

**STATE OF MINNESOTA  
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

.....  
**February 3, 2021**

**Meeting conducted remotely though Webex due to COVID-19 pandemic**

.....  
**MINUTES**

The meeting was called to order by Chair Haugen.

Members present: Flynn, Haugen, Leppik, Rashid, Rosen, Swanson

Others present: Sigurdson, Engelhardt, Olson, Pope, staff; Hartshorn, counsel

**MINUTES** (January 8, 2021)

After discussion, the following motion was made:

Member Leppik's motion:	To approve the January 8, 2021, minutes as drafted.
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Vote on motion:	A roll call vote was taken. All members voted in the affirmative (Rosen abstained).
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**CHAIR'S REPORT**

**A. 2021 meeting schedule**

The next Board meeting is scheduled for 11:00 a.m. on Wednesday, March 3, 2021.

**EXECUTIVE DIRECTOR REPORT**

Mr. Sigurdson told members that the 2020 year-end campaign finance reports became public on the day before the Board meeting and that there already had been several news stories about the information in those reports. Mr. Sigurdson said that 93% of the candidate reports and 95% of the political committee, political fund, and party unit reports had been filed on time. Mr. Sigurdson stated that it had been harder to support committees this year than in past years and that he was happy with these results. Mr. Sigurdson recognized staff's efforts in obtaining the reports, particularly the efforts of the IT staff. Mr. Sigurdson also stated that 98% of the lobbyist reports, due January 15<sup>th</sup>, and 97% of the annual economic interest statements, due January 25<sup>th</sup>, had been timely filed. Mr. Sigurdson finally reported that 71% of the original economic interest statements had been filed even though those statements were not due until March 8<sup>th</sup>.

Mr. Sigurdson said that legislative hearings would be scheduled soon for the four members who needed to be confirmed. Mr. Sigurdson also told members that Rep. Kaohly Vang Her had agreed to author the Board's technical proposals in the House. Mr. Sigurdson said that the governor's proposed

budget included a small increase for the Board, which would allow the Board to fill the vacant EIS program administrator position. Mr. Sigurdson also summarized two bills that had been introduced in the House. One bill, authored by former Board member Rep. Emma Greenman, would replace the public subsidy program with a voucher system. Mr. Sigurdson said that the new voucher system, along with the other campaign finance related provisions in the bill, would require additional Board staff if passed into law. Mr. Sigurdson stated that the second bill would require disclosure of electioneering communications on campaign finance reports and was similar to the Board's 2013 legislative recommendations.

### **LEGISLATIVE RECOMMENDATIONS**

Mr. Sigurdson presented members with a memorandum regarding this matter that is attached to and made a part of these minutes. Members decided to consider the economic interest and campaign finance provisions separately.

#### **A. Economic interest statement**

Mr. Sigurdson told members that there were three policy recommendations related to the economic interest program. The first would establish a two-tiered disclosure system that would allow soil and water conservation supervisors, watershed district managers, and members of watershed management organizations to report only their occupations, sources of compensation, and real property in the state. The second recommendation would require public and local officials to report their beneficial interests. The final recommendation would require public and local officials to disclose direct interests in government contracts. Mr. Sigurdson reviewed the history of the proposals and alternatives that had been considered in past years.

After discussion, the following motions were made:

Member Swanson's motion: To approve the staff draft of the recommendations to create a two-tier disclosure system and to require disclosure of direct interests in government contracts.

Vote on motion: A roll call vote was taken. All members voted in the affirmative.

Member Rashid's motion: To approve the 2018 staff draft of the recommendation to require disclosure of spousal interests as amended to add direct interests in government contracts to the list of spousal interests that must be disclosed.

Vote on motion: A roll call vote was taken. All members voted in the affirmative.

## **B. Campaign finance**

Mr. Sigurdson told members that there were two policy recommendations for the campaign finance program. The first would redefine independent expenditures to include both express advocacy and words that are the functional equivalent of express advocacy. The second would provide regulation of contributions made with bitcoin and other virtual currencies. Mr. Sigurdson reviewed the history of these proposals and the citizen comments that had been received in the past. Mr. Sigurdson also distributed a new comment on the express advocacy proposal that had been sent by George Beck of Clean Elections Minnesota. This comment is attached to and made a part of these minutes.

