



RIO GRANDE FOUNDATION v. CITY OF SANTA FE – BACKGROUNDER

Executive Summary

One of the definitive freedoms of our constitutional system is the right to freely express one’s opinions—to educate the public and promote a position—on political and social controversies without risk of retaliation, and without having to give up one’s right to privacy. That’s why in the 1950s, the Supreme Court held that government officials can’t force advocacy groups to turn over the identities of their supporters to public officials. “Compelled disclosure of affiliation with groups engaged in advocacy,” the Court ruled in a case in which Alabama tried to force the NAACP to disclose the names and addresses of its supporters, “may constitute as effective a restraint on freedom of association” as direct censorship.¹

Yet recent years have witnessed a growing trend of state and local governments forcing nonprofit groups to turn their donor lists over to the government whenever those groups communicate with voters about local ballot initiatives. One of these cities is Santa Fe, New Mexico, which mandates that even people who spend as little as \$250 on a political campaign must give the government personal identifying information—a rule that chills free speech by charities and other nonprofit organizations, and exposes their donors to potential harassment and retribution. The Goldwater Institute filed this lawsuit to protect the vital rights of free speech and association in our constitutional democracy.

The Problem

According to the National Center for Charitable Statistics, there are over 1.5 million nonprofit organizations in the United States.² These include schools, churches, art centers, public radio stations, research foundations, and other groups. Many of these charities sometimes work to influence public issues that are important to their members—from something as local as a new animal shelter to something as broad as national healthcare policy. This means adding their voice to the public debate on a given topic.

Unfortunately, cities and states are implementing laws designed to make it harder for nonprofits to participate in policy debates, robbing the public of these important voices. These new laws,

¹ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

² *Quick facts about nonprofits*, National Center for Charitable Statistics, <http://nccs.urban.org/data-statistics/quick-facts-about-nonprofits>

passed under the guise of “campaign finance” reform, have nothing to do with public officials or individual candidates. Instead, they target groups that are merely speaking about whether a particular ballot measure is a good or bad idea.

Here’s how it works: A nonprofit chooses to support or oppose a local ballot initiative and runs a series of Facebook posts, creates a webpage, takes out a newspaper advertisement, sends a mailer, creates a YouTube video, or communicates its message to the public in one of dozens of other ways. Under new donor-disclosure laws, if the nonprofit spends more than a token amount to spread its message, it must then file reports detailing its spending, and that includes the onerous requirement that it disclose its donors’ names, addresses, and occupations to the government.

Charitable donors suddenly find that the donations they thought were private have become part an official government record—one that is available to anyone with a computer and web browser. If those charities happen to be unpopular or to support controversial causes, then the families that chose to send in a contribution might find themselves targeted for harassment and intimidation by opponents of those causes.

This is not just speculation. The past decade has seen an increasing trend of harassment toward individuals and nonprofit groups that take controversial political opinions—on both the left and the right. Groups as diverse as Tea Party organizations and Planned Parenthood have been the focus of concerted retaliation efforts by people who disagree with their political positions. A 2014 report by the U.S. House of Representatives found that the IRS had systematically targeted conservative groups for scrutiny.³ After passage of a controversial ballot initiative in California, opponents of the proposition created public websites that combined donor information with an interactive map, so that people could look up donors and their home addresses online.⁴ One U.S. Senator even lauded the idea of forcing nonprofit organizations to disclose the identities of their donors because it would have “a deterrent effect.”⁵

It’s true: Compelled disclosure has the effect of discouraging people to donate to charities that take unpopular positions on public issues, thereby diminishing or silencing the voices of those charities in the public debate.⁶ Knowing this, a charity might reasonably decide to remain silent on a particular topic, rather than be forced to turn its donor lists over to the government. But the reason our Constitution protects freedom of speech is precisely to protect people against retaliation when they support political causes—especially controversial ones.

Santa Fe Demands Disclosure Over a YouTube Video About a Soda Tax

³ U.S. House of Representatives, *The Internal Revenue Service’s Targeting of Conservative Tax-Exempt Applicants: Report of Findings for the 113th Congress* (Dec. 23, 2014), pp. i-ii, <http://oversight.house.gov/wp-content/uploads/2014/12/>

⁴ Thomas M. Messner, *The Price of Prop. 8*, Heritage Foundation Backgrounder No. 2328 (Oct. 22, 2009), http://s3.amazonaws.com/thf_media/2009/pdf/bg2328.pdf.

