

Nonprofit Law Alert: United States Court of Appeals for the Second Circuit Upholds Attorney General's Donor Disclosure Requirements for Non-Profit Entities

On February 15, The United States Court of Appeals for the Second Circuit (the "Second Circuit") upheld the dismissal of a challenge to the New York State Attorney General's requirement that both 501 (c)(3) and 501 (c)(4) charitable organizations annually disclose their donor lists.

Citizens United and Citizens United Foundation had challenged the Attorney General's requirement that non-profit entities disclose donor information that must be included in Schedule B of Form 990. Currently, a non-profit entity must submit "a list of the organization's donors, the donors' addresses and the amounts of their donations" to the Internal Revenue Service ("IRS"). Citizens United and Citizens Foundation claimed that the New York State Attorney General's disclosure regulations violated the First Amendment, the Due Process Clause of the Fourteenth Amendment the New York State Constitution, and that they were preempted by federal law.

The Second Circuit dismissed on several grounds the claims that the disclosure requirements violate the First Amendment. First, the court agreed with the Attorney General that the agency has an important interest "in ensuring organizations that receive special tax treatment do not abuse that privilege" and in preventing tax-exempt organizations "from using donations for purposes other than those they represent to their donors and the public." Next, the court stated that the disclosure requirements would not chill speech more than any other disclosure requirement, since the entities required to disclose their donors must already submit this information to the IRS.

Next, Citizens United and Citizens United Foundation alleged that the Attorney General's enforcement of the disclosure regulations violated the Due Process Clause, because the Attorney General did not begin enforcing the requirement until 2013 while the organizations had failed to disclose their donors since registering with the Attorney General in 1995. The groups alleged that given this change in enforcement, the Attorney General was required to provide them with notice before they faced discipline. The Second Circuit disagreed, concluding that the Attorney General's recent enforcement of the regulations reflected only "a change in enforcement priorities." Furthermore, the shift in priorities did not "trigger a notice requirement" since the groups were already required to submit donor lists, but had simply failed to do so.

The Second Circuit also concluded that the Attorney General's disclosure requirements were not preempted by federal law and did not violate the New York State Constitution. Notably, while Citizens United and the Citizens United Foundation alleged that the Attorney General did not have the power to include 501 (c)(4) entities "in the definition of 'charitable organization'", which requires 501 (c)(4) organizations to disclose their donors, the court disagreed.

The court reasoned that excluding 501 (c)(4) organizations from the donor disclosure regulations would

allow them to “serve as shells to keep donors anonymous to” 501 (c)(3) entities.

Attorney General Eric Schneiderman has praised the Second Circuit’s decision. He stated that the “ruling affirms that Citizens United can no longer shroud its biggest donors in secrecy.” Also, he explained that the disclosure requirements assist “regulators so that they can police fraud and abuse in the non-profit sector.”

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