

Political Privacy Update: Supreme Court to Hear Two Donor Privacy Cases from California

January 2021

On January 8, the U.S. Supreme Court granted certiorari in two donor privacy challenges to California's compulsory donor disclosure for nonprofit organizations. The first is *Americans for Prosperity Foundation v. Xavier Becerra* (Case No. 19-251). The second is *Thomas More Society v. Xavier Becerra* (Case No. 19-255). The Court deferred action in a third case, *Institute for Free Speech v. Xavier Becerra* (Case No. 19-793). *Election Law News* has been tracking these cases because of their significance to the nonprofit sector.

Background

California's Attorney General requires all nonprofit organizations to disclose their donor lists as a condition of registering to solicit donations from California citizens. Three nonprofit organizations challenged the compulsory donor disclosure rule as a violation of the First Amendment right of associational privacy. The results were mixed in the federal district courts, but the U.S. Court of Appeals for the Ninth Circuit upheld the rule in all three cases. Each plaintiff nonprofit petitioned the Supreme Court for certiorari.

The Court took over a year to review the petitions. In February 2020, the Court invited the U.S. Solicitor General to express the view of the United States. The Solicitor submitted a brief urging the Court to grant certiorari and clarify the law in November.

Importance of Judicial Clarification

Election Law News has analyzed the Ninth Circuit's rulings and the jurisprudential issues in need of clarification by the Supreme Court. Lower courts have been struggling to find consistency and uniformity

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in the jurisprudence of First Amendment privacy and in judicial outcomes. As a result, the line between political privacy and its exceptions has become blurred. Therefore, the Supreme Court's opinion in the California cases will be critically important to all nonprofit organizations that engage in a wide range of political speech and associational activities.

Predicting how the current Supreme Court would clarify the First Amendment right of political privacy is difficult. The pendulum has swung back and forth on the Court since the 1940s. *Election Law News* has traced the history of the doctrine in an eight-part series:

- Chapter 1: The Edgerton Dissent
- Chapter 2: The New Deal Witch Hunt
- Chapter 3: Red Monday, Paul Sweezy, and the Frankfurter Concurrence
- Chapter 4: *NAACP v. Alabama*
- Chapter 5: Talley, McIntyre, Jehovah's Witnesses and the Right to Speak Anonymously
- Chapter 6: Campaign Finance and Other Very Public Exceptions to Privacy
- Chapter 7: In Need of Judicial Clarity
- Chapter 8: A Postscript on the Individual and Social Costs of Compelled Disclosure

This series documents the First Amendment right to associational privacy that emerged through fits and starts, culminating in a unanimous decision in *NAACP v. Alabama* in 1958, and how the right has given way to exceptions and a variety of governmental interests – to the point that government power to compel exposure of citizens who associate around causes has often eclipsed the right. Further, there is a national movement seeking to expose more speakers and funders of expanding categories of speech – not just electoral speech but policy advocacy too. The movement for ever-greater compulsory exposure is gaining in Congress and state legislatures in the name of good government and other asserted values. Meanwhile, political polarization and intolerance for competing ideas is acute, accentuating the chilling effects of exposure.

As *Election Law News* previously suggested, the Supreme Court needs to reset the proper judicial scrutiny and analysis for the important First Amendment right of privacy in political speech, association, and conscience. The California cases are an excellent fulcrum for clarification.

Amici Participation

The case is important for the nonprofit sector. Not since 1958 has the Court squarely addressed the right to associational privacy. Therefore, the cases are likely to attract a number of friend of the court briefs. *Amicus* briefs in support of the nonprofit appellants may be due as soon as March 1, 2021 (unless the briefing schedule is altered by the Court). *Amicus* briefs in support of California will be due sometime in early April.