

GOVERNMENT OVERREACH HURTS CHARITIES AND THOSE THEY SERVE

BY ELIZABETH MCGUIGAN

EXECUTIVE SUMMARY

- ◆ **NONPROFIT ORGANIZATIONS ARE APPROPRIATELY REGULATED TO ENSURE COMPLIANCE WITH STATE AND FEDERAL LAW.**
- ◆ **YET NEW, UNFOUNDED GOVERNMENT MANDATES AND THE OVERREGULATION OF THE CHARITABLE SECTOR IMPEDE THE IMPORTANT WORK OF CHARITIES.**
- ◆ **TOO OFTEN, NEW REGULATIONS ARE IMPOSED WITHOUT EVIDENCE OF A SYSTEMIC PROBLEM OR NEED.**
- ◆ **CHARITIES ARE HEAVILY REGULATED BY THE FEDERAL GOVERNMENT AND EACH NEW STATE OR LOCAL REQUIREMENT HAMPERS THE SECTOR AND REMOVES THE CRUCIAL PREDICTABILITY NECESSARY TO SUPPORT CHARITIES AND THE COMMUNITIES THEY SERVE.**
- ◆ **WHEN CONSIDERING BURDENSOME RULES FOR CHARITIES, LAWMAKERS MUST ENSURE THEY ARE WARRANTED AND TAILORED TO A SPECIFIC, EVIDENCE-BASED NEED.**

The Philanthropy Roundtable supports efforts to ensure the charitable sector is properly regulated, with strategic oversight and without unnecessary burdens on nonprofits.

CASE STUDY IN REGULATORY OVERREACH: CALIFORNIA



When thinking about the appropriate balance of regulations for nonprofits, it is useful to consider a recent, high-profile example of overregulation. Beginning in 2010, under then-state Attorney General Kamala Harris, California began requiring nonprofits operating in the state to submit unredacted copies of their IRS 990 Form Schedule

B documents. This includes the names, addresses and amounts contributed by substantial donors to an organization. Although the sensitive information was not intended to be made public, leaks and technical failures of the office led to the exposure of donor information to the public. In a time of extreme social pressures and divisive debates about controversial issues, this exposure put donors in physical and financial danger and spurred lawsuits against the state.

In 2021, the U.S. Supreme Court ruled against the California attorney general's office and their demand for major donor information from nonprofits in the state. In its *Americans for Prosperity Foundation v. Bonta* decision, the Court upheld donor privacy and concluded that California's bulk collection of donor information was unconstitutional.¹

In the wake of this decision, other states are pursuing policies that would overregulate the charitable sector.

CHARITABLE SECTOR STRUGGLES UNDER UNFOUNDED MANDATES



Nonprofit organizations, defined by section 501 of the Internal Revenue Code, are heavily regulated entities.² Much of the restrictions and requirements on these organizations are enforcement tools that ensure American givers can trust that the charitable organizations they support are acting according to their stated missions.

UNFORTUNATELY, DESPITE THESE RECENT CASES AND HISTORICAL PRECEDENT, THERE ARE AN INCREASING NUMBER OF STATE-LEVEL REQUIREMENTS THAT ARE DUPLICATIVE, OVERLY BURDENSOME AND HAMPER THE GOOD WORKS OF OPERATING CHARITIES, PRIVATE FOUNDATIONS AND OTHER NONPROFIT ENTITIES.

While ample attention is paid to the role of the IRS in classifying organizations with 501(c)(3) status and requiring the filing of annual reports, less attention is paid to the role of state governments in regulating the charitable sector. State authority stems from two fundamental aspects of state power: consumer protection and corporate law, as charities are treated as businesses that are not established to make a profit.

Historically, state regulation of nonprofit organizations predates federal rules. In

fact, the current issue of states overregulating the charitable sector is not a new problem. One of the landmark legal cases in American history actually resulted from an effort by the New Hampshire governor to appoint board trustees at Dartmouth College. In the *Trustees of Dartmouth College v. Woodward* case of 1819, the Supreme Court ruled

the state violated the Constitution by attempting to convert the private college into a public university and install a new board of trustees.³ This case established the concept of the private charitable organization in United States constitutional law.

