tea Party members who learned her address from a government disclosure form after she donated to Barack Obama's presidential campaign.

Thus in 2012, when Harris ordered nonprofits to submit unredacted forms instead of the edited versions her office had previously accepted, the foundations were reluctant to trust her promise to keep the information secret. Their concern proved warranted: A few years later, a federal court found that the attorney general's office published nearly 1,800 of these confidential documents on its website shortly after making the demand, revealing what the judge called a "pervasive, recurring pattern" of information security breaches. "The Attorney General's current approach to confidentiality," he concluded, "obviously and profoundly risks disclosure" of personal information.

DANGER OF DISCLOSURE

Fears regarding the consequences of publicizing private donor information are nothing new. In the 1950s, southern state governments tried to force the NAACP and other anti-segregation groups to turn over their donor lists, claiming such information

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was necessary to ensure that these organizations were complying with state corporation and tax laws. The real reason, however, was intimidation: by publicly releasing the names and addresses of NAACP supporters, state officials hoped to silence civil rights advocates. To some extent, it worked. In June 1956, after the NAACP refused to comply, an Alabama judge fined it $10,000 and enjoined it from raising funds or recruiting members. That effectively disbanded the NAACP in Alabama for eight years.

In 1958, the U.S. Supreme Court unanimously ruled such mandates unconstitutional. "Compelled disclosure of affiliation with groups engaged in advocacy," it said, could easily be an "effective … restraint on freedom of association … particularly where a group espouses dissident beliefs."

Alabama's lawyers argued that any threats or harassment that NAACP supporters might experience were the fault of private parties, not the state, but the Court rejected that idea. To mandate

Protesters outside the Manhattan apartment of political donor David Koch, June 5, 2014.

SPENCER PLATT / GETTY IMAGES

the disclosure of this private information was inviting harassment. The justices even likened it to forcing NAACP members to "wear identifying arm-bands" that would attract hostility from the crowd. Such requirements not only risked intimidation and violence, but were also likely to "induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure."

Two years later, in *Shelton v. Tucker*, the justices reiterated the point in a case challenging an Arkansas law that forced schoolteachers to identify every organization to which they donated money. The Arkansas Supreme Court upheld the requirement on the grounds that it "provide[d] school boards with needed information" and noted that the information was "being kept under lock and key." But the Supreme Court disagreed. "Even if there were no disclosure to the general public," wrote Justice Potter Stewart, the mandate still violated the First Amendment because it put "pressure upon a teacher to avoid any ties which might displease those who control his professional destiny." In short, teachers fearing retaliation would choose to censor themselves rather than risk losing their jobs or incurring the wrath of parents or supervisors.

THE COURT WAFFLES

The *NAACP* and *Shelton* cases made clear that laws intruding on the privacy of donors or advocacy organizations are unconstitutional unless they pass the legal test known as "strict scrutiny," a demanding requirement under which government must prove it has a compelling reason for forcing disclosure and that it cannot accomplish its goals in any more narrowly targeted way.

Yet the Court appeared to retreat from that high standard in the 1970s. In *Buckley v. Valeo* (1976), it upheld a federal campaign finance law that, among other things, required contributors to political candidates to disclose their personal information to the public. Applying the somewhat less protective rule of "exacting scrutiny" instead, it held that requiring a candidate's donors to turn over their names and addresses was intended to prevent corruption or bribery, and that was "sufficiently important to outweigh" the confidentiality concerns discussed in the *NAACP* and *Shelton* decisions. Although it acknowledged that mandatory disclosure poses a "threat to the exercise of First Amendment rights" because it is likely to "deter some individuals who otherwise might contribute," the *Buckley* Court thought using the "exacting" instead of "strict" test would strike a compromise. This lower standard still imposes significant limits on government, but requires only an "important," instead of a "compelling," reason for forcing donors to reveal personal information.

What reasons were important enough? Since *Buckley*, courts have held that there are three: Government can force donors to publish their private information in order to:

- prevent corruption,
- ensure against the appearance of corruption, and
- serve the so-called informational interest, which refers to efforts to educate the public about who supports one side or the other in a campaign.

That last category is the most problematic, given that the boundaries of the "informational interest" remain unclear. In the 2010 *Citizens United* case, the Court said government can impose disclosure mandates to "help [voters] make informed choices in the political marketplace." But that case, like *Buckley*, involved people who contributed to candidates running for office. The Court did not say whether the same desire to educate voters would also permit government to force donors to either side of an initiative campaign to make their personal information public, or to compel donors to organizations not engaged in politics, such as public interest law firms, to reveal their private information.