After discussion, the following motions were made:

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|---------------------------------|--|
| Member Leppik's motion:         | To approve the staff draft of the virtual currency recommendation.   |
| Vote on motion:                 | A roll call vote was taken. All members voted in the affirmative.  |
| Member Rashid's motion:         | To approve the staff draft of the express advocacy recommendation.   |
| Member Rosen's motion:          | To amend Member Rashid's motion so that it calls for the approval of the staff draft of the express advocacy recommendation as amended to add the following sentence to the end of that language: Any person or organization that identifies themselves in the same manner that the authors of the Federalist Papers identified themselves will be considered to be in compliance with all disclosure requirements provided for in this statute. |
| Vote on Member Rosen's motion:  | A roll call vote was taken. Motion failed (Five nays, Rosen voted aye).  |
| Vote on Member Rashid's motion: | A roll call vote was taken. Motion passed (Five ayes, Rosen voted nay)   |

## **REVIEW OF UPCOMING U.S. SUPREME COURT CASES INVOLVING DISCLOSURE BY 501(c)(3)s**

Mr. Olson presented members with a memorandum regarding this matter that is attached to and made a part of these minutes. Mr. Olson told members that the U.S. Supreme Court had granted review of the decision in *Americans for Prosperity Foundation v. Becerra*, 903 F. 3d 1000 (9<sup>th</sup> Cir. 2018). Mr. Olson said that this decision concerned two cases challenging California's requirement that 501(c)(3) organizations disclose their large donors. Mr. Olson reviewed the history of the litigation and the arguments made to the Supreme Court in the petitions for review. Mr. Olson said that any decision reached by the Supreme Court would be unlikely to directly affect Chapter 10A. A decision could have an indirect impact, however, if it were written broadly enough to require narrow tailoring of disclosure requirements even in the context of campaign finance.

**ENFORCEMENT REPORT**

**A. Consent item**

**1. Administrative termination of lobbyist Eric Dick (2521)**

Mr. Olson told members that a lobbyist principal, the Minnesota Medical Association, had asked to terminate the lobbyist registrations of Mr. Dick on behalf of five related principals due to his death on January 5, 2021. Mr. Olson said that Board staff had administratively terminated Mr. Dick’s lobbyist registrations as of December 31, 2020, which was the end of the previous reporting period. Mr. Olson said that lobbyist disbursement reports had been filed on Mr. Dick’s behalf for four of the principals, covering the reporting period that had ended on December 31, 2020. Mr. Olson said that a reporting lobbyist for the fifth principal had filed a lobbyist disbursement report inclusive of Mr. Dick’s lobbyist disbursements during the reporting period that ended on December 31, 2020.

After discussion, the following motion was made:

Member Flynn’s motion: To approve the requested administrative termination.

Vote on motion: A roll call vote was taken. All members voted in the affirmative.

**B. Waiver requests**

Name of Candidate or Committee	Late Fee & Civil Penalty Amount	Reason for Fine	Factors for Waiver and Recommended Action	Board Member’s Motion	Motion	Vote on Motion
Noah Rouen (2955)	\$225 LFFs (\$75 x 3)	1st 2020 Lobbyist	3 reports were due 6/15/2020 and filed 6/18/2020. Lobbyist had difficulty gathering records needed to complete reports due to office closures resulting from COVID-19. RECOMMENDED ACTION: Waive	Member Leppik	To approve the staff recommendation.	A roll call vote was taken. All members voted in the affirmative.
Todd Gramenz (4515)	\$1,075 LFFs \$1,000 CP	1st 2019 Lobbyist 1st 2020 Lobbyist 2nd 2020 Lobbyist	Report due 6/17/2019 was filed two days late resulting in \$50 LFF. Report due 6/15/2020 was filed 1/6/2021 resulting in LFF and CP of \$1,000 each. Report due 1/15/2021 was filed 1/19/2021 resulting in \$25 LFF. Lobbyist registered in January 2019 and has certified for four reporting periods that no lobbying disbursements were made and he was not paid more than \$500 within calendar year to lobby. Because lobbyist does not appear to have been required to register, staff	No motion.	At Member Swanson’s request, members agree to progress this matter to the next meeting.	

		recommended waiver of amounts owed, contingent upon lobbyist filing termination statement and agreeing not to register again unless he becomes lobbyist as defined by Chapter 10A. RECOMMENDED ACTION: Waive, contingent upon termination			
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**C. Informational items**

**1. Payment of civil penalty for prohibited independent expenditures by a principal campaign committee**

Perry Nouis for Minnesota, \$550

**2. Payment of civil penalty for disclaimer violation**

Perry Nouis for Minnesota, \$300

**3. Payment of late filing fee for 2020 pre-general 24-hour notice**

Win Justice, \$100

**4. Payment of late filing fee for 2020 pre-general report of receipts and expenditures**

Omar Fateh Senate Committee, \$350  
 Firefighters Association of Minneapolis Political Fund, \$50