⁵ Remarks of Sen. Chuck Schumer regarding the DISCLOSE ACT (Senate Rules and Administration Committee Hearing, July 17, 2012), https://www.youtube.com/watch?v=NHX_EGH0qbM

⁶ Dick M. Carpenter, *Disclosure Costs: Unintended Consequences of Campaign Finance Reform*, Institute for Justice (March 2007), <http://ij.org/wp-content/uploads/2015/03/DisclosureCosts.pdf>

The Rio Grande Foundation, a 501(c)(3) nonprofit based in New Mexico, recently ran afoul of a donor-disclosure ordinance passed in 2015 by the City of Santa Fe. Santa Fe voters were considering a municipal ballot initiative (which was ultimately defeated) that would have increased sales taxes on sugary beverages—a “soda tax.” Santa Feans would be voting on the ballot measure on May 2, 2017.⁷

Since the Foundation is opposed to soda taxes as a matter of principle, it decided to run a campaign encouraging Santa Fe voters to reject the ballot measure. It communicated with voters in two related ways. First, the Foundation used its Facebook page⁸ to explain to voters why the tax was a bad idea. Second, it directed them to a webpage and associated YouTube video which could be found at www.NoWaySantaFe.com. The webpage and video⁹ provided basic information about the tax—like the fact that it would nearly double the price of a 12-pack of soda, that it applied broadly to all sugary beverages, including Starbucks drinks, and that similar taxes in other cities had hurt small businesses.

The Foundation’s Facebook posts, website, and video drew the attention of the Santa Fe City Attorney. During the month of April, the Foundation received five different letters from the City Attorney which, combined with a citizen complaint, demanded that the Foundation detail its spending on the soda tax and disclose its donors to the city. These demands culminated in a late-April hearing before the Santa Fe Ethics & Campaign Review Board, where the citizen complainant presented evidence that the Foundation had spent more than the City’s \$250 reporting threshold to oppose the soda tax.¹⁰ The presentation included an affidavit and testimony from a local videographer about the estimated cost of the “No Way Santa Fe” video.

After meeting in executive session, the Review Board came back and issued a formal reprimand against the Foundation, together with a renewed demand that the Foundation disclose its spending and its donors to the government.¹¹

The Santa Fe Ordinance

In 2015, Santa Fe joined the cities of Albuquerque¹² and Las Cruces¹³ in passing one of the most aggressive donor-disclosure laws in the country. Santa Fe requires charities to disclose their donors to the government whenever the charity spends more than \$250 to communicate with 100 or more voters about a municipal ballot measure.¹⁴

⁷ T.S. Last, *Soda tax goes flat in Santa Fe*, Albuquerque Journal (May 2, 2017), <https://www.abqjournal.com/997373/early-returns-are-against-sugary-drinks-tax.html>

⁸ <https://www.facebook.com/rgfnm/>

⁹ <https://www.youtube.com/watch?v=PLxWJwxuQqo>

¹⁰ See Santa Fe Ethics & Campaign Review Board, April 24, 2017 Meeting Agenda, Item 2-b, available at http://www.santafenm.gov/april_24_2017_ecrb_packet

¹¹ See Santa Fe Ethics & Campaign Review Board, April 24, 2017 Meeting Minutes, Item 2-b, available at http://www.santafenm.gov/document_center/document/6731

¹² Albuquerque City Charter, Article XIII, Section 6(d) (“Measure Finance Committees”).

¹³ Las Cruces City Code, Section 8-36.

