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Backgrounder on Center for Competitive Politics v. Harris:

Ninth Circuit Decision on Donor Privacy Threatens Non-Profits' 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.

A) How did this case arise?

As in most other states, charities soliciting contributions in California are required to register with the state. 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 either 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 do not exist under California's and many other state's laws.

Historically, the California Attorney General has not required registered charities to file a copy of their confidential, unredacted Form 990 Schedule B donor lists with the state. The Attorney General 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 Attorney General also has not cited any recent change in circumstances warranting these demands. Because the Attorney General is not legally entitled to this information and has no good reason for having it, the Center for Competitive Politics (CCP) filed suit to stop this practice.

B) What are the parties' legal arguments?

CCP argues that the California Attorney General'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 that the First

Amendment's protections are most important to. 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 donors' shoulders and reviewing which groups they give to, that will create a chilling effect and reduce donors' willingness to give to certain groups, thereby reducing their ability to speak and to associate freely.

The California Attorney General's office claims it has a substantial interest in obtaining the names of non-profits' donors to catch non-profits engaged in self-dealing, improper loans, and other unfair practices. But the only example it has cited of the usefulness of donor information is in its review of in-kind donations to determine whether non-profits are improperly reporting the value of such donations. (The Attorney General has not explained why this matters. Presumably, the concern is that non-profits 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 actually are.) This infinitesimally narrow concern does not justify the Attorney General's broad demand for all donor information whatsoever, 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 Attorney General 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.

C) Could charitable organization donor lists become public?

The short answer is, yes, this is possible.

- There is no clear legal authority prohibiting the California Attorney General's Office from making the donor lists it receives public.

- The Attorney General's Office has merely cited its current internal, informal practice of not publicly releasing donor lists.

- The Attorney General's Office represents that it would oppose public disclosure of donor lists if a freedom of information request was filed, but the California Public Records Act information 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."

- The Ninth Circuit decision erroneously concludes that disclosure of donor lists is prohibited under California law because the state law prohibits disclosure of what is

prohibited under federal law. But the federal tax code does not specifically prohibit state officials from disclosing tax information that they have obtained directly from charities.

D) What are the implications of this decision?

Perhaps the most disturbing aspect of this decision is that it inverts the "exacting scrutiny" standard for judicial review of government-compelled disclosure of private information. Under this standard, the government must have a "sufficiently important" interest and the compelled disclosure must bear a "substantial relationship" with 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 actually erodes this standard of review in two ways: (1) it lowers the bar by accepting that the California Attorney General's demand is "not wholly without rationality" – a burden that is much lower than the "sufficiently important" interest standard; and (2) the court required CCP to prove that it would suffer an "actual burden" from the compelled disclosure, instead of placing the burden of persuasion 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 left to stand, 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.

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

- Pave the way for government officials to summarily ask newspapers for their subscriber lists, Netflix for what its viewers are watching, and credit card companies for what their card holders are buying, all for no particularly compelling reason.

- Allow other state licensing agencies to demand customer lists as a condition for renewing a professional's license to practice.