**5. Payment of late filing fee for September 2020 report of receipts and expenditures**

CWA COPE PCC, \$50  
 CWA Working Voices, \$25

**6. Payment of late filing fee for 2020 pre-primary 24-hour notice**

Firefighters Association of Minneapolis Political Fund, \$250

**7. Payment of civil penalty for 2017 year-end report**

Vote Jerry Loud, \$1,000 (revenue recapture)

**8. Partial payment of late filing fee for 2016 year-end report**

Committee to Elect Wade Fremling House 3B, \$462.36 (revenue recapture)

**9. Forwarded anonymous contributions**

Doug Wardlow for Attorney General, \$28  
 Josiah Hill for Senate, \$25

**10. Return of public subsidy due to exceeding carryforward limit**

Aleta (Borrud) for MN Senate, \$6.69

**11. Return of public subsidy due to overpayment**

Rob Ecklund for 3A Rep, \$1,194.37  
Lislegard (David) For House 6B, \$729.83  
Tomassoni (David) for State Senate, \$655.91  
Sundin (Mike) Volunteer Committee, \$635.80  
Julie Sandstede For MN House Volunteer Committee, \$582.87  
Murray Smart House District 12A, \$389.75  
Shane Mekeland for MN House Representative, \$388.69  
Ron Thiessen for MN House 15B, \$372.84  
Dotseth (Jeff) Volunteer Committee, \$272.16  
Michelle Lee for State Senate, \$269.69  
Thomas Manninen for House District 3A, \$239.78  
Committee to Elect Rob Farnsworth, \$210.44  
Bakk (Thomas) for Senate, \$184.21  
Andrew (Mathews) for Senate, \$141.17  
Westrom (Torrey) for Senate Committee, \$121.48

**LEGAL COUNSEL'S REPORT**

Mr. Hartshorn presented members with a legal report that is attached to and made a part of these minutes. Mr. Hartshorn told members that the pleadings in the Brown and NARAL Pro Choice matters had been served. Mr. Hartshorn said that pleadings had been drafted in several other matters and would be served after the review process was completed.

**OTHER BUSINESS**

There was no other business to report.

**EXECUTIVE SESSION**

The chair recessed the regular session of the meeting and called to order the executive session. Upon recess of the executive session, the chair had nothing to report into regular session.

There being no other business, the meeting was adjourned by the chair.

Respectfully submitted,



Jeff Sigurdson  
Executive Director

Attachments:  
Memorandum regarding legislative policy recommendations

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February 3, 2021

Comment from George Beck, Clean Elections Minnesota  
Memorandum regarding review of upcoming U.S. Supreme Court cases  
Legal report



# MINNESOTA

## CAMPAIGN FINANCE BOARD

**Date:** January 27, 2021

**To:** Board Members

**From:** Jeff Sigurdson, Executive Director

**Telephone:** 651-539-1189

**Re:** Legislative recommendations

At the January meeting the Board adopted legislative policy recommendations for the lobbying program, and recommendations to resolve technical issues in the campaign finance and economic interest statement (EIS) programs. Member Swanson requested that at this meeting staff bring the legislative policy recommendations that the Board presented to the legislature in 2020 for discussion and possible recommendation to the legislature in 2021. The recommendations from 2020 (minus the technical recommendations adopted last month) are attached for review.

Member Rashid was not present during the last Board discussion on the recommendations, and therefore is not familiar with the relevant issues. To address that problem, and as a refresher for all Board members, this memo provides a brief review of the recommendations' origins, the public comments received in 2020 on the recommendations, and a staff memo from 2019 on express advocacy.

Some of the 2020 policy recommendations have their origins in provisions that were proposed to the legislature in 2018. For example, in 2018 the Board recommended that EIS statements include the financial holdings of the public official's spouse. This recommendation was heard in the House, but ultimately stalled because it did not include domestic partners, and language to resolve that issue to both parties' satisfaction could not be drafted. In 2019 the Board attempted to solve the issue by moving to a standard that would require disclosure of a "beneficial interest." This interest would include a spouse, and any other individual whose financial holdings might directly benefit the public official. The beneficial interest recommendation was not authored in 2019. The recommendation that the EIS program have a two-tiered disclosure system, with the second tier requiring less financial disclosure for public officials who have limited authority, was also presented in 2018. Some legislators told me that they personally supported this idea, but in the end the Board's recommendations on the EIS program did not pass out of committee.<sup>1</sup>

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<sup>1</sup> In contrast the 2018 recommendations for the campaign finance program passed both bodies easily.