More recent cases have struck down other attempts by states to overregulate nonprofits. For example, several decisions have ruled that “certain regulations of charitable subscriptions, barring fees in excess of a prescribed level, effectively imposed prior restraints on fundraising, and were therefore incompatible with the First Amendment.”⁴

Unfortunately, despite these recent cases and historical precedent, there are an increasing number of state-level requirements that are duplicative, overly burdensome and hamper the good works of operating charities, private foundations and other nonprofit entities.

DUPLICATIVE MANDATES

Most states require charitable organizations to register with the state, typically with the secretary of state or attorney general, and to provide annual reports on their activities.⁵ This information is critical to securing the public’s trust in the charitable sector and helping state officials root out bad actors.

However, some states require nonprofit corporations to complete forms with multiple agencies, that often ask for repetitive information. Even where these do not request new, additional information and ask instead for a nonprofit to file information from federal forms with the state as well, charitable organizations are forced to spend more resources on complying with regulations that could be instead used to further their missions. This burden is not insignificant. In New York, the state legislature reversed course on requiring charities to file with the Department of State in addition to the attorney general’s Charities Bureau after nonprofits objected to the increased burden.⁶

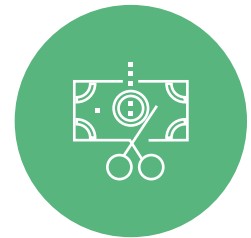
A number of states, including Michigan, New


Jersey and Oregon, require charities to report to the state attorney general any amendments to the articles of incorporation.⁷ As this reporting is already required at the federal level, this unnecessarily adds to the compliance burden of charitable organizations by adding another filing with little additional benefit to the state.

INVASIVE MANDATES

States are also increasingly requiring new, sometimes invasive information such as the home addresses of their officers. For example, there are growing calls for charitable organizations to disclose an increasing number of details about operations, governance and grantmaking. These requirements extend beyond the consumer protection goals of regulations and infringe on the freedom to give and serve our communities by threatening the ability of organizations to fulfill their charitable missions. Several states have such burdens in place or are considering proposals to add unnecessary layers of regulations such as:

- In Massachusetts, charitable organizations must file extensive reports with the state’s attorney general. This includes a 15-page form, (compared to North Dakota’s three-page form, for example). These mandatory reports in Massachusetts require disclosure of everything from types of solicitation activities to the names and addresses of fundraisers and board members. In addition to the steep compliance costs this reporting imposes on Bay State charities, the reports are all made publicly available through the Non-Profit Organizations/ Public Charities Division of the attorney general’s office.⁸ In today’s highly divisive culture, having detailed information on charities may pose a threat to the organizations, their boards and staff.
- A Connecticut law that imposed onerous requirements for paid charitable fundraisers was successfully challenged in a federal lawsuit.⁹ Under the statute, which the state





has agreed to cease enforcing as a result of *Kissel v. Seagull*, fundraisers must “provide the state with 20-day advance notice before being allowed to speak. ... A fundraiser is further required to not only tell the state he plans to speak but also submit to the state his script and any promotional material he plans to use.”¹⁰ The complaint that put a stop to these requirements further took issue with the requirement to maintain all donor names and addresses for three years and to provide this information to the state’s Department of Consumer Protection on demand. Despite the legal challenge to its existing mandates, Connecticut lawmakers are considering even more onerous requirements. A 2021 bill filed in Connecticut (House Bill 6217) would have required charitable organizations to disclose their registration number and the percentage of funds collected in the prior calendar year that “directly funded the charitable purpose of such organization,” when fundraising. While the bill may be aimed at weeding out bad apples in fundraising, the scope is broad and sweeping to cover legitimate activities.