¹⁴ Santa Fe City Code Section 9-2.6A

Like traditional campaign-finance regulations, the law applies to organizations that support or oppose candidates for public office. This case does not involve that portion of the law since 501(c)(3) groups are already prohibited from supporting or opposing candidates for public office as part of their tax-exempt status.¹⁵

The extraordinary aspect of the Santa Fe ordinance—and the subject of this lawsuit—is its application to charities and nonprofits that are communicating about simple ballot initiatives, like the soda tax. In Santa Fe, whenever a charity spends more than \$250 to support or oppose a municipal ballot initiative, it must file a report with the city government.¹⁶ That report must include the amount of each contribution, plus the name, address, and occupation of the person making the contribution.¹⁷ Charitable organizations are exempt only if they are conducting internal communications to their members.¹⁸ Any public communications—from Facebook to newspaper ads to billboards—are subject to the aggregate expenditure cap.

As is often the case with these kinds of laws, media organizations are exempted.¹⁹ Thus, a nonprofit theater or hospital that supported the city’s spending on a new project would have to disclose its donors, but the local public radio station would not.

Every nonprofit organization that wishes to speak about a Santa Fe ballot initiative is thus confronted with a stark choice: Spend more than \$250 and turn over its donor list to the government—or spend less than \$250, protect its donors, but have little impact on the public debate.

The Law

Santa Fe’s donor-disclosure law isn’t just detrimental to charities and their donors, it’s also illegal under the U.S. and New Mexico Constitutions. The rights to speak and associate freely are fundamental human rights and are essential to the functioning of a healthy democratic republic. That’s why those rights are enshrined in the First Amendment to the U.S. Constitution and the New Mexico Constitution²⁰.

Nevertheless, governments continue to attack the free speech and associational rights of anyone who participates in the political process—like a small nonprofit opposing a city soda tax. Robust debate makes politicians’ jobs harder and gives them less opportunity to shape their desired political outcomes. Many politicians want fewer voices, not more. And disclosure laws like the one in Santa Fe are an effective way to ensure that fewer organizations will speak about proposed legislation.

Yet the right to speak about proposed laws, and the right to associate with charities and other groups that speak about proposed laws, is protected by both the U.S. and New Mexico

¹⁵ Internal Revenue Service, *Exemption Requirements for 501(c)(3) Organizations*, <https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-section-501-c-3-organizations>

¹⁶ Santa Fe City Code Section 9-2.6A

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ New Mexico Constitution Article II, Section 17.

Constitutions. Ever since the civil-rights battles of the 1950s, the Supreme Court has held that laws requiring charities to disclose their donors to the government violate the First Amendment. “This Court has recognized the vital relationship between freedom to associate and privacy in one’s associations.... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.”²¹

As the Court acknowledged, compelled disclosure laws hurt both charities and their donors. Charities have their speech chilled because they are less likely to engage in public debate about important issues. Donors have their right to free association violated by being exposed to potential harassment and intimidation as a result of their giving.

Case Logistics

The plaintiff in this case is the Rio Grande Foundation, a nonprofit 501(c)(3) organization based in Albuquerque. The defendants are the City of Santa Fe and its Ethics & Campaign Review Board.

The case was filed in the United States District Court for the District of New Mexico on July 26, 2017.

The Rio Grande Foundation is asking the federal court to permanently enjoin the City’s enforcement of its donor-disclosure requirement, so that the Foundation and other nonprofits may freely participate in public debates about city ballot initiatives without being forced to turn their donor lists over to the government.

The Legal Team

Matt Miller is a Senior Attorney at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation, where he heads up the Institute’s free-speech litigation. Prior to joining the Goldwater Institute, Matt served as the Managing Attorney of the Texas Office of the Institute for Justice, which he opened in 2008. Early in his legal career, he was an attorney at a large Dallas law firm.

Jon Riches is the Director of National Litigation and General Counsel at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation. He litigates in areas of taxpayer rights and fiscal policy, public union and pension reform, government transparency, economic liberty, and school choice, among others. Prior to joining the Goldwater Institute, Jon served on active duty in the U.S. Navy Judge Advocate General’s (JAG) Corps, where he represented hundreds of clients, litigated dozens of court-martial cases, and advised commanders on a vast array of legal issues.

The **Goldwater Institute** opened in 1998, with the blessing of its namesake. Its early years focused on defending liberty in Barry Goldwater’s home state of Arizona. Today, the Goldwater

²¹ *Patterson*, 357 U.S. at 462.

Institute is a national leader for constitutionally limited government, with hundreds of legislative and court victories to its name.