The Board first proposed the campaign finance recommendation to expand independent expenditures to include material that uses words that do not expressly advocate for the election or defeat of a candidate in 2013. A recommendation on this issue has been made every year except in 2017 and 2018. There have been variations on the wording used in the recommendation on independent expenditures, but the basic issue is the same; is the express advocacy standard found in the Supreme Court decision *Buckley v. Valeo* still adequate for Minnesota? The staff memo from Mr. Olson that I mentioned earlier reviews the key court decisions that define what options are available for regulation of political speech made independent of candidates. The public comments from 2020 centered chiefly around this issue. In recent legislative sessions language similar to the Board's recommendation regarding the definition of independent expenditures has been found in bills introduced in both chambers. This year language that would classify communications that do not use words of express advocacy as independent expenditures is found in House File 9.

In 2019 the Board's recommendations (policy and technical) were not introduced as a bill in either body, and with one exception, the recommendations were not incorporated into any other proposed legislation.<sup>2</sup> In 2020 the pandemic cut short the opportunity to have discussions with legislators about the proposals, but there had been little response to the proposals when the session basically came to an end in March.

### **Economic Interest Statement Policy Recommendations Overview**

- **Establish a two-tiered disclosure system.** The disclosure required for soil and water conservation district supervisors and members of watershed districts and watershed management organizations is excessive given their limited authority. In a two-tiered system, members of these boards and districts would disclose their occupation, sources of compensation and non-homesteaded property owned in the state. The members of these boards and districts would not disclose securities or professional or business categories.
- **Require public and local officials to disclose direct interests in government contracts.** This new disclosure would consist of a listing of any contract, professional license, lease, franchise, or permit issued by a state agency or any political subdivision of the state to the public official as an individual, or to any business in which the public official has an ownership interest of at least 25 percent.
- **Expand EIS disclosure to include beneficial interests that may create a conflict of interest.** The Board believes that the EIS program provides the public with disclosure of assets held directly by an official that may create a conflict of interest when conducting public business. However, the EIS program does not require disclosure of assets owned by another even when those assets will provide direct financial benefit to the public official because of a contract or relationship between the public official and the owner of the asset. To address this gap in disclosure the Board recommends expanding disclosure to include the official's "beneficial interest" in assets owned by another.

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<sup>2</sup> Language similar to the Board's recommendation to modify the definition of express advocacy was added to the House omnibus elections bill. The Senate did not hear any campaign finance or election administration bills in 2019.

The draft statutory language for the recommendations is attached to this memo.

### **Campaign Finance Program Recommendations Overview**

- **Provide regulation of contributions made with bitcoins and other virtual currency.** During 2018 staff received calls from campaign committees asking for guidance on accepting and reporting contributions made with bitcoins and other virtual currencies. Chapter 10A does not provide any guidance on the subject, other than to view the virtual currency as something of value. The Board's proposal will provide a statutory basis for disclosing and regulating the conversion of virtual currency into United States currency.
- **Redefine independent expenditures to include both express advocacy and words that are the functional equivalent.** Under current statute an independent expenditure must use words of express advocacy (vote for, elect, support, cast your ballot for, Smith for House, vote against, defeat, reject, or very similar words) to state support of, or opposition to, a candidate. A communication that avoid words of express advocacy, but which nonetheless has the clear purpose of influencing voting in Minnesota, does not in many cases need to be reported to the Board. The Board proposal expands the definition of independent expenditure to include communications that do not use the eight magic words but could have no reasonable purpose other than to influence voting in Minnesota.

The draft statutory language for the recommendations is attached to this memo.

### **Attachments**

2020 Public comments

2019 Memo on substantial equivalent of express advocacy

Statutory language for EIS and campaign finance policy recommendations

**From:** [George Beck](#)  
**To:** [Sigurdson, Jeff \(CFB\)](#)  
**Subject:** Board meeting on Feb. 3, 2121  
**Date:** Friday, January 29, 2021 3:35:02 PM

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Do not select links or open attachments unless verified. Report all suspicious emails to Minnesota IT Services Security Operations Center.

Dear Executive Director Sigurdson:

The question of the appropriate definition for "expressly advocating is once again before the Campaign Finance Board. In the past the Board has recommended expansion of the definition, at least once unanimously.

In looking over the materials for this meeting, I reviewed again a letter from Americans for Prosperity (the Koch funded organization) that asked the Campaign Finance Board not to recommend expansion of the definition of "expressly advocating" to encompass contributions that do not use certain explicit words in its communication.

It suggests that the Board would be incapable of interpreting the new definition because its too vague. However, the 20 other states that have adopted this new definition have successfully applied it in their work.

AFP claims a right of privacy for contributors, but when we enter the political arena with contributions to support candidates their is no right to privacy because voters have a right to know and need to know who is supporting candidates.