In fact, only six months after *Citizens United*, the Court issued a decision called *Doe v. Reed*, which expressly declined to answer those questions. Justice Samuel Alito wrote a separate opinion saying he thought the answer was no: "Were we to accept [the] asserted informational interest," he warned, states could require the disclosure of "all kinds of demographic information," including the "race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships" of anyone supporting a campaign or nonprofit. That would conflict with "a half century of our case law, which firmly establishes that individuals have a right to privacy of belief and association." But in the decade since *Doe*, several lower courts have rejected Alito's view and upheld laws that force organizations supporting or opposing ballot initiatives to publish confidential donor information on the theory that these requirements (in the Seventh Circuit's words) "provid[e] additional information useful to the consumer of political messaging."

The Tenth Circuit took a more moderate view in *Sampson v. Buescher* (2010). Forcing donors to initiative campaigns to reveal their personal information, said the judges, can prove more distracting than informative because it can turn a campaign into ad hominem argument instead of a debate over an initiative's merits. And because disclosure requirements sometimes apply to people who contribute trivial amounts, they often fail to give voters any useful information. *Sampson* itself involved a law that forced people donating as little as $20 to an initiative campaign to put their names and addresses on a publicly accessible list. But that did not teach voters who the initiative's *sponsors* were, just who its *supporters* were. And that was not information the public really found helpful—certainly not enough to warrant seriously infringing on donors' First Amendment rights.

RIO GRANDE

Yet while *Sampson* struck down that particular disclosure mandate, it allowed others to remain in place. Thus, when the New Mexico–based Rio Grande Foundation announced its opposition to an initiative campaign that would levy a 2¢ sales tax on sugared soft drinks in Santa Fe, city officials ordered the foundation to turn over the names, addresses, phone numbers, and employer information of anyone who contributed even a penny to its efforts opposing that proposition. Rio Grande had posted a third party's video on its Facebook page arguing against the soda tax and the city believed that the video must have cost more than the legal threshold amount of $250 to make. So even though Rio Grande had not made the video, posting it online amounted to an "election expenditure" triggering the disclosure mandate.

Rio Grande sued, arguing that the anti-privacy mandate violated its First Amendment rights and was likely to scare away donors. The city replied that the requirement helped educate voters about who opposed the soda tax initiative, but Rio Grande, relying on *Sampson*, pointed out that voters get little benefit from knowing the identities of people who contribute only a few dollars to a campaign. Mandatory disclosure is less likely to teach the public anything than to risk retaliation or even violence against the foundation's donors—or, at least, to scare away prospective donors who don't want their names put on a government list.

At trial, Rio Grande provided testimony from members of other organizations that share the foundation's free-market perspective and who suffered harassment, threats, and even physical attacks after their own names and addresses were publicized. Nevertheless, the trial court upheld the mandate. Rio Grande's *own* members had not suffered similar retaliation, it said, so the Santa Fe ordinance created little risk of harassment. That case is now on appeal.

THOMAS MORE AND AMERICANS FOR PROSPERITY FOUNDATION CASES

When Harris ordered nonprofits to turn over their donor information in 2012, she did not claim that doing so served the "informational interest." Instead, she asserted that having the information would improve the office's "investigative efficiency." In other words, it would make it easier for law enforcement officials to ensure that nonprofits were complying with state tax laws. That seemed dubious because the state's lawyers could easily get that information through other channels that would better protect the rights of innocent donors. Several nonprofits, therefore—including the Thomas More Law Center and Americans for Prosperity—sued, arguing that the risk to their donors if their identities were made public, or the danger that people would be dissuaded from donating in the first place, outweighed the attorney general's claims of "efficiency."

Federal courts in California ruled in the plaintiffs' favor after holding trials that showed that donors' fears were well grounded. Yet the Ninth Circuit reversed the decisions, holding that "inves-

tigative efficiency" was a legitimate reason to demand the information and that the risk to donors was only "modest."

