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NOTE

AMERICANS FOR PROSPERITY FOUNDATION V. BONTA: THE DIRE CONSEQUENCES OF ATTACKING A MAJOR SOLUTION TO DARK MONEY IN POLITICS

LINDSAY HEMMINGER*

Unlimited spending by the super-wealthy dominates the political arena yet operates in the shadows.[1] The last remaining tool used to bring this spending to light is at risk of total extinction.[2] The result is a significant threat to the integrity of United States' democracy.[3]

In *Americans for Prosperity Foundation v. Bonta*,[4] the United States Supreme Court addressed the constitutionality of a California disclosure requirement compelling tax-exempt charities to disclose to the Attorney General's Office Internal Revenue Service ("IRS") forms identifying their major donors.[5] The Court determined that the law was unduly burdensome on First Amendment associational rights, despite the fact that the donor information was kept confidential from the public and any identified harms were minimal and wholly unrelated to the disclosure regime.[6] Therefore, the Court incorrectly held that the disclosure requirement was facially unconstitutional.[7] In doing so, the Court rejected its own precedent and inappropriately applied an exacting scrutiny standard that required the disclosure regime be narrowly tailored to the government interest it

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1. *See infra* Section IV.D.
2. *See infra* Part IV.
3. *See infra* Section IV.D.
4. 141 S. Ct. 2373 (2021).
5. *Id.* at 2380.
6. *See infra* Section IV.C.
7. *Bonta*, 141 S. Ct. at 2389.

promotes.[8] Additionally, the Court turned its back on its own proclamations about the importance of preserving disclosure laws in the absence of significant First Amendment burdens, and it disregarded the significant protections that disclosure requirements provide in a multitude of contexts.[9] By viewing this case in a vacuum, the Court ignored the greater consequences that its decision will have on disclosure laws for organizations that are permitted to engage in political activity.[10] Without these laws, the transparency of large amounts of political spending is severely limited, worsening the decline of public trust in the electoral process.[11]

After summarizing the law surrounding First Amendment rights and disclosure laws, this Note supports the dissent's call for a return to precedent when applying exacting scrutiny to disclosure requirements.[12] Courts should apply an exacting scrutiny standard that requires the plaintiff to show that there is a substantial relationship between the disclosure law and a sufficiently important government interest.[13] When they apply this standard, they must appropriately weigh the government interests in enacting such laws with harms that actually result from their enforcement.[14] Justice Sotomayor correctly mentioned that, because the Court's holding is not exclusive to disclosure requirements for 501(c)(3) charities, any organization subjected to disclosure laws will likely see the *Bonta* holding as a green light to successfully challenge them.[15] Because the new exacting scrutiny standard is the functional equivalent of strict scrutiny, it will be incredibly difficult for states to prevail in court.[16] However, the dissent failed to acknowledge the breadth of consequences the Court's holding is likely to have on the integrity of United States' elections and the democratic process.[17]

This Note aims to expand on the dissenters' concerns by emphasizing the important role that disclosure laws play in maintaining transparency of big spending in politics.[18] It argues that the uber-wealthy's financial influence on American politics is one of the largest threats to democracy, though it is rarely discussed in the media.[19] This Note recommends that the

8. *Id.* at 2384.
9. *See infra* Section IV.B.
10. *See infra* Section IV.D.
11. *See infra* Section IV.D.
12. *See infra* Section IV.A.
13. *See infra* Section IV.B.
14. *See infra* Section IV.B.
15. *See infra* Section IV.D.
16. *See infra* Section IV.D.
17. *See infra* Section IV.D.
18. *See infra* Section IV.D.
19. *See infra* Section IV.D.

