Litigation Backgrounder
Center for Competitive Politics v. Harris

The Issue in Brief

Does California's attorney general have the power to ban a nonprofit organization from asking for donations unless it hands over a list of its past supporters for inspection, even if the group has no involvement in elections? That simple question is at the heart of *Center for Competitive Politics v. Harris*.

Federal tax law and Supreme Court precedent concerning First Amendment protections say no, but this has not stopped California Attorney General Kamala Harris from making such requests.

The Attorney General is demanding that nonprofit groups, including the Center for Competitive Politics (CCP), an educational nonprofit corporation organized under §501(c)(3), provide unredacted copies of their Schedule B, an addendum to the tax Form 990 filed with the Internal Revenue Service that lists contributors' names and addresses. If CCP fails to comply, the organization will be banned from asking Californians for any financial support.

The Attorney General's requirement creates a stark choice for CCP and many other nonprofit groups in the same situation. If CCP opts to protect the privacy of its contributors and forgoes fundraising efforts in California, being unable to speak with potential donors in the state will irreparably harm the organization and its donors. Without the ability to solicit funds from the most populous state in the nation, CCP's ability to defend the First Amendment nationwide will be curtailed.

However, if CCP instead decides to comply with the Attorney General's demand to hand over its donor list, its right to freely associate with its supporters, many of whom would strongly desire to keep their privacy, and their right to freely associate with other like-minded supporters of free speech, will be chilled.

Either of course of action would infringe on CCP's First Amendment-protected rights.

This chilling effect cannot be taken lightly. Freedom of speech and association are protected by the First Amendment. If government is to restrict or burden these rights, it must have a good for doing so.

CCP filed a lawsuit in the United States District Court for the Eastern District of California to defend the rights of CCP's supporters and those of other similar nonprofit groups put in a similar predicament.

California has yet to offer any reasonable justification for its demand. Moreover, the California Attorney General's demand is preempted by federal statute. The Internal Revenue Code ("IRC") makes clear that state officials, such as the California Attorney General, cannot seek or obtain the names and addresses of contributors to §501(c)(3) organizations. The privacy of contributors to charitable organizations is a primary concern of the tax laws, and long settled Supreme Court precedent on the First Amendment dating back over 50 years strictly limits the ability of states to access non-profit organizations' member lists or contributor lists if the groups are not involved in election campaigns.

The California Attorney General's demand damages freedom of association, violates the clear terms of the federal tax law, and ignores the Supremacy Clause of the United States Constitution, which forbids state action that conflicts with federal law.

Facts in the Case

Plaintiff Center for Competitive Politics is an educational nonprofit organized under § 501(c)(3) of the Internal Revenue Code. CCP's mission is to promote and defend the First Amendment rights to free political speech, assembly and petition through strategic litigation, communication, activism, training, research and education. To support its activities, CCP solicits charitable contributions nationwide, including in California.

The defendant in the lawsuit is California Attorney General Kamala Harris, who demanded that CCP provide the state with its unredacted Schedule B listing the names and addresses of CCP's major financial contributors. The California Attorney General is vested with the power to supervise compliance with the state's regulation of charitable corporations and solicitations. Charities are required to register with the state if they wish to solicit contributions from California citizens. Generally, the filings are available for public inspection. The Attorney General has the power to block such registry if she "finds that any entity…has committed an act that would constitute violation of…an order issued by the Attorney General, including, but not limited to… fail[ure] to file a financial report, or [filing] an incomplete financial report." (CAL GOV. CODE § 12591.1(b)(3).)

CCP registers with the State and submits its publicly available IRS Form 990 to the Attorney General. CCP has been a member of the Registry since 2008 and does not object to continuing to file the public version of Schedule B.

This year, for the first time since CCP registered in 2008, the California Attorney General demanded that CCP produce a copy of its confidential Schedule B – listing the names and addresses of contributors – as filed with the Internal Revenue Service. A letter dated February 6, 2014, acknowledges the receipt of CCP's periodic filing for its charitable registration, but states that "[t]he filing is incomplete because the copy of Schedule B,

Schedule of Contributors, does not include the names and addresses of contributors." It goes on to say that CCP must "[w]ithin 30 days of the date of this letter… submit a **complete** copy of Schedule B, Schedule of Contributors, for the fiscal year noted above, as filed with the Internal Revenue Service." (bold, underline in original.) The letter claims that failure to provide this information will make CCP's financial report incomplete, potentially rendering the organization ineligible to solicit charitable contributions.

By compelling the disclosure of the names and addresses of CCP's contributors, California will unlawfully and substantially deprive CCP and its supporters of the free association rights secured by the First Amendment. If, however, CCP refuses to comply in order to protect its privacy and the privacy of its donors, it will risk losing its ability to solicit charitable contributions in California. The result would be a serious First Amendment injury through lost contributions and the silencing of CCP's speech aimed at California donors.

