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Why We Filed an Amicus Brief in the U.S. Supreme Court to Protect Charitable Nonprofits

By: Tim Delaney

Every year, the U.S. Supreme Court selects only about 80 cases from among the 7,000-8,000 petitions seeking review. This year, the Court agreed to consider two cases originally filed in California that – depending how the Court rules – could impact the operations of charitable nonprofits. We filed an *amicus curiae* (friend of the court) brief to alert the Court to potential significant harm to the work of charitable nonprofits and thereby injury to the public. We warned, “There is much more at stake here than meets the eye.” Here is the background, what is happening at the Court, and why we filed our brief.

Background

Federal law requires every charitable nonprofit to file with the IRS a Form 990 Informational Return, including a Schedule B, which reports on a *confidential, non-public* basis the names and amounts given by the nonprofit’s “substantial contributors” – those donating the greater of either \$5,000 or more than two percent of the group’s revenue. Several states, including California, also require charitable

organizations to file a copy of the Form 990 and Schedule B (or its equivalent) on a *confidential, non-public* basis when filing their charitable solicitation registration forms.

Two organizations – Americans for Prosperity Foundation (AFPF) and Thomas More Law Center (Law Center) – refused to file their Schedule B with the California Attorney General (CA AG), which is charged with oversight of charitable organizations to protect the public from fraud and misuse of charitable resources. Instead, they filed separate lawsuits to stop any enforcement against them. Both claimed that the First Amendment’s freedom of association allowed them to shield the identity of their major donors from state law enforcement officials – even on a *confidential, non-public* basis.

The district court initially barred the CA AG from enforcing the law. The Ninth Circuit Court of Appeals vacated those injunctions and sent the cases back for trial. The lower court conducted trials in the two cases and ruled for AFPF and the Law Center that the filing requirement was unconstitutional as applied to them. On appeal, the Ninth Circuit noted the judge made “several questionable evidentiary rulings” and reversed his decisions for several reasons, including that he applied the wrong legal standard.[\[i\]](#)

In the Supreme Court

The Supreme Court consolidated the two cases to be considered together. Although [AFPF's Brief](#) and the [Law Center's Brief](#) raise arguments with some nuanced differences, both contend that the Ninth Circuit applied a more relaxed legal standard than it should have. Moreover, both entities speculate that the CA AG may leak information about donors and might harass their donors if he knew who they were. They also express concern that if their major donors knew their identities were being disclosed, even confidentially just to law enforcement, they would stop donating.

The [California Attorney General's Brief](#) urges the Court to affirm the decision of the Ninth Circuit in its favor. The CA AG explains how the Ninth Circuit – not the trial court – applied the proper legal standard of “exacting scrutiny” to the state’s *confidential, non-public* reporting requirements. The AG also shows how the law and the facts supported the Ninth Circuit’s rejection of the facial challenges by AFPF and Law Center to the Schedule B requirement. Finally, the AG demonstrates how the

evidence at trial failed to support either group's demand that they be exempted from the Schedule B requirement.

On the surface, this looks like a dry legal issue about what standard of legal scrutiny a court should apply. But it has attracted extraordinary attention, with more than 80 *amicus curiae* briefs filed. A large percentage of them were filed by entities that in the past have been active in the long-running battle in election/campaign finance law regarding whether the identity of donors to partisan political campaigns may be withheld (to protect their "anonymity") or should be disclosed (to protect voters from "dark money").[\[iii\]](#)

Many other *amicus* briefs were filed. Briefs supporting AFPF and the Law Center included several filed by think tanks that routinely file *amicus* briefs for conservative and libertarian interpretations of the law (e.g., American Center for Law and Justice, Cato Institute), pro-donor and commercial and professional fundraising groups (e.g., Philanthropy Roundtable, The Nonprofit Alliance Foundation, joined by Association of Fundraising Professionals *et al*), and the [Arizona Attorney General](#), joined by 21 other state Attorneys General. Arguments of facts and law supporting the CA AG were included in briefs filed by 12 Scholars of the Law of Non-Profit Organizations; 14 Legal Historians (independent professors of law and history); the [New York Attorney General](#), joined by 16 more state Attorneys General; the [California Association of Nonprofits](#); and the National Council of Nonprofits.

The Court has scheduled oral argument for Monday, April 26 at 10 am. It has granted the motion by the [U.S. Solicitor General, who had filed a brief](#), to participate in oral argument.

Why we filed the [National Council of Nonprofits *amicus curiae* brief](#)

A traditional role of an *amicus* brief is to draw a court's attention to something it should or should not do when writing its opinion. For instance, in a case about radio broadcasting, the television industry might urge a court to make sure its ruling includes television broadcasters because the same principles should apply – or warn the court to avoid writing so broadly that it sweeps in television because the two industries are different. Our *amicus* brief plays this traditional role: alerting the Court to the danger of "inadvertently weakening the ability of charitable nonprofits to

provide services to the millions of people who depend on them daily” and urging the Justices to be “sensitive to the greater risks and the ever-present law of unintended consequences” such as dragging charitable nonprofits into polarizing partisan politics.