Court return to an exacting scrutiny standard that does not require narrow tailoring, not simply to protect disclosure laws that aim to police charitable fraud, but also to provide states the ability to combat the improper influences of dark money in their elections.[20]

I. THE CASE

California officials conducted investigations into Thomas More Law Center ("the Law Center") and Americans for Prosperity Foundation ("the Foundation"), the petitioners, for unlawful charitable activity.[21] Petitioners are 501(c)(3) organizations that focus on direct issue advocacy.[22] The Law Center was founded to "restore and defend America's Judeo-Christian heritage by represent[ing] people who promote Roman Catholic values, marriage and family matters, freedom from government interference in [religion] and opposition to the imposition of Sharia law within the United States."[23] The Foundation was founded in 1987 to "further[] free enterprise, free society-type issues," and they hold conferences, publish policy papers, and develop educational programs to "promote the benefits of a free market."[24] Since 2001, both organizations had consistently failed to comply with a California requirement to disclose their contributors to the California Attorney General, though they did submit a complete Schedule B[25] with the IRS.[26] The Registry Unit, a faction of the Charitable Trusts Section of the California Department of Justice, is responsible for overseeing the registration and renewal processes of charity organizations.[27] In 2012 and 2013, the Registry Unit informed both organizations of their deficiency in submitting the Schedule B information.[28]

Rather than complying with the Attorney General's demands, the Law Center and the Foundation separately filed suit in the Central District of California.[29] Both organizations contended that the Schedule B requirement was unconstitutional because it burdened their First Amendment right to free

20. *See infra* Part IV.

21. Ams. for Prosperity Found. v. Bonta 141 S. Ct. 2373, 2380 (2021).

22. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1005 (9th Cir. 2018).

23. *Id.* (alterations in original) (internal quotation marks omitted).

24. *Id.*

25. Schedule B to Form 990 "requires organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year" or who have donated "more than 2 percent of an organization's total contributions." *Bonta*, 141 S. Ct. at 2380.

26. *Becerra*, 903 F.3d at 1006.

27. *Id.* at 1005–06.

28. *Id.* at 1006.

29. *Id.*

association by deterring donors from contributing to their organizations.[30] The organizations filed motions for a preliminary injunction, and the district court granted their requests, finding that "they had raised serious questions going to the merits of their cases and demonstrated that the balance of hardships tipped in their favor."[31]

On appeal, the Ninth Circuit reversed the district court's order and remanded the case, holding that it was bound by precedent to reject the organizations' constitutional challenges.[32] The Ninth Circuit applied an exacting scrutiny standard[33] and held that the petitioners failed to show any actual burden on their First Amendment rights as a result of the Attorney General's requirement to collect the Schedule B forms for nonpublic use.[34] Thus, the Ninth Circuit narrowed the injunction, "enjoining the Attorney General . . . from making Schedule B information public" and allowing the collection and usage of the Schedule B forms for enforcement purposes.[35]

On remand, the district court, again, found for the petitioners and granted a permanent injunction prohibiting the Attorney General from collecting the organizations' Schedule Bs.[36] The court applied exacting scrutiny that required narrow tailoring.[37] The court held that, because the Attorney General rarely used Schedule B forms to audit or investigate charities and the State could obtain the information provided on the forms elsewhere, the disclosure requirement "was not narrowly tailored to the State's interest in investigating . . . misconduct."[38] Additionally, the district court found that the disclosure requirements burdened the associational rights of donors because, in both cases, members of the organizations had received threats and harassing calls, and the potential for future retaliation was great if donor or member affiliations became public knowledge.[39] However, it was unclear if the harassment was a direct consequence of donor disclosure, considering the Attorney General's policy was to keep the Schedule B information confidential.[40] Nevertheless, the district court found that the State was not capable of ensuring the confidentiality of the donor information

30. *Id.*

31. *Id.*

32. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2380–81 (2021) (citing Ams. for Prosperity Found. v. Harris, 809 F.3d 536, 538 (9th Cir. 2015) (per curiam)).

33. See *infra* Section II.C for an explanation of the exacting scrutiny standard.

34. *Harris*, 809 F.3d at 538, 542.

35. *Id.* at 543.

36. *Bonta*, 141 S. Ct. at 2381.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

because the Attorney General had mistakenly posted confidential Schedule B information to its website in the past.[41] Despite the fact that California had "codified a policy prohibiting [public] disclosure," the district court found it reasonable that donors and potential donors feared disclosure.[42]

