

# Donor Privacy: Expanded Protections, Growing Threats in 2020

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STRENGTHENING OUR FREE SOCIETY

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## Executive Summary

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- ❑ Donor privacy is critical to the protection of philanthropic freedom—the right of Americans to choose how and where to spend their charitable assets in order to fulfill their diverse missions. Unwarranted state incursions into private charitable giving will chill the exercise of First Amendment freedoms, allowing donors to fund controversial philanthropic causes without fear of harassment and reprisal.
- ❑ Donor privacy also protects those who choose to give anonymously for a variety of good reasons, including deeply held moral or religious beliefs, a sense of humility, a wish to lead a more private life, and the desire to minimize solicitations from other organizations.
- ❑ States have been the most active front in the battle to protect donor anonymity. So far this year, 15 states have considered legislation that would threaten the privacy of donors to 501(c)3 organizations. On the other side, seven states advanced donor-privacy protections this year, with four of them—Louisiana, Oklahoma, Utah, and West Virginia—enacting them into law. There have been several lawsuits around the country challenging efforts to force donor disclosure. The most important of these cases is *Americans for Prosperity Foundation v. Becerra*, a case challenging the California attorney general’s demand for that group’s donor list. The U.S. Supreme Court is weighing whether to take the case in its next term.

# Introduction

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For decades, the issue of “transparency” as applied to giving for charitable, civic, and political purposes enjoyed a rough but widespread consensus. Based on reasonable concerns about corruption in federal elections that began in the early nineteenth century and increased with the growth of powerful and wealthy corporations and labor union organizations, there was a legitimate and compelling reason for the government’s interest in mandatory disclosure of contributions made to candidates for public office as well as the political committees that directly supported their campaigns. The confidentiality of donations to charitable and civic organizations remained under constitutional protection, a distinction that derived primarily from the Supreme Court’s 1958 decision in *NAACP v. Alabama*, which held that the forced disclosure of the civil rights organization’s membership list threatened the right of free association. Subsequent lawsuits and court decisions extended the same protections to organizations’ donor lists.

These lawsuits, and others like them, are critical to the protection of philanthropic freedom—the right of Americans to choose how and where to spend their charitable assets in order to fulfill their diverse missions. Donor privacy and confidentiality are essential to a vibrant civil society. Unwarranted state incursions into private charitable giving will chill the exercise of the First Amendment freedoms that ensure donors may give even to controversial philanthropic causes without fear of harassment and reprisal. Donor privacy also protects those who choose to give anonymously for a variety of good reasons, including deeply held moral or religious beliefs, a sense of humility, a wish to lead a more private life, and the desire to minimize solicitations from other organizations.

But any consensus that existed about the critical importance of donor privacy has broken down over the past decade. The 2010 U.S. Supreme Court decision in *Citizens United v. Federal Election Commission*, which allowed incorporated entities, unions, and other organizations to expressly advocate for the election or defeat of candidates for office, prompted a backlash demanding greater transparency in “political” spending—which, in many instances, came to include gifts made to nonprofits (including 501(c)3 charitable organizations) engaging in any public policy work. As anonymous giving is increasingly seen as a sinister—rather than virtuous—undertaking, proposed donor-disclosure mandates have expanded to include the non-campaign activity of advocacy organizations like Planned Parenthood Federation of America and the National Right to Life Educational Foundation. If successful, these proposals would expose philanthropists to the sort of retribution donors to political candidates face today, including job loss, death threats, and boycotts.

This report provides a brief overview of recent efforts to preserve donor privacy, which have generally been successful. Bad legislation that would infringe on donor privacy has been defeated in most instances; good legislation that proactively defends donor privacy has passed in several states and made inroads in more; and courts around the country already have struck down some threats and could deliver a major victory next year.



The state capitol in Oklahoma, where donor privacy advocates passed protective legislation in 2020.