- In 2021, Oregon lawmakers considered a bill (Senate Bill 723) that would have required nonprofits that meet certain requirements, including receipt of public funds, to comply with open meetings law and public records law, to post a copy of the nonprofit’s proposed annual budget to its public website and to submit to and cooperate with audits performed by government officials.¹¹ While the bill died in committee, this follows a dangerous trend toward the view that charitable assets are public property.
- In 2019, legislators in New Mexico introduced a measure (House Bill 599) to require nonprofit corporations to include a certain number of women on their boards of directors. Nonprofits that failed to comply would have faced penalties of up to \$5,000 for the first violation, and up to \$10,000 for any subsequent violations. While the bill was not enacted, it was recommended for passage by the House

Consumer and Public Affairs Committee.¹²

- In 2019, Pennsylvania House Resolution 953 would have required a government study of all tax-exempt nonprofit corporations registered in the state, evaluating whether these organizations “truly contribute to the common good” or “place an unfair tax burden on working-class residents of the Commonwealth.” The resolution did not specify objective criteria for determining how charities would be evaluated in contributing to the common good, leaving this to the judgment of government officials.¹³
- In 2008, California lawmakers considered Assembly Bill 624, legislation that would have required private, corporate or public foundations headquartered in the state to report personal demographic information about their board, staff, vendors and grantees.¹⁴
- In 2021, a measure was introduced in New Jersey (New Jersey Assembly Bill 5695/ Senate Bill 3779) that would have required corporations and nonprofit corporations to include in their annual report, filed with the Department of the Treasury, demographic information statistics for the members of its corporate board and senior management, including race, ethnicity, sexual orientation, gender identity or expression, disability status and veteran status.¹⁵

Several states impose filing requirements that far exceed federal requirements. In Connecticut and Indiana, paid fundraisers must not only register annually with the state, but also provide notice to the state before any solicitation campaign. While no longer enforced following *Kissel v. Seagull*, Connecticut’s law prescribes severe penalties for violations: a fine of \$5,000 and a year in prison.

EXECUTIVE BRANCH OVERREACH



Beyond the legislation outlined above, there are state attorneys general or other state officials who act unilaterally to impose new burdens on the charitable sector. Due to the *Americans for Prosperity Foundation v. Bonta* case outlined above, some of the most discussed impositions in recent years have been on the donor disclosure front, as threats to donor privacy still exist. In Hawaii, for example, the state attorney general's office has subpoenaed documents relating to all of a nonprofit's financial accounts, simply because it opposed the construction of the Thirty Meter Telescope.¹⁶ The issue is the subject of ongoing litigation in the state and illustrates the overreach potential of state offices.

More recently, the California attorney general's office has targeted donor-advised funds (DAFs), or individual charitable giving accounts, with increased scrutiny. In February 2021, the office issued a survey to DAF sponsors located in the state or located elsewhere but registered in the state. The attorney general's office demanded information regarding administrative and

investment fees, grants made over the last three years, number of DAFs, assets in DAFs, payout policies, private foundation gifts to DAFs and DAF-to-DAF transfers.¹⁷ This mandatory survey covered a sweeping array of confidential financial data of DAF sponsoring organizations, which are themselves public charities, without any evidence of fraud or abuse. Every question in this survey is a potential opportunity for the state attorney general to impose new regulations on DAFs without going through the legislative process.

The state's Senior Assistant Attorney General Tania Ibanez presented a list of potential DAF restrictions that may be considered by the attorney general's office or the state legislature including: establishing a specific payout rate, setting a time limit for DAF donations and barring private foundation use of DAFs.¹⁸

In Minnesota, the state attorney general's office is also interested in increasing DAF regulations. During a virtual event in June 2021, Carol Washington, the state's assistant attorney general said, "I've heard it referred to as kind of a parking lot for these assets or this New York Times article called it a storage unit. ... This money is held up in these funds – billions and billions of dollars – and it's not doing anything to help people. Particularly with the pandemic and increasing disparities and other concerns, there's been a lot of attention

SELECTED QUESTIONS FROM CALIFORNIA'S MANDATORY DAF SURVEY

1. Do YOU have a DISBURSEMENT POLICY for DAFs YOU manage?*

- ☐ Yes
☐ No

2. Do YOU have a policy to address any actual or potential SELF-DEALING GRANT disbursements?*

- ☐ Yes
☐ No

3. What Steps do YOU take to VET the recipients of GRANTS made by YOUR DAFs?*

- ☐ Yes
☐ No

5. Please describe and attach any and all policies related to any and all fees and commissions charged to YOUR DAFs, including but not limited to, fees identified in this section of the survey.

