

Courts Reject Overbroad Compulsory NJ/NY Disclosure Laws

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Two federal courts recently have restrained overbroad compulsory donor disclosure and related disclosure laws on the basis of First Amendment privacy concerns. Considered together, the court rulings re-affirm First Amendment protection for political privacy and anonymity in political speech and association. They also signal caution to legislators and regulators that the courts will impose meaningful constitutional boundaries around government efforts to compel public registration and disclosure of political activities.

Citizens Union v. New York

In 2016, the New York legislature passed, and Governor Cuomo signed, a new ethics law that required each non-profit 501(c)(3) organization to disclose its contributors (\$2,500 and more) whenever the organization contributed \$2,500 in a six-month period to a social welfare 501(c)(4) organization. It also required 501(c)(4) groups that spend over \$10,000 a year on issue advocacy to disclose their contributors (\$1,000 or more). The law was challenged in the U.S. District Court for the Southern District of New York as a violation of the First Amendment by non-profit organization Citizens Union of the City of New York and other non-profit groups.

"There is no question," the court started its analysis, "that public disclosure of donor identities burdens the First Amendment rights to free speech and free association." The court surveyed historical precedents, including the often discounted opinions in *McIntyre v. Ohio* (1995), *Talley v. California* (1960), and *NAACP v. Alabama* (1958), as well as the Supreme Court's seminal decision in *Buckley v. Valeo* (1976), and divined a clear line between election advocacy, which can be regulated through compelled donor disclosure, and

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issue advocacy, which generally cannot be so regulated.

The court, applying a muscular version of “exacting scrutiny,” then assessed whether there was any “substantial relation” between public identification of donors and New York’s asserted interests in providing citizens information, deterring corruption, and detecting violations of the law. The court found that the compelled disclosure of 501(c)(3) donors was not justified in light of the “tangential and indirect support of political advocacy” covered by the law. Among other weaknesses, the court found the relationship between a 501(c)(3)’s donors and electioneering or direct lobbying “too attenuated to effectively advance any informational interest.” Many donors contribute to a non-profit’s general treasury without earmarking their contributions for the eventual use by a 501(c)(4) organization.

The court also struck the law’s requirement for 501(c)(4) groups to disclose their donors if they engage in issue advocacy. The court first considered the breadth of the topics covered by disclosure, which included any elected official’s “position” on legislation or potential legislation. The court observed that “any matter of public importance could become the subject of legislation and given the range of positions taken by all elected officials,” which the court termed “pure issue advocacy.” Indeed, the “government acknowledges that the government interest at stake is the interest in revealing ‘the funders of issue advocacy,’” the court recorded. “The cases upholding donor disclosure requirements have never recognized an informational interest of such breadth.” The court also distinguished the breadth of the issue advocacy covered by the New York law and the narrow “electioneering communication” definition at issue in *McConnell v. FEC* (2003).

Accordingly, the court struck the compulsory disclosure laws for both 501(c)(3) and 501(c)(4) organizations as violative of the First Amendment.

Americans for Prosperity v. New Jersey

In 2019, the New Jersey legislature passed, and Governor Murphy signed (subject to expressed constitutional reservations), S1500 which required 501(c)(4) and 527 organizations that spend as little as \$3,000 in a calendar year on “influencing or attempting to influence the outcome” of any election, public question, legislation or regulation, or that merely “provide any political information” about any candidate, public question, legislation or regulation, to file quarterly reports publicly disclosing the names of all contributors who donated \$10,000 (or more). The law included activities to influence elections such as voter registration, polling, research and get-out-the-vote drives, even if they were non-partisan. The law was challenged facially and as-applied under the First Amendment by non-profit 501(c)(4) organization Americans for Prosperity, which moved first for a preliminary injunction.

Like its sister court in New York, the federal court in New Jersey started by acknowledging that “compelled identification of contributors to independent groups that expend money on political causes ‘can seriously infringe’ the rights to privacy of association and to belief guaranteed by the First Amendment.” The court cited *Buckley v. Valeo* and *NAACP v. Alabama*. The court also relied upon the critical distinction *Buckley* drew between issue advocacy and election advocacy. The New Jersey court quoted the *Buckley* formulation for exacting scrutiny to require that a law “furthers a vital governmental interest ... that is achieved by a means

which does not unfairly or unnecessarily burden either a minority party's or individual candidate's equally important interest in the continued availability of political opportunity." Finally, the court held the government responsible for undesirable public attention visited by compelled disclosure.

The court concluded there was no "substantial relation between the disclosure requirement and a sufficiently important governmental interest" because it was patently overbroad. The court cited three main reasons. First, the law required disclosure of donors for merely "political information," even "purely factual information" about public officials and their votes in office, such as a "scorecard" informing citizens how a public official voted. Second, it applied to communications over virtually all possible media. Third, it applied to activities from January 1 through election day in November.

Accordingly, the court issued a preliminary injunction prohibiting the state from enforcing the compulsory disclosure law based on the likelihood that it facially violated the First Amendment. The court reserved judgment on the plaintiff's as-applied challenge, although it expressed sympathy for the claim noting what it called the current "climate marked by the so-called cancel or call-out culture that has resulted in people losing employment, being ejected or driven out of restaurants while eating their meals; and where the Internet removes any geographic barriers to cyber harassment of others."

Conclusion

The Supreme Court's seminal decision in *Buckley v. Valeo* (1976) figured centrally in each decision. Specifically, the courts observed the critical line *Buckley* drew between *election* advocacy versus *issue* advocacy. Another common thread was application of a muscular "exacting scrutiny" standard of review that came closer to strict scrutiny than the rational basis review that other courts recently have applied. Applying these principles, the federal courts in New York and New Jersey found facial infirmities with the state laws. The New York and New Jersey rulings are likely to be appealed to the Second and Third Circuits, respectively, which have tended to be more deferential to government compelled disclosure.