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# State Legislation

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Legislation is now regularly introduced in states to force nonprofit organizations to disclose the names of some or even all of their donors. Most often, the intent is to expose contributors to organizations that directly advocate for or against candidates for office, but the legislation is drafted in such a way that it unintentionally sweeps in other speech unrelated to elections. There have been three noteworthy attempts to curb donor privacy over the past two years:

- In 2019, Idaho Republican legislators introduced a bill (S. 1114) that would have required a nonprofit that merely mentioned a candidate by name in one of its communications, such as a newsletter or blog, to disclose its donors—even if the mention simply noted that an incumbent had introduced legislation of interest to the group. A broad coalition of organizations testified against the bill, including pro-life and pro-Second Amendment groups, the ACLU of Idaho, the Idaho Nonprofit Center, and Planned Parenthood. As a result, the bill did not make it out of committee, and it did not return in 2020.
- Perhaps the broadest donor-disclosure bill in recent years was Maine’s LD 1423 in 2019. Acting on behalf of a constituent, a Republican legislator introduced a bill that would have required each nonprofit incorporated in the state to list every donor in its publicly available annual report. The original intent of the bill may have been to uncover improper influence by donors on nonprofits that receive government funding, but the constituent did not show up at the hearing to explain its purpose. At the start of the committee hearing, the chair remarked that it was unusual to see the state’s Chamber of Commerce, the Maine Policy Institute

(a free-market think tank), and the ACLU of Maine all on the same side; committee members’ subsequent comments made clear they had no interest in requiring charitable organizations or other nonprofits to reveal their donors. The committee voted unanimously against the bill. Like the Idaho bill, Maine’s proposed legislation was poorly crafted and unwittingly intrusive regarding charitable and civic donor privacy. Much of the legislation donor-privacy advocates faced in 2020 was no different.

- More challenging are cases like the introduction of Section UU of A. 9505 / S. 7505, in the New York Legislature in 2020. Part of a broader budget bill, Section UU would have mandated that “[a]ny registered charitable organization” with revenue greater than \$250,000 annually submit its unredacted Schedule B (part of the Form 990 tax return that nonprofits file with the IRS, which includes major donors’ names, addresses, and amounts) to the Department of Taxation and Finance, which would then publish the information on its website. This provision appears to be part of a long-running battle between Governor Andrew Cuomo and several nonprofit organizations that have opposed many of his policies. In 2019, a federal court struck down previous legislation that similarly threatened donor privacy (see below); Section UU is simply the governor’s most recent attempt to pry open the donor lists of organizations he does not like. Fortunately, the section was removed from the budget bill at the urging of a number of New York charities, including several local Habitat for Humanity and YMCA organizations, as well as groups from the state’s artistic and cultural community.

To date in 2020, 15 states have considered 29 donor-disclosure bills that would have threatened donor privacy for 501(c)3 organizations. At press time, just four of these bills remained active, with the rest failing to advance in the legislative process.

On the other side, seven states advanced donor-privacy legislation this year—six of them using the “Personal Privacy Protection Act,” which prevents state and local officials from demanding nonprofit donor information without a subpoena, or nonprofits from disclosing any information they might possess. Similar legislation originally passed the Michigan Legislature in late 2018, though it was vetoed by the outgoing governor, and Mississippi passed the Personal Privacy Protection Act in 2019. Four of the states where it was introduced in 2020 passed it: Louisiana, Oklahoma, Utah, and West Virginia. In each, it was supported by broad bipartisan majorities and coalitions of organizations spanning the ideological spectrum, including state chapters of the American Civil Liberties Union and Americans for Prosperity. Thanks to this legislation, nonprofit donors in these states are protected from intentional or inadvertent disclosure and the retribution they could face from overly zealous activists of all stripes.

## Federal Legislation

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There has generally been little interest at the federal level in requiring the disclosure of charitable contributions. One piece of legislation introduced in 2020 that might force donor disclosure in limited circumstances is the U.S. House of Representatives’ H.R. 5929. The bill would require publicly traded corporations to reveal dues and other payments made to nonprofits organized under Section 501(c) of the tax code if the recipients engage in either “independent expenditures” (expenditures “expressly advocating the election or defeat of a clearly identified candidate”) or “electioneering communications.”

While few, if any, charitable organizations are likely to be affected, the definition of “electioneering communication” could potentially include speech by charities about issues, as the Independence Institute (a Colorado-based think tank organized as a 501(c)3 charity) learned in 2017. It tried to run ads encouraging Coloradans to contact their U.S. senators and ask them to support sentencing-reform legislation—but the Federal Election Commission determined (and the U.S. Supreme Court agreed) that the ads were electioneering communications because one of Colorado’s senators was up for election at the time the ads would have run. That meant the Independence Institute would have had to disclose some of its donors.