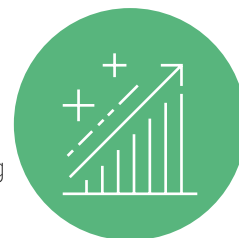


being put on these donor-advised funds.” She continued by describing the “transparency gap” that the office is interested in: “The attorney general’s specific interest is there is a reporting and transparency gap between when the money is ... donated from typically a private foundation (where we’re going to focus) to the ultimate end recipient of those dollars. Because donor-advised funds or the fund holders do not file the same registration and paperwork that the foundations do. ...”¹⁹

Governors have demonstrated a willingness to overreach on nonprofit regulations as well. In 2018, then-Gov. Steve Bullock issued an executive order requiring entities bidding for state government contracts to disclose certain contributions related to election communications. Fortunately, this order was rescinded by current Gov. Greg Gianforte in Executive Order No. 3-2021.²⁰

Most of the examples offered here relate directly to operating charities, but parallel and often additional rules are imposed on private foundations and other grantmaking entities. These regulations are worthy of further analysis.

STATES SEEK SOLUTIONS



While some states are seeking unnecessary rules and mandates for nonprofits, others acknowledge the need for balance. We all agree it is important and appropriate for states to oversee charities, fundraisers and others in the sector. As in any area, there are bad actors who must be investigated and prosecuted. This protects the vast majority of charitable organizations that comply with laws and regulations and signals to donors they may be confident their contributions are being used for good.

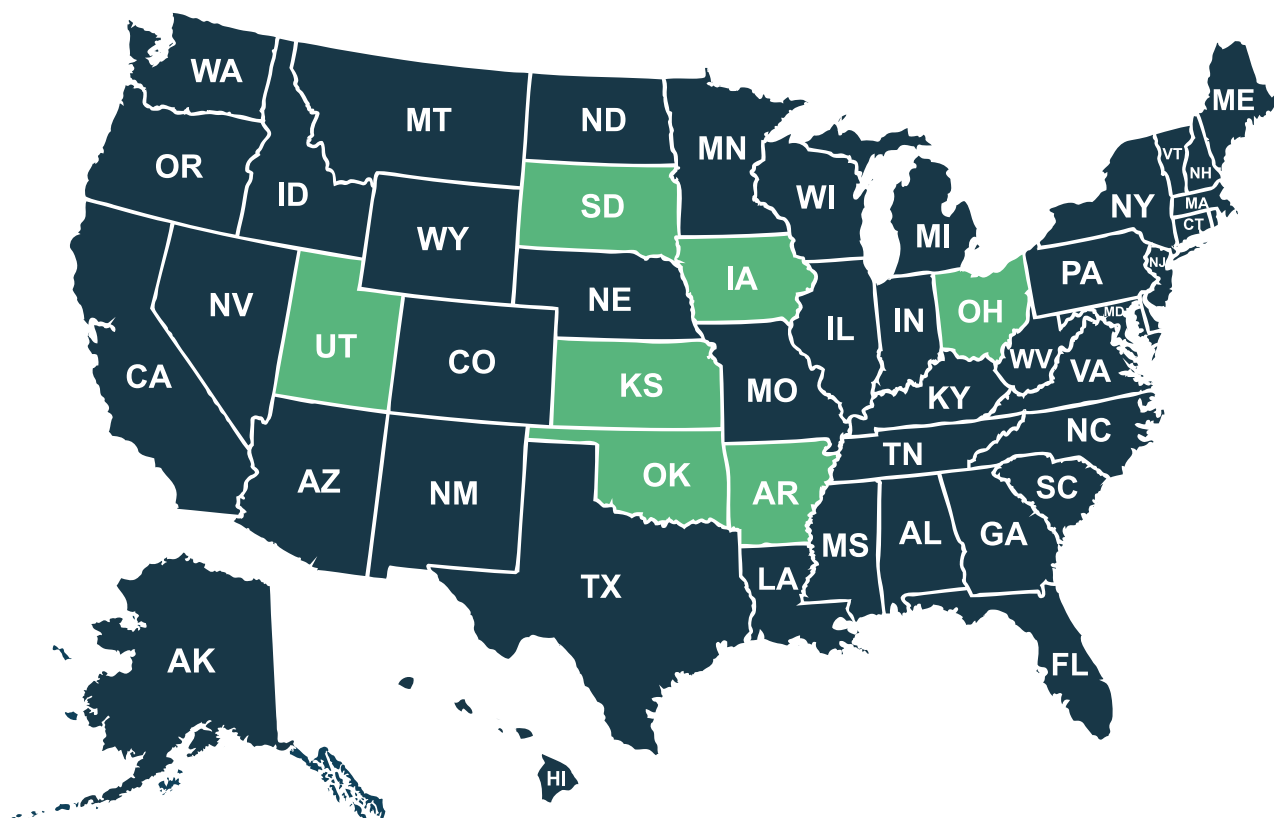
There are certainly existing areas of regulation that serve the charitable sector, such as restrictions on political campaign activities, unscrupulous paid fundraising practices or oversight of nonprofits that receive direct government grants. These complex issue areas, while not the focus of this primer, deserve a thorough discussion on their own merits.