AFP also suggests that this change undermines free speech. However, this change does not keep anyone from speaking, but only asks, "who is speaking?"

This is a question of disclosure and transparency. Opponents continue to support dark money in Minnesota in order to hide their identity from voters. *Citizens United* cited disclosure as a safeguard against big contributions. Please recommend that disclosure be the law in our state.

Thank you.

George Beck  
Clean Elections Minnesota  
952-446-7261



# MINNESOTA CAMPAIGN FINANCE BOARD

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**Date:** January 27, 2021

**To:** Board members

**From:** Andrew Olson, Legal/Management Analyst

**Telephone:** 651-539-1190

**Re:** Americans for Prosperity Foundation v. Becerra, [903 F.3d 1000](#) (9<sup>th</sup> Cir. 2018)

## **California's Requirement that 501(c)(3) Organizations Provide List of Large Donors**

Most 501(c) organizations are required to file Form 990 and its accompanying schedules<sup>1</sup> annually with the Internal Revenue Service (IRS). Those that receive contributions totaling at least \$5,000 from a single contributor typically must file Schedule B.<sup>2</sup> That schedule generally consists of a list with the name and address of, and amount contributed by, each person that contributed at least \$5,000. However, an organization that satisfies the IRS's 1/3 public support test<sup>3</sup> is only required to include each contributor who gave more than \$5,000 and whose contributions comprised more than 2% of the organization's total contributions.

California requires charitable organizations that solicit contributions in California to register with the state attorney general<sup>4</sup> and generally requires them to annually file with the state a copy of the Form 990 they filed with the IRS, including Schedule B.<sup>5</sup> The Schedule Bs filed by each charitable organization were generally shielded from public disclosure pursuant to an internal policy of California's Office of the Attorney General and that policy was codified as a regulation in 2016.<sup>6</sup> Some 501(c)(3) organizations declined to provide their Schedule Bs, withheld certain pages, or redacted them to exclude donor names and addresses and that practice continued without enforcement action being taken for a decade.<sup>7</sup> Starting in 2010 California's Office of the

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<sup>1</sup> [irs.gov/forms-pubs/about-form-990](https://irs.gov/forms-pubs/about-form-990)

<sup>2</sup> [irs.gov/pub/irs-pdf/f990ezb.pdf](https://irs.gov/pub/irs-pdf/f990ezb.pdf)

<sup>3</sup> Generally an organization satisfies the 1/3 public support test if at least 1/3 of the value of its contributions is comprised of contributions given by governmental units or public charities and contributions given by contributors who each gave less than 2% of the organization's total support.

<sup>4</sup> See *Cal. Gov't Code § 12580 et seq.* and *Cal. Code Regs. tit. 11, § 300 et seq.*

<sup>5</sup> *Cal. Code Regs. tit. 11, § 301.*

<sup>6</sup> *Americans for Prosperity Found. v. Becerra and Thomas More Law Center v. Becerra, Combined Brief in Opposition to Petitions for Writs of Certiorari 4*; *Cal. Code Regs. tit. 11, § 310(b).*

<sup>7</sup> *Ctr. for Competitive Politics v. Harris, 784 F.3d 1307, 1311 (9th Cir. 2015)*, *cert. denied* 577 U.S. 975 (2015); *Americans for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1052 (C.D. Cal. 2016)*, *rev'd and vacated sub nom. Americans for Prosperity Found. v. Becerra, 903 F.3d 1000 (9th Cir. 2018).*

Attorney General gradually began demanding that 501(c)(3) organizations provide unredacted copies of their schedule Bs.<sup>8</sup>

### **Federal District Court and Ninth Circuit Court of Appeals Decisions**

In March 2014 a 501(c)(3) organization, the Center for Competitive Politics (CCP), filed a lawsuit in federal court challenging on its face the requirement to provide an unredacted Schedule B, asserting that the requirement is preempted by federal law and violates the First Amendment's guarantee of freedom of association. In May 2014 a federal district court denied the CCP's motion for a preliminary injunction and a year later a Ninth Circuit Court of Appeals panel affirmed the district court.<sup>9</sup> The Ninth Circuit Court of Appeals rejected the CCP's preemption argument and applied exacting (intermediate) scrutiny to the challenged regulation, concluding that the requirement is substantially related to a sufficiently important governmental interest. The Ninth Circuit Court of Appeals noted that the CCP failed to show any actual burden on its freedom of association and rejected the CCP's facial challenge, but left the door open to a future as-applied challenge if the CCP could demonstrate "a reasonable probability that the compelled disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."<sup>10</sup>