## Litigation

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The most significant litigation to protect donor privacy comes from a string of cases challenging the California Attorney General’s office requirement that nonprofits include a full and unredacted Schedule B with their annual state registration filings. This new policy was introduced in 2010 under former Attorney General Kamala Harris, and has been continued by her successor, Xavier Becerra. Several lawsuits have been filed challenging this new policy, including those from 501(c)3 charitable organizations like the Americans for Prosperity Foundation, the Thomas More Law Center, and the Center for Competitive Politics (now the Institute for Free Speech). In all these cases, nonprofit organizations challenged the California attorney general’s authority to require donor information, citing the U.S. Supreme Court’s 1958 ruling that Alabama could not compel the NAACP to release its membership list and later decisions to include donor lists as well. If the California attorney general’s policy is allowed to stand, it will mean the government must only assert a plausible reason for obtaining donor lists—effectively eviscerating donors’ right to privacy.

The United States Supreme Court currently is considering whether to hear *Americans for Prosperity Foundation v. Becerra*, a case challenging the California attorney general's demand for that group's donor list. The Americans for Prosperity Foundation won at the district court level after Judge Manuel Real agreed that the documented history of violent threats against the group's members, donors, and leadership meant it should not be forced to turn over its list. That decision was overturned by the U.S. Court of Appeals for the Ninth Circuit. The U.S. Supreme Court requested in late February 2020 that the U.S. Solicitor General "file a brief in this case expressing the views of the United States," suggesting the Court is giving serious consideration to hearing it. Normally, the decision whether to hear oral arguments would already have been made, but the COVID-19 pandemic has postponed the Court's schedule. If the Court accepts the case, it likely will not be heard until Fall 2020 at the earliest, and possibly not until Spring 2021. Should the Court eventually rule in favor of charitable donor privacy, it could effectively shut down many of the current attacks on a donor's right to give anonymously.

Another major donor-privacy case was resolved in September 2019 when U.S. District Judge Denise Cote struck down portions of a New York state law passed in 2016 that required 501(c)4 organizations to disclose all their donors when they spend over \$10,000 in a calendar year on communications about the position of any elected official on potential or pending legislation, and also required charitable 501(c)3 organizations to reveal donors who gave to 501(c)4 "social welfare" arms that engaged in lobbying. Citizens Union of the City of New York, a progressive advocacy organization, challenged the provisions as a violation of its freedom of speech and freedom of association, noting that it appeared to be nothing more than a political response to the *Citizens United* decision. In its ruling to invalidate the disclosure mandates, the District Court concluded that the state had no authority to "regulate issue advocacy untethered to any electioneering

communication" and that the connection between donors to 501(c)3 organizations and lobbying communications by 501(c)4 organizations was "too attenuated to effectively advance any informational interest" the state might have.

Most recently, the Rio Grande Foundation (a free-market think tank in New Mexico, organized as a 501(c)3 charity) filed a lawsuit in December 2019 challenging a law that would force it and other nonprofits to disclose donors if they engage in issue advocacy mentioning anyone who is a candidate for office. As noted in the complaint, the Rio Grande Foundation wants to disseminate a legislator scorecard to thousands of New Mexico voters in advance of the November 2020 election. These mailings will be made within 60 days of the election and will include names and pictures of incumbent legislators, along with information on their voting records while in office. At the time of this report, no further actions had occurred in this case.

# Conclusion

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Despite some legislative and judicial victories, the vital right to donor privacy remains under assault in a variety of venues across the country. We need to be vigilant and ready to act quickly when activists and politicians seek to diminish the right to donate anonymously to charitable organizations and civic causes. We may additionally choose to support legislation like the Personal Privacy Protection Act. But it is also imperative to increase public understanding of the many reasons why a donor would choose to avoid disclosure and the critical role donor privacy plays in the health and sustainability of civil society. Fortunately, a broad coalition of groups spanning the ideological spectrum already understands the importance of opposing bills that would undermine donor privacy. Recent experience shows that growing that coalition and expanding support for donor privacy among the general public will significantly increase the likelihood of legislative and judicial victories moving forward.





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