Helping to preserve this balance between proper oversight and damaging overregulation, some states are pursuing measures that proactively protect charities from regulatory overreach by creating predictable regulatory environments for the nonprofit sector, while still allowing state attorneys general to investigate fraud, administer

state contracts and enforce the law.

One form this takes is legislation that simply prevents the state's administrative entities from imposing additional burdens on charities without legislative action. A number of states have enacted such legislation in recent years.²¹

STATES PROACTIVELY PROTECTING CHARITABLE ORGANIZATIONS



KEEP REGULATORY LANDSCAPE PREDICTABLE FOR CHARITIES



The charitable sector and broader civil society thrive in America. In a time of significant social and economic challenges, it is crucial to reject efforts

to impose burdensome mandates on charitable organizations. Lawmakers must ensure any new requirements are closely scrutinized to ensure they are based on solid evidence of widespread need, rather than on anecdotes and rumors. When such burdens are sought by unilateral executive action, legislators have the responsibility to challenge the overreach that directly hurts the communities they represent.

Such mandates serve to rob philanthropic programs of scarce time and resources necessary to support individuals and communities in need. Further, they may cause charities to close or move out of state. Rather than imposing unfounded rules on charities, lawmakers have ample opportunity to foster civil society and demonstrate their jurisdictions are friendly to charities and those who support them.

Protecting charities with proactive measures allows these organizations to continue to focus on the day-to-day programs, initiatives and activities that transform lives and communities. America's future will be brighter if state lawmakers and regulators foster a friendly environment for private charitable organizations to meet the needs of their citizens, enrich their cultures and solve pressing societal challenges.