That was an odd conclusion to reach given that "efficiency" has never been regarded as a good enough reason to intrude on First Amendment rights. Under either *NAACP*'s "strict scrutiny" test or the "exacting scrutiny" of *Buckley*, government can only demand the disclosure of donor information if it has a "compelling" or "important" reason for doing so. Yet efficiency is only considered a "legitimate" interest, which ranks below "compelling" or "important" in the constitutional hierarchy. That means that while the government may do some things in the name of efficiency, it can't impose significant limits on free speech simply to make its own operations more efficient.

As a group of judges who dissented from the decision observed, the court was "lower[ing] the bar governments must surmount to force disclosure of sensitive associational ties"—a result that would allow "a state's self-serving assertions about efficient law enforcement ... to justify disclosures notwithstanding the threats, hostility, and economic reprisals against socially disfavored groups that may ensue." The Supreme Court took the case and heard arguments in late April.

TRANSPARENCY OR PRIVACY?

Lawsuits like these take place against a backdrop of increasing demands by politicians and activists for restrictions on what they call "dark money," a term that refers to contributions to nonprofits and think tanks that advocate for one side or the other of a political debate and are not subject to the disclosure requirements of federal and state election laws. Often framed in the language of transparency, these demands to "end dark money" typically imply that shadowy forces are distorting the democratic process by secretly subsidizing political arguments that are inimical to the public good.

There is little research to substantiate this. As law professor Bradley Smith and others have shown, there is no evidence that "big money" decisively influences elections. But the demand for stripping donors of their privacy doesn't stop at elections. In recent years, some—most notably Sen. Sheldon Whitehouse (D–RI)—have argued that "industry-tied foundations" and "anonymous money groups" that litigate constitutional cases or file friend-of-the-court briefs should also be forced to turn over their donor lists. These include Pacific Legal Foundation, the Goldwater Institute, and the Cato Institute. This is a disturbing demand because these groups don't endorse or oppose candidates at all. Being nonprofit 501(c)(3) organizations, they aren't allowed to. Instead, they engage in efforts to persuade citizens and officials about policy or legal issues, all of which is perfectly legitimate. And that means that, unlike a political party, forcing them to reveal their donors' identities cannot serve the corruption-related goals that the *Buckley* decision had in mind. Instead, such demands run the risk of intruding on freedoms essential to democratic debate. Rather than falling within the *Buckley* precedent, these groups should come within the more protective rule of the *NAACP* decision—meaning that government cannot force them to turn over confidential donor information.

In the California case, now called *Americans for Prosperity v. Bonta*, the Supreme Court will have to decide which rule governs: *Buckley* or *NAACP*. If it chooses the less protective *Buckley* rule, it seems likely that the next step for anti-privacy forces will be to compel even groups like these to reveal their supporters' names, addresses, and employer's information.

Aside from constitutional concerns, the basic premise of "transparency"—that requiring people to give voters more information is invariably a good thing—is dubious. Research shows that mandatory disclosure can confuse or mislead the public. As the *Sampson* court observed, it can foster distracting ad hominem arguments, which is one reason America's Founding Fathers used pseudonyms such as Publius when engaged in political debates.

Scholars have also shown that people can suffer from "information overload" when they receive so much data that they cannot make use of it, or can suffer from biases such as the "availability heuristic" that leads them to misinterpret the data they're given, leading to counterproductive results. Law professor Alexander Volokh gives a revealing example: When Massachusetts put acetic acid on its list of toxic substances—forcing food companies to disclose its presence on warning labels—consumers began avoiding salad dressing because it contains the chemical, which is a chief component of vinegar. That meant people made the less healthy decision to eat fewer vegetables as a result of the mandate.

More recently, the Ninth Circuit Court of Appeals struck down a San Francisco ordinance that required soda makers to say in their ads that sugared soft drinks are bad for one's health because, by failing to impose the same requirement on other equally unhealthy beverages, the disclosure mandate gave consumers the false impression that soda is uniquely dangerous. As law professors Omri Ben-Shahar and Carl Schneider conclude in a comprehensive survey of the subject, "mandated disclosure repeatedly fails to accomplish its ends."

If compulsory disclosure is fraught with risks in the context of scientifically verifiable information, it's even more problematic in the political realm, where it is liable to political manipulation. Missouri, for example, adopted a law in 1996 that forced candidates for federal office to state on the ballot—in all caps—if they "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS." The Supreme Court later struck down the law on the grounds that by "directing the citizen's attention to [that] single consideration," it "impl[ied] that the issue is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the [voter]." Mandatory disclosure ended up being politically biased.