The Attorney General's Demand is not Justified

Inspecting donors to non-profits contradicts the principle that civic engagement is a good thing that ought to be encouraged. Contributions to charitable educational organizations are tax deductible precisely because these activities promote the public good. Consequently, government must avoid burdening the associational rights of §501(c)(3) organizations as much as possible and justify any such burdens with a legitimate government interest. In this case, California has failed to do either.

The state's brief claims that it needs non-profits' donor information to evaluate whether tax-exempt groups are violating laws against self-dealing, but is contradicted by the fact that non-profits already report such transactions that might raise such concerns on their publicly available tax returns filed with the IRS. Additionally, California has not requested this information in previous years, suggesting it is not truly necessary in order for the state to regulate §501(c)(3) organizations active in the state.

This reasoning is much too vague and not nearly strong enough to justify imposing significant burdens on CCP's associational rights, and the rights of its contributors. To date, the Attorney General has yet to explain, in detail, the mechanism by which this confidential and protected information is relevant to California's interests or that alternatives that are less harmful to First Amendment Rights are insufficient.

The Attorney General's Demand is Preempted by Federal Tax Law

The First Amendment and the Internal Revenue Code protect the privacy of individuals who wish to support charitable educational organizations that seek to advance the public good. The Internal Revenue Code regulates the disclosure of confidential federal tax information, and is the sole authority governing such information.

One focus of the tax law is on privacy of tax return information, including the contributors to § 501(c)(3) organizations. Federal law prohibits public dissemination by governments of complete Schedule B information for organizations registered under § 501(c), and explicitly prohibits state officials from obtaining the Schedule B of § 501(c)(3) organizations unless done for tax law enforcement reasons, and then only if a request is made to the US Treasury Department. (26 U.S.C. § 6104(c)(3).) This case presents exactly such a scenario: a state official, here the California Attorney General, attempting to obtain the Schedule B of a § 501(c)(3) organization, CCP, for a reason not permitted by the law.

States may not act contrary to federal law, particularly when the intent of Congress is clear. In this case, Congress set very clear rules for disclosure of tax returns of § 501(c) organizations. It provided that the tax returns of certain tax-exempt organizations would be publicly available except for confidential donor information. It expressly protected § 501(c)(3) and § 501(c)(4) organizations from mandatory public disclosure of donor information contained on Schedule B forms. (§ 6104(d)(3)(A)). It limited the ability of state officers, such as the California Attorney General, to obtain the unredacted Schedule B from those entities. Further, Congress explicitly prohibited state officials from requesting the Schedule B forms of § 501(c)(3) organizations for charitable solicitation registrations.

Through these provisions, the IRC expressly preempts a state official from compelling § 501(c)(3) organizations to hand over their Schedule B as filed. This is exactly the case at hand. Thus, California Attorney General Harris cannot compel CCP to comply with her demand as a condition for soliciting contributions in the state.

Supreme Court Precedent Dating Back Over 50 Years Strongly Protects Privacy

In addition to statutory protection of donor privacy in the federal tax law, the United States Supreme Court has recognized that the anonymity of contributors to nonprofit educational organizations is generally protected, lest an individual be subject to retaliation for supporting an organization that works on an unpopular topic. The State may only demand disclosure of an organization's funders if necessary to advance a sufficiently important governmental interest. A state official's curiosity about an organization and its contributors are not a sufficient reason to compel disclosure.

An undisturbed line of U.S. Supreme Court precedent dating to the Civil Rights cases of the 1950s supports this by expressly prohibiting state governments from obtaining contributor lists of non-partisan nonprofit corporations absent a sufficient showing of need. In perhaps the most important and famous case, *NAACP v. Alabama*, the state sought the names and addresses of registered supporters of the National Association for the Advancement of Colored People "to determine whether petitioner was conducting intrastate business in violation of the Alabama foreign corporation registration statute."[1] The Supreme Court ruled that Alabama could not force disclosure of NAACP members, stating "the effect of compelled disclosure of the membership lists… [would]

abridge the rights of" NAACP members to "to engage in lawful association in support of their common beliefs."

The Court has been clear that chilling effects from disclosure merit deep consideration, observing that "[i][t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective… restraint on freedom of association."[2] Further, it has stated that "regulatory measures [], no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights."[3]

CCP will suffer just such an injury if the California Attorney General's demand is carried out.

Legal Team

CCP's legal team is led by Legal Director Allen Dickerson.

About CCP

The Center for Competitive Politics is one of the nation's premier centers of public interest litigation. It is the only public interest organization with in-house litigation staff solely focused on the defense of First Amendment rights to free political speech, assembly and petition. CCP was co-counsel in SpeechNow.org v. Federal Election Commission, which held that there can be no limits on contributions to independent expenditure committees. This case created what is now known as Super PACs. In addition to its strategic litigation, CCP works to promote and defend First Amendment rights to free political speech, assembly, and petition through communication, activism, training, research, and education.

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[1] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 464 (1958).

[2] *NAACP v. Alabama*, 357 U.S. at 462.

[3] *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 297 (1961).