ENDNOTES

- 1 The Philanthropy Roundtable, Donor Privacy Policy Primer, November 2021. <https://www.philanthropyroundtable.org/home/resources/briefings/issue/donor-privacy-a-constitutional-right-for-american-givers>
- 2 For a snapshot of these regulations, see: <https://www.irs.gov/charities-and-nonprofits>
- 3 Dartmouth College, “Dartmouth College Case Decided By the U.S. Supreme Court” <https://250.dartmouth.edu/highlights/dartmouth-college-case-decided-us-supreme-court>
- 4 Illinois Ex Rel. Madigan v. Telemarketing Associates, Inc. (01-1806) 538 U.S. 600 (2003) <https://www.law.cornell.edu/supct/html/01-1806.ZO.html>
- 5 The Urban Institute, “State Regulation and Enforcement in the Charitable Sector,” Sept. 2016. <https://www.urban.org/sites/default/files/publication/84161/2000925-State-Regulation-and-Enforcement-in-the-Charitable-Sector.pdf>
- 6 Kay Dervishi, “State legislature passes bill undoing NY’s new donor disclosure requirement,” NYNMedia.com, June 23, 2021. <https://nynmedia.com/content/state-legislature-passes-bill-undoing-nys-new-donor-disclosure-requirement>
- 7 The Urban Institute, “State Regulation and Enforcement in the Charitable Sector,” Sept. 2016. <https://www.urban.org/sites/default/files/publication/84161/2000925-State-Regulation-and-Enforcement-in-the-Charitable-Sector.pdf>
- 8 More information about the filing requirements in Massachusetts may be found on the attorney general’s website here: <https://www.mass.gov/orgs/the-attorney-generals-non-profit-organizationspublic-charities-division>. A copy of the form instructions is available here: <https://www.mass.gov/doc/form-pc-instructions-2020-update/download>. Note: the IRS requires all U.S. tax-exempt nonprofits to make public their three most recent Form 990 or 990-PF annual returns and all related supporting documents
- 9 Kissel v. Seagull, 3:21-cv-120 (JAM) (D. Conn. Jan. 19, 2022) <https://casetext.com/case/kissel-v-seagull-1>
- 10 Kissel v Seagull, Complaint for Declaratory Judgment and Permanent and Preliminary Injunctive Relief, United States District Court, District of Connecticut, Civil Action No. 21-120. Jan. 28, 2021. <https://pacificlegal.org/wp-content/uploads/2021/01/Kissel-v.-Seagull-Complaint.pdf>
- 11 Oregon Senate Bill 723 is available online: <https://olis.oregonlegislature.gov/liz/2021R1/Downloads/MeasureDocument/SB0723/Introduced>
- 12 Full text and more information about HB 599 may be found here: <https://legiscan.com/NM/bill/HB599/2019>
- 13 Full text and more information about HR 953 may be found here: <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2019&sind=0&body=H&type=R&bn=0953>
- 14 The Philanthropy Roundtable, Briefing, “Donor Privacy: Expanded Protections, Growing Threats in 2020,” Aug. 2020. <https://www.philanthropyroundtable.org/home/resources/briefings/issue/philanthropic-freedom/threats-to-where-you-give>
- 15 The New Jersey legislation is available here: <https://legiscan.com/NJ/text/S3779/id/2395971>
- 16 Mark Ladao, “Supreme Court partially approves subpoena into bank records of group opposing TMT,” Honolulu Star Advertiser, Sept. 23, 2021. <https://www.staradvertiser.com/2021/09/23/breaking-news/supreme-court-partially-approves-subpoena-into-bank-records-of-group-opposing-tmt/>
- 17 The survey was discussed by Tania M. Ibanez, senior assistant attorney general, CA, during a virtual event hosted by Georgetown Law, Continuing Legal Education, “Donor-Advised funds: regulator’s perspective,” April 20, 2021.
- 18 Tania M. Ibanez, senior assistant attorney general, CA, during a virtual event hosted by Georgetown Law, Continuing Legal Education, “Donor-Advised funds: regulator’s perspective,” April 20, 2021.
- 19 Carol Washington, Remarks and slides during virtual CLE event hosted by Minnesota attorney general’s office, “Consumer Justice,” June 28, 2021.
- 20 Jerrick Adams, “Montana governor rescinds executive order compelling disclosure of political spending,” Ballotpedia News, March 2, 2021. <https://news.ballotpedia.org/2021/03/02/montana-governor-rescinds-executive-order-compelling-disclosure-of-political-spending/>
- 21 The states with proactive legislation in place to protect the charitable sector from regulatory overreach include: Arkansas, Iowa, Kansas, Ohio, Oklahoma, South Dakota and Utah.

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ABOUT PHILANTHROPY ROUNDTABLE

Philanthropy Roundtable is a nonprofit organization dedicated to building and sustaining a vibrant American philanthropic movement that strengthens our free society. To achieve this vision, the Roundtable pursues a mission to foster excellence in philanthropy, protect philanthropic freedom and help donors to advance liberty, opportunity and personal responsibility.



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