That case is only an unusually extreme example of what Cass Sunstein calls "availability entrepreneurship," meaning efforts by those engaged in a political debate to influence the public by "fixing people's attention on specific problems, interpreting phenomena in particular ways, promoting group polarization,

attempting to raise the salience of certain information," and so forth. Although clothed in the language of the "information interest," disclosure mandates are often adopted in service of a particular narrative about politics, which holds that one's own side of the debate speaks for the true public interest, while the opposing side represents nefarious "big money" interests seeking to manipulate democracy for their own private gain. "Transparency" is often more about persuading voters about the "right" outcome than about ensuring an unbiased democratic process.

That appears to be the motivation behind H.R. 1, the so-called "For the People Act," currently under consideration in Congress. One provision of this bill would repeal the Internal Revenue Service's Revenue Procedure 2018-38, the regulation that allows groups like the Thomas More Law Center to file their annual reports with redactions to protect donor information. Another section of the bill would force nonprofits to disclose their donors' private information if they make "campaign-related disbursements" totaling more than $10,000. Although the bill contains an exception for situations in which disclosure "would subject [a] person to serious threats, harassment, or reprisals," it doesn't explain what counts as "serious" or how this risk is supposed to be determined before the fact. As lawyers at Wagenmaker & Oberley—a national leader in representing nonprofits—have noted, this exception is so badly written that it "may be defined based on experience of actual threats and reprisals. In other words … too late."

WHO FUNDS YOU?

It's not necessarily wrong to try to persuade voters that one's opponents are bought and paid for, of course. Whether it be a candidate, a ballot initiative, or a high-stakes lawsuit in the Supreme Court, people have every right to argue that the other side is a stalking horse for self-seeking manipulators. Given that the First Amendment already ensures that each side of a debate is free to make that argument, there appears to be little need to add laws *forcing* people to reveal their identities. If one's opponents try to conceal their funding sources, one can always point out that fact to voters. And research shows that voters already tend to favor candidates who disclose their financial information over those who don't, without need for government intervention.

The downside to that intervention is obvious. Not only can it lead to actual violence—perhaps years after the fact—but anti-privacy mandates encourage the insidious "chilling effect" whereby people refrain from donating to groups or causes they believe in for fear of retaliation. Measuring a chilling effect can be hard because it is impossible to determine how many people are frightened into silence. When people choose not to speak out, there are fewer instances of overt retaliation against speakers—just because there are fewer speakers. Or, as the D.C. Circuit Court of Appeals put it, the fact that one cannot point to specific examples of people being harmed for expressing themselves "can be viewed as much as proof of the success of the chill as of evidence of the absence of any need for concern." When told that they must risk exposure and retribution for donating to causes they believe in, many people simply prefer to keep their heads down.

And they're right to be intimidated. Not only are violent incidents such as those that followed California's same-sex marriage campaign proof of the risk in today's increasingly intolerant political climate, but once information is published on the internet, it can't be erased. The risk of retaliation, therefore, never completely disappears. In 2014, the CEO of the software company Mozilla was forced to resign after it was revealed that he had donated to that campaign six years earlier. In 2019, the city of San Antonio banished the fast-food chain Chick-fil-A from its airport in retaliation for the company's contributing to some Christian groups that, among other activities, oppose same-sex marriage. And a person who contributes to a nonprofit today may face retaliation over an entirely unrelated matter that the organization becomes involved in later.

Little wonder that a 2020 Cato Institute study found that 62% of Americans are afraid to express their political views publicly. A third of those surveyed believed that revealing their opinions would harm their employment prospects. In fact, that chilling effect is precisely what motivates some of those demanding "transparency." When challenged in 2012 about the fact that some people would hesitate to express their opinions if forced to reveal personal information, Sen. Chuck Schumer (D–NY) replied that he was not bothered by this. It was "good," he said, "to have a deterrent effect."

That is obviously the opposite of what the First Amendment contemplates. It exists to protect free speech—including the right to contribute money to groups that advocate for positions one believes in, free from government interference or reprisals. In 1995, the Supreme Court recognized that speaking out while retaining one's privacy "is not a pernicious, fraudulent practice" but an "honorable tradition" that protects the free exchange of ideas and respects the importance of dissent. "Anonymity," said the Court, "is a shield from the tyranny of the majority."

Today, that right appears to be under threat more than ever before. R

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