In December 2014 and April 2015, two 501(c)(3) organizations, the Americans for Prosperity Foundation (AFPF) and the Thomas More Law Center (TMLC), filed separate lawsuits in federal court challenging the requirement both on its face and as applied to each plaintiff as violative of the guarantees of freedom of speech and association under the First Amendment. The district court granted preliminary injunctions barring California from demanding that the plaintiffs produce copies of their Schedule Bs during the pendency of their lawsuits. However, a Ninth Circuit Court of Appeals panel vacated those injunctions in December 2015.<sup>11</sup>

After the Ninth Circuit Court of Appeals published its decision in the appeal brought by the CCP, the district court focused solely on the as-applied challenges brought by the AFPF and the TMLC and applied exacting (intermediate) scrutiny.<sup>12</sup> In April 2016, following a bench trial, the district court held that the requirement violated the AFPF's First Amendment rights and imposed a permanent injunction.<sup>13</sup> The court reached the same conclusion and ordered the same relief with respect to the TMLC in November 2016.<sup>14</sup> In doing so, the district court noted that

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<sup>8</sup> [Americans for Prosperity Found. v. Becerra and Thomas More Law Center v. Becerra, Combined Brief in Opposition to Petitions for Writs of Certiorari 4-5](#). The State of California explained this change by stating that prior to 2010, it lacked sufficient staff to address deficient filings.

<sup>9</sup> [Ctr. for Competitive Politics v. Harris, 784 F.3d 1307, 1317 \(9th Cir. 2015\)](#), *cert. denied* 577 U.S. 975 (2015).

<sup>10</sup> *Id.* at 1317 (quoting [McConnell v. Fed. Election Comm'n, 540 U.S. 93, 198 \(2010\)](#) and [Buckley v. Valeo, 424 U.S. 1, 74 \(1976\)](#)) (internal brackets omitted).

<sup>11</sup> [Americans for Prosperity Found. v. Harris, 809 F.3d 536, 538 \(9th Cir. 2015\)](#).

<sup>12</sup> The lawsuits were each assigned to U.S. District Court Judge Manuel Real. The Ninth Circuit Court of Appeals later held that while the district court stated it was applying exacting scrutiny, the tests applied were those utilized by courts applying strict scrutiny, which was not the appropriate level of scrutiny.

<sup>13</sup> [Americans for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049 \(C.D. Cal. 2016\)](#), *rev'd and vacated sub nom. Americans for Prosperity Found. v. Becerra, 903 F.3d 1000 (9th Cir. 2018).*

<sup>14</sup> [Thomas More Law Ctr. v. Harris, No. 2:15-CV-03048, 2016 WL 6781090, at \\*7 \(C.D. Cal. 2016\)](#), *vacated sub nom. Americans for Prosperity Found. v. Becerra, 903 F.3d 1000 (9th Cir. 2018).*

California's Office of the Attorney General had a significant history of security lapses and Schedule Bs not being properly classified as confidential, increasing the likelihood "that compelled disclosure of Schedule B would chill Plaintiff's First Amendment rights."<sup>15</sup>

The Ninth Circuit Court of Appeals consolidated the two cases for purposes of appeal and reversed the district court in September 2018.<sup>16</sup> The court held that requiring the filing of unredacted Schedule Bs furthered the state's interests of preventing fraud and self-dealing by charitable organizations. This holding mirrors that of the Second Circuit Court of Appeals in 2018, which upheld a similar requirement imposed by New York.<sup>17</sup> The court held that the plaintiffs failed to show that the requirement will have more than a modest impact on contributions. The court stated that "[a]lthough there may be a small group of contributors who are comfortable with disclosure to the IRS, but who would not be comfortable with disclosure to the Attorney General, the evidence does not show that this group exists or, if it does, its magnitude."<sup>18</sup> This holding likewise mirrored that of the Second Circuit Court of Appeals. With respect to the possibility of donors facing reprisals, the court noted that changes had been implemented to prevent future inadvertent disclosures of Schedule Bs and that the risk of future inadvertent disclosures was small. Given that slight risk, the court held that the plaintiffs failed to demonstrate "a reasonable probability that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals."<sup>19</sup> The court therefore held that the AFPF and the TMLC failed to show that the requirement imposed a significant burden on their First Amendment rights.

