

Kaufman Dolowich’s Donor Privacy Case Heard Today by U.S. Supreme Court

(April 26, 2021, Washington, DC) — Kaufman Dolowich & Voluck’s six-year legal battle to protect the First Amendment rights of peaceable assembly and free speech from state deterrence and reprisal is over—except for the outcome.

Today the Supreme Court of the United States heard oral argument in *Thomas More Law Center v. Bonta and the companion case brought by Americans for Prosperity Foundation (AFPF)*. “The case is in the hands of the Supreme Court, which must decide on the constitutional right of anonymous free speech,” said Louie Castoria, partner, Kaufman Dolowich & Voluck (KD). “We hope the court decides that states shouldn’t chill donors’ support by subjecting their private information to government scrutiny and the all-too-real risk of public disclosure and retaliation.”

Castoria filed the case against California’s Attorney General, prevailed at trial and was lead counsel through the Attorney General’s appeal. He was joined for the petition to the Supreme Court by John Bursch of Alliance Defending Freedom, who became lead counsel. Bursch and Castoria attended the argument to the Court today.

“In the last year, we’ve seen how volatile the marketplace of ideas has become, attacking one another, stigmatizing people for their cultures and deeply held beliefs, and assaulting the foundations of our society. This isn’t the time to aid or spread fear of opposing ideas,” said Castoria.

After scores of written briefs by the three parties, the U.S. Solicitor General, and 53 briefs by organizations and individuals supporting one side or the other, and volumes of exhibits and testimony from the two trials and combined appeals, today’s arguments boiled down to 105 minutes of legal arguments, almost all devoted to responding to the Justices’ probing questions.

The stakes are high, not just for Thomas More, AFPF, and California, but for 501(c)(3) nonprofit charities nationwide: must such charities turn over their lists of significant donors to state bureaucracies? If so, they face the threats of governmental misuse and public disclosure of their identities and addresses—whether intentional, mistaken, or by electronic theft. “And,” Castoria noted, “once their names are divulged to cyberspace, donors’ anonymity can never be restored.”

People whom the Thomas More Law Center has represented have faced assassination attempts, death and kidnapping threats, boycotts, public derision and disparagement. Others, represented by the writers of the briefs supporting Thomas More and/or AFPF, have been fired from their jobs, targeted by foreign governments for bodily or financial harm, or “doxed,” that is, became victims of harmful personal information, including falsehoods, spread about them through social media, in attempts to mark them as pariahs.

The “amici” for Thomas More and/or AFPF, as writers of supportive briefs are called, come from across the ideological spectrum, but all agree that donors’ first amendment rights must be protected. They include 22 states that do not require charities to disclose their donors (only four states do), constitutional scholars, the American Civil Liberties Union (ACLU), National Association for the Advancement of Colored People (NAACP), Council on American-Islamic Relations, Hispanic Leadership Foundation, Chamber of Commerce of the United States, Electronic Frontiers Foundation, Citizen Power Philanthropy Roundtable, Concerned Women for America, National Association of Manufacturers, and the Nonprofit Alliance Foundation.

“It’s amazing,” Castoria commented. “The wide range of the writers’ beliefs and interests underscores the importance to everyone of free speech and associational advocacy, rights our Founders exercised before enshrining them in the Constitution. State regulators

should treat the First Amendment like the electric third rail, maintaining a respectful distance, only interfering when the government interest is exceptionally strong, and even then, in the least disruptive way possible.”

The Justices’ questions focused on whether donors to all charities would be dissuaded if they knew their identities might be disclosed, and whether donors’ right to privately associate must give way to regulatory interests. Several Justices explored the distinctions between facial (applies to all charities) and as-applied constitutional challenges, which would affect only the two petitioners. One Justice commented that under the Attorney General’s proposed level of deference to the state, no charity could ever prevail in an as-applied challenge. Another commented that the blanket requirement to disclose donor lists is a direct restriction on association and free speech, because nonprofits cannot speak to Californians without first disclosing their donors.

The Attorney General and U.S. Solicitor General conceded that the government’s regulatory means must fit with the ends it advances. At trial in the Law Center’s case the record was clear that the state had made no effort to reconcile, let alone fit, the ends to the means.

KD is proud to have the opportunity to advocate for our client in this momentous case.