[Our brief](#) makes these points:

- ***The litigants are very atypical.*** The parties that filed the lawsuits are not representative of typical charitable nonprofits. Ninety-seven percent of charitable nonprofits spend \$5 million or less annually; 92 percent spend less than \$1 million. Also, charitable nonprofits may not engage in partisan political activities for or against any candidate for public office. By contrast, Americans for Prosperity Foundation, which spent \$18 million in 2018, is related to and has many of the same officers and board members as Americans for Prosperity (AFP), a very politically active 501(c)(4) that spent \$89.6 million and “whose political spending is so massive and widespread, some have suggested it ‘may be America’s third-biggest political party’” (see citations in the brief). AFP, in turn, has its own SuperPAC, Americans for Prosperity Action, which reported spending more than \$47.6 million in independent expenditures to influence elections during the 2019-2020 election cycle. Using their 2018 revenues, when reporting their “substantial contributors” on Schedule B, the two percent disclosure threshold for AFPF was about \$340,000 (meaning anyone giving less than that would not be listed); for Law Center it was approximately \$31,700. See *amicus* brief by [Scholars of the Law of Non-Profit Organizations](#) at page 16.
- ***Our Point to the Court:*** Do not make changes to the law affecting about 1.3 million charitable nonprofits based on the actions and wants of large outliers.
- ***“Context matters.”*** We warn, “This is a campaign finance case that is cloaked in charity law clothing,” and any mixing of the two can create significant problems. To illustrate the risk, when the Court decided the election law case of *Citizens United v. Federal Election Commission* in 2010, the opinion used the generic term “nonprofits” throughout. But on each occasion, it was referring to non-charitable nonprofits – organizations tax exempt under tax code sections 501(c)(4) and 501(c)(6), which legally may engage in partisan electioneering work. Section 501(c)(3), however, expressly prohibits charitable nonprofits from engaging in any partisan activities, so the Court’s loose use of the term “nonprofit” caused considerable confusion. Moreover, disclosure of donor information in election law matters occurs in ways and for purposes (public

disclosure to inform the public) distinctly different from those in charity law (*confidential, non-public* disclosure just to law enforcement to keep bad actors from damaging public trust by masquerading as charitable nonprofits). Our concern is heightened because many of the groups participating in the matter now before the Court are the same election-law warriors that have been part of the long-running war between political campaign donors who want to remain anonymous versus people who oppose “dark money” and want all dollars spent to influence elections to be disclosed for the voting public to see. A victory by those wanting secrecy from law enforcement in the charity law context risks politicizing charitable nonprofits, organizations that should remain fully protected from caustic, partisan politics. **Our Point to the Court:** The Court should recognize that the case before it is a thinly veiled election law case being waged in the charity law context and that the outcome of the case could put the work of charitable nonprofits at risk.

- **“Keep polarizing partisanship away from charitable nonprofits.”** Our brief underscores that we oppose all efforts – from friend and foe alike – to politicize the charitable nonprofit community for partisan gains. We provided leadership for the nonprofit community in 2017-2018 that defeated multiple attempts to “destroy” the Johnson Amendment by eliminating [nonprofit nonpartisanship](#). The reason is simple; virtually everything in the campaign finance and election law context is fraught with partisan outrage, division, and polarization. **Our Point to the Court:** Don’t use this case to chip away at the broad support for the longstanding protections of charitable nonprofits from partisan demands from candidates, their operatives, and donors.
- **“Protect the public trust.”** Charitable nonprofits know they depend on earning and maintaining the public’s trust; otherwise, people will stop donating their time and money to charitable missions. That’s why charitable nonprofits want state and federal law enforcement to have information for oversight that keeps bad actors from masquerading as nonprofits and stops misuse of charitable assets. **Our Point to the Court:** Public trust and the wellbeing of the charitable sector rely on effective law enforcement performed in cooperation and partnership with nonprofits, and Schedule B is neither burdensome nor intrusive.
- **“Deterrence merits heavy weight.”** Our brief highlights the value of Schedule B as a deterrent. AFPP and Law Center argue that California doesn’t use Schedule B enough in litigation to justify using it at all. The CA AG countered by focusing on Schedule B’s value in detecting and prosecuting fraud

once committed. We emphasize the important value of Schedule B as front-end enforcement that discourages bad acts from occurring at all. **Our Point to the Court:** Bad actors need to know they will be caught if they seek to unduly profit from charitable organizations, engage in unlawful tax-avoidance schemes, or disguise partisan, election-related contributions as charitable donations.

- **“This case is not about public disclosure of all donors.”** We declare unequivocally that we would oppose any attempts by governments to force charitable nonprofits to *publicly* identify all their donors’ names and amounts given– but that is not the issue here. Rather, the issue is whether a state can require charitable nonprofits to simply file – in a *confidential, non-public* way with state law enforcement – a copy of the exact same Schedule B identifying only “substantial contributors” that they already provided to the IRS to help deter and detect fraud. **Our Point to the Court:** All charitable nonprofits agree that public disclosure of donor names is inappropriate, but that is not the issue before the Court, despite the slippery and misleading rhetoric by many filing briefs that the case is about “public” disclosures.
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[\[i\]](#) In addition to AFPP and the Law Center challenging the CA AG over using Schedule B in California, Citizens United, a politically active 501(c)(4) noncharitable nonprofit, and its related 501(c)(3) charitable nonprofit, Citizens United Foundation, filed a similar lawsuit against the New York Attorney General (NY AG) for requiring Schedule B, claiming as well that the state’s requirement for Schedule B violated the Constitution. The district court dismissed all claims. On appeal, the Second Circuit Court of Appeals, like the Ninth Circuit, upheld the NY AG’s requirement to file Schedule B. *See Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018).

[\[ii\]](#) Forces that have favored anonymity filing briefs here include Senator Mitch McConnell; Citizens United; American Legislative Exchange Council; National Association of Manufacturers; and US Chamber of Commerce. Forces that have fought against dark money filing briefs here include 15 U.S. Senators; Campaign Legal Center, Common Cause, Citizens for Responsibility and Ethics in Washington, and League of Women Voters of California.