In March 2019 the Ninth Circuit Court Appeals declined to rehear the cases en banc and five judges dissented from that decision.<sup>20</sup> The dissenting judges forcefully argued that the panel that reversed the district court ignored substantial evidence showing that the state failed to safeguard Schedule Bs from public disclosure and that individuals affiliated with the plaintiffs have been subjected to harassment and threats. The dissenting judges stated that when a plaintiff satisfies its burden showing the likelihood of threats of violence and reprisals, the appropriate level of scrutiny to be applied is heightened to require narrow tailoring of the means

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<sup>15</sup> *Id.* at \*5. The court also stated that "given the history of the Registry completely violating the 'longstanding confidentiality policy,' the Attorney General's assurances that a regulatory codification of the same exact policy will prevent future inadvertent disclosures rings hollow. The Attorney General's steps to attempt to rectify the disclosures and prevent future disclosures is commendable. Yet, trial testimony supported what should be an obvious fact, the Registry cannot assure that documents will not be inadvertently disclosed no matter what steps it takes."

<sup>16</sup> [Americans for Prosperity Found. v. Becerra](#), 903 F.3d 1000 (9th Cir. 2018).

<sup>17</sup> [Citizens United v. Schneiderman](#), 882 F.3d 374 (2d Cir. 2018). New York similarly did not enforce its requirement for years, but began seeking to compel the filing of unredacted Schedule Bs in 2013, which would remain confidential pursuant to a regulation. The New York regulation upheld by the Second Circuit Court of Appeals in 2018 is separate from statutes New York enacted in 2016, requiring public disclosure of some donors to 501(c) organizations. Those statutes were invalidated as facially violative of the First Amendment by a federal district court in 2019, and similar statutes enacted in New Jersey were effectively invalidated pursuant to permanent injunctions entered in three separate federal district court cases in 2020.

<sup>18</sup> *Americans for Prosperity Found.* at 1014.

<sup>19</sup> *Id.* (quoting [John Doe No. 1 v. Reed](#), 561 U.S. 186, 200 (2010) and [Buckley v. Valeo](#), 424 U.S. 1, 74 (1976)).

<sup>20</sup> [Americans for Prosperity Found. v. Becerra](#), 919 F.3d 1177 (9th Cir. 2019) (Ikuta, S., dissenting).

employed by the state.<sup>21</sup> The dissenting judges also concluded that the requirement was not substantially related to the state's asserted interest because "Schedule Bs are rarely used to detect fraud or to enhance enforcement efforts."<sup>22</sup>

## Appeal to United States Supreme Court

Both the AFPP and the TMLC sought review by the United States Supreme Court.<sup>23</sup> In February 2020 the Supreme Court invited the Solicitor General to file a brief in the consolidated cases on behalf of the United States and in January 2021 the Court granted review. An oral argument date has yet to be scheduled. Aside from the fact that the Supreme Court previously denied review of a facial challenge to the same regulation in 2015, the cases are somewhat unique in terms of the number of amicus briefs that have been filed in support of the positions propounded by the AFPP and the TMLC, including those of the United States and the Council on American-Islamic Relations (CAIR).

The AFPP argues in its petition for review that the Ninth Circuit panel should have required narrow tailoring of the mechanism employed by the state, rather than merely requiring a substantial relation between the mechanism and the asserted state interest, because disclosure sought outside of the electoral context does not serve the purposes discussed in campaign finance and referendum petition cases such as *Citizens United v. FEC* and *Doe v. Reed*.<sup>24</sup> CAIR reiterates those arguments in its amicus brief.<sup>25</sup>

The TMLC argues in its petition for review that the Ninth Circuit should have applied strict scrutiny and required narrow tailoring. The TMLC also reasserts its facial challenge to the requirement and argues that the requirement is unconstitutional, as applied to TMLC, under any standard because its supporters have been subjected to harassment and threats and the website of California's attorney general "is so vulnerable to hacks, leaks, and inadvertent disclosures 'that Schedule B information is effectively available for the taking.'"<sup>26</sup>

In its amicus brief the United States, like the AFPP and CAIR, argues that the Ninth Circuit panel should have applied exacting scrutiny and required narrow tailoring.<sup>27</sup> However, the United States offers an additional argument in an attempt to distinguish the disclosure sought by the IRS from the disclosure sought by the State of California. The United States argues that unlike the State of California, the IRS does not compel 501(c) organizations to file Schedule Bs because that disclosure is required as a condition of participating in a "voluntary tax-benefit program—in effect, a governmental subsidy. An organization seeking the subsidy is not, strictly speaking, compelled to disclose its donors, because it always can forgo the governmental benefit."<sup>28</sup>

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<sup>21</sup> *Id.* at 1179.

<sup>22</sup> *Id.* at 1186.

<sup>23</sup> The Supreme Court docket numbers are [19-251](#) (AFPP v. Becerra) and [19-255](#) (TMLC v. Becerra).

