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NEWSLETTER

Political Privacy Law Update

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Election Law News has been tracking developments in the U.S. Supreme Court's consideration of three petitions for certiorari seeking Court review of the California Attorney General's (AG) mandatory donor-disclosure rule for nonprofit organizations. The Court requested a response from the California AG in *Institute for Free Speech v. Becerra* (No. 19-793). The AG filed his opposition brief on May 1. The Institute for Free Speech replied on May 15. All three cases now are fully briefed and awaiting a Court decision on the grant of certiorari. However, they do not appear on the upcoming cert conference.

In his opposition, the state AG argues that the Internal Revenue Service (IRS) already requires nonprofit organizations to disclose their donors to the IRS on forms known as "Schedule B," and all California does is require the nonprofits to send a copy of that document to California as a condition of soliciting donations from California citizens. The AG argues that this disclosure of donors advances the AG's consumer protection functions and is not a significant burden on the free-association rights of nonprofits.

The Institute for Free Speech's reply emphasizes that all donor-disclosure mandates necessarily burden free-association rights by chilling donors from associating. Moreover, the Institute argues the state must demonstrate a greater, more specific need for the information than California can show.

New York Tries to Compel Nonprofit Donor Disclosure, Again

After a federal court struck a New York State mandatory donor-exposure law as unconstitutional, the New York legislature is trying to revive a modified reporting and donor-exposure law through language in a budget bill. The modified rule would require nonprofit organizations to disclose publicly the names of their donors when

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they "advocate[] for or against" any "elected official, executive or administrative or legislative body relating to ... any proposed legislation, pending legislation, rule, regulation, hearing or decision" and the donor contributed funds to the nonprofit "in whole or in part for the support of the covered communication." The legislature apparently believes these limitations will save the law from the federal court's previous First Amendment ruling. The modified rule also would require nonprofit organizations to file their IRS Schedule Bs (identifying donors) with the New York Secretary of State as well as the New York Attorney General. New York's latest legislation is explained by Wiley's Carol Laham and Eric Wang here.

IRS Protects Donor Privacy for Certain Nonprofit Organizations

Meanwhile, in May 2020 the IRS adopted a new rule relieving nonprofit organizations other than 501(c)(3)s, such as 501(c)(4) advocacy organizations, from listing the names of their donors on Schedule Bs submitted with their annual tax information returns (Form 990s). Wiley's Tom Antonucci has explained the recent rulemaking.

The absence of donor names on Schedule Bs will frustrate the efforts of states such as California and New York that force donor disclosure by requiring nonprofits to file their Schedule Bs with the states. Because the IRS no longer requires 501(c)(4) organizations to list donor names on their Schedule Bs, the states that piggyback on the IRS reports will have to find another mechanism for obtaining the names of donors.

Under the IRS rule, charitable, religious, and educational 501(c)(3) organizations will be required to continue listing the names of donors on their Schedule Bs, so the states likely will continue to seek copies of their Schedule Bs. The IRS deemed donor disclosure by 501(c)(3) organizations necessary because the donors are entitled to income tax deductions for their donations, so disclosure of their names facilitates the IRS's cross-checks of allowable deductions.