<sup>24</sup> [AFPP's Petition for Writ of Certiorari at 22.](#)

<sup>25</sup> [Brief of Amicus Curiae Council on American-Islamic Relations at 4-7.](#)

<sup>26</sup> [TMLC's Petition for Writ of Certiorari at 30](#) (quoting *Americans for Prosperity Found.* at 1183).

<sup>27</sup> [Brief for the United States as Amicus Curiae at 8.](#)

<sup>28</sup> *Id.* at 12.

## Potential Impact on Chapter 10A

Any decision reached by the Court is unlikely to directly impact Chapter 10A, because the tailoring required of disclosure requirements is different depending on whether the disclosure involved serves the informational and anti-corruption interests attendant to elections recognized in *Buckley v. Valeo* and its progeny. Moreover, if the Supreme Court reverses the Ninth Circuit solely with respect to the as-applied challenges of the plaintiffs, the application of the Court's holding is unlikely to be broad enough to impact Chapter 10A.

However, it is possible that an opinion sustaining the TMLC's facial challenge could be written broadly enough to require that disclosure requirements be more narrowly tailored even in the context of campaign finance. It is also possible that the Court could issue an opinion requiring an exemption procedure for those organizations whose donors are likely to face threats of violence or other reprisals due to their association with a recipient organization. If that occurs, the opinion could be informative, if not directly applicable, with respect to Minnesota Statutes section 10A.20, subdivisions 8 and 10. Those provisions establish an exemption procedure for contributors and entire associations if there is clear and convincing evidence that individuals would be exposed to threats of physical coercion or other reprisals as a result of the required disclosure. Finally, it is possible that an opinion could be written broadly enough to have some impact on Minnesota Statutes section 10A.27, subdivisions 13 and 15. Those provisions generally require committees, funds, and party units accepting contributions from unregistered associations to obtain a financial disclosure statement from each contributing association and then provide that disclosure statement to the Board, which is a public document. Under certain circumstances those disclosure statements may include the name and address of a donor to an unregistered association who did not intend for their donation to be used for political purposes, so their associational interests could be similar to those of individual contributors to the AFPF and the TMLC.



**CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD  
February 2021**

**ACTIVE FILES**

Candidate/Treasurer/ Lobbyist	Committee/Agency	Report Missing/ Violation	Late Fee/ Civil Penalty	Referred to AGO	Date S&C Served by Mail	Default Hearing Date	Date Judgment Entered	Case Status
Sandra (Sandi) Blaeser		2018 Public Official Statement of Economic Interest	\$100 LFF and \$1,000 CP	9/11/20				
		2019 Public Official Statement of Economic Interest	\$100 LFF and \$1,000 CP					
Chilah Brown Michele Berger	Brown (Chilah) for Senate	Unfiled 2016 Year- End Report of Receipts and Expenditures	\$1,000 LFF \$1,000 CP	3/6/18	8/10/18 1/8/21			Removed from hold 9/14/20 at Board's request.
		Unpaid late filing fee on 10/31/16 Pre- General Election Report	\$50 LFF					
Alyssa Eichman	Swing Right PAC	Unfiled 2018 Year- End Report of Receipts and Expenditures	\$1,000 LFF \$1,000 CP	10/5/20				
		Late Filing of 2018 Pre-General Report due 10/29/18; filed on 10/30/18	\$50 LFF					
Kelly Gunderson		Candidate Statement of Economic Interest due 6/16/20	\$100 LFF \$1,000CP	9/23/20				

Candidate/Treasurer/ Lobbyist	Committee/Agency	Report Missing/ Violation	Late Fee/ Civil Penalty	Referred to AGO	Date S&C Served by Mail	Default Hearing Date	Date Judgment Entered	Case Status
Marcus Harcus	MN Campaign for Full Legalization	Original Statement of Economic Interest, due 6/16/20	\$100 LFF \$1,000 CP	10/5/20				
		Lobbyist Disbursement Report due 6/15/20	\$1,000 LFF \$1,000 CP					
		Lobbyist Disbursement Report due 1/15/20	\$1,000 LFF \$1,000 CP					
		Late Filing of Lobbyist Disbursement Report due 1/15/19; filed on 6/16/19	\$1,000 LFF					
		Late Filing of Lobbyist Disbursement Report due 6/15/18, filed on 6/27/18	\$200 LFF					
		Annual Lobbyist Principal Report, due 3/16/20	\$1,000 LFF \$1,000 CP					
Beau Hullerman		Candidate Statement of Economic Interest due 6/16/20	\$100 LFF \$1,000CP	9/23/20				
Tim Johnson		Candidate Statement of Economic Interest due 6/16/20	\$100 LFF \$1,000CP	9/11/20				