The Ninth Circuit vacated the district court's judgment, holding that the district court erred in applying a narrow tailoring standard.[43] The Ninth Circuit applied an exacting scrutiny standard that required a substantial relationship between the law and a sufficiently important government interest.[44] In doing so, the Ninth Circuit held that the collection of Schedule Bs was necessary to provide efficient and effective investigations into charity misconduct, despite the fact that the Attorney General could obtain Schedule B information by other means.[45] The court also held that the Foundation and the Law Center failed to show that compliance with the requirement would significantly burden donors' associational rights, or, more specifically, "meaningfully deter contributions."[46] Moreover, the Ninth Circuit noted that the risk of public disclosure was slight due to the Attorney General's implementation of stronger protocols to prevent breaches of confidentiality.[47] Thus, the court held that the California law "survive[d] exacting First Amendment scrutiny,"[48] and denied a rehearing en banc.[49] The United States Supreme Court granted certiorari to resolve the issue of whether California's Schedule B disclosure requirement violated the First Amendment right to free association.[50]

II. LEGAL BACKGROUND

The First Amendment, as incorporated by the Fourteenth Amendment of the United States Constitution, protects the right to associate with others.[51] The compelled disclosure of one's affiliation with advocacy groups may constrain freedoms of association in certain circumstances.[52] In *Americans for Prosperity Foundation v. Bonta*, the Supreme Court of the United States applied an exacting scrutiny standard that required narrow tailoring to strike

41. *Id.*
42. *Id.*
43. *Id.*
44. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1008 (9th Cir. 2018).
45. *Id.* at 1011–12.
46. *Id.* at 1019.
47. *Id.* at 1018.
48. *Id.* at 1020.
49. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2382 (2021).
50. *Id.* at 2379.
51. U.S. CONST. amend. I.
52. NAACP v. Alabama *ex rel.* Patterson (NAACP v. Alabama), 357 U.S. 449, 462 (1958).

down a California disclosure requirement that compelled charitable organizations to file copies of their IRS Form 990 and Schedule B documents with the Attorney General.[53] Such documents required the disclosure of "names and addresses of donors who . . . contributed more than $5,000" in any given tax year.[54] Section II.A explores the associational rights vested in the First Amendment.[55] Section II.B discusses the California disclosure law and federal disclosure requirements.[56] Section II.C sets forth the different standards of scrutiny the Court uses to assess the constitutionality of laws and evaluates the application of scrutiny in First Amendment challenges.[57] Lastly, Section II.D evaluates facial challenges to legislative acts.[58]

A. The First Amendment and Associational Rights

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[59] The Court has recognized that the right to freely associate with others is implied in the First Amendment.[60] More specifically, the First Amendment implicitly protects the right to freedom of political association.[61] According to the Supreme Court, the right to free association is "fundamental and highly prized,"[62] and it "need[s] breathing space to survive."[63] This means that laws may not be vague, overbroad, or too burdensome on associational rights.[64] The Court contends that the protection of this right allows for the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[65] Individuals and organizations are protected from governmental actions that discourage the exercise of associational freedoms,

53. *Bonta*, 141 S. Ct. at 2380.

54. *Id.*

55. *See infra* Section II.A.

56. *See infra* Section II.B.

57. *See infra* Section II.C.

58. *See infra* Section II.D.

59. U.S. CONST. amend. I.

60. Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

61. *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958) (holding that the First Amendment protects the "freedom to engage in association for the advancement of beliefs and ideas"); *see also* NAACP v. Button, 371 U.S. 415, 430 (1963) (affirming that the First Amendment protects the right to engage freely in political associations); Kusper v. Pontikes, 414 U.S. 51, 56–57 (1973) (same); Clingman v. Beaver, 544 U.S. 581, 586 (2004) (same); Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 451 (2007) (same).

62. Gibson v. Fl. Legis. Investigation Comm., 372 U.S. 539, 544 (1963).

63. *Button*, 371 U.S. at 433.

64. *Id.*

65. Roth v. United States, 354 U.S. 476, 484 (1957).

even where such actions seem wholly unrelated to constitutionally protected political rights.[66] Revealing political associations by requiring organizations to disclose their donors may constitute a governmental action that stifles First Amendment associational rights.[67] Similarly, requiring individuals to disclose their political ties may also suppress First Amendment rights.[68] Disclosure of associational ties has the potential to deter individuals from exercising political expression and could cause individuals to refrain from contributing to or becoming a member of certain groups and organizations, especially when disclosure subjects him or her to threats, harassment or reprisals.[69] Because First Amendment rights "need breathing space to survive," governments may enact such regulations "only with narrow specificity."[70]

B. Disclosure Requirements

1. Disclosure Requirements Generally

Disclosure requirements come in various forms for various purposes.[71] Though subjected to restraints, states and municipalities may enact laws that require that organizations disclose the identity of its members or its contributors.[72] Federal and state campaign laws may include requirements to disclose contributions made to candidates for federal office,[73] signatory information on referendum petitions,[74] and the identity of any entity responsible for funding electioneering communications.[75] The Court has

66. *NAACP v. Alabama*, 357 U.S. at 461; *see also* Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) ("Freedoms such as [freedom of association] are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.").

67. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).

68. *NAACP v. Alabama*, 357 U.S. at 461; *see also* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 91 (1982) ("The Constitution protects against compelled disclosure of political associations and beliefs. Such disclosures 'can seriously infringe on privacy of association and belief guaranteed by the First Amendment.'" (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam)).

69. *See e.g.*, *NAACP v. Alabama*, 357 U.S. at 461–63 (holding that "[c]ompelled disclosure of membership in an organization engaged in advocacy of particular beliefs" may create a "deterrent effect" on an individual's freedom to exercise his or her "constitutionally protected right of association").

70. NAACP v. Button, 371 U.S. 415, 433 (1963).

71. *See infra* notes 72–96 and accompanying text.

72. *See* Ctr. for Competitive Pols. v. Harris, 784 F.3d 1307, 1310 (9th Cir. 2015) (holding that California's disclosure law requiring organizations to disclose donor names to the Attorney General did not violate the First Amendment).

73. Buckley v. Valeo, 424 U.S. 1, 84 (1976) (per curiam).

74. Doe v. Reed, 561 U.S. 186, 192 (2010).

75. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010).

identified several governmental interests in the enactment of disclosure laws.[76] For example, states enact disclosure laws that inform the public of large contributions with the goal of deterring corruption and "avoid[ing] the appearance of corruption."[77] Additionally, disclosure laws are used for recordkeeping and reporting and serve as a means of "gathering the data necessary to detect violations of the contribution limitations [set forth by law]."[78]

A state may also wish to promote transparency among the electorate and inform them as to where political campaign money originates and how a candidate spends the funds.[79] The Supreme Court highlighted this point in *Citizens United v. Federal Election Commission*.[80] That case grappled with a challenge to the Bipartisan Campaign Reform Act of 2002,[81] which prohibited corporations and unions from using general funds to make direct contributions to political candidates or independent expenditures that advocated for the election or defeat of a candidate through any form of media.[82] However, corporations and unions were allowed to establish "'separate segregated fund[s]'" known as political action committees ("PACs") through which they could fund electioneering communications.[83] PACs could receive donations from stockholders and employees of the corporation or members of the union.[84] Citizens United planned to air a movie that criticized Hillary Clinton ahead of the 2008 election but feared that the film and the advertisements would violate the Act.[85] Citizens United alleged that the ban on electoral spending infringed on their First Amendment right to political speech, while the Government argued that limiting corporate political speech through spending restrictions prevented corruption.[86] The Court held that the Government had no constitutional basis to limit corporate independent expenditures in elections and invalidated Section 441b.[87] The Government is not permitted to suppress political speech by imposing limits on outside spending on political campaigns.[88] Despite removing the

76. *Buckley*, 424 U.S. at 66–68.

77. *Id.*

78. *Id.* at 67–68.

79. *Id.* at 66.

80. 558 U.S. 310, 368 (2010).

81. 2 U.S.C. § 441b (2002).

82. *Citizens United*, 558 U.S. at 366.

83. *Id.* at 321. Electioneering communications include political advertisements. 2 U.S.C. § 441b.

84. *Citizens United*, 558 U.S. at 321.

85. *Id.*

86. *Id.* at 356.

87. *Id.* at 365.

88. *Id.*

limitations on corporate election spending, the Court acknowledged that disclosure requirements were imperative to ensuring the integrity and transparency of that spending.[89] The Court assured that "prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[90] More specifically, disclosure laws allow citizens to "see whether elected officials are in the pocket of so-called moneyed interests."[91]

Congress has also considered the importance of maintaining transparency in political spending through disclosure requirements.[92] Congressman John Sarbanes, who represents Maryland's Third District, introduced the For the People Act in January of 2021.[93] The bill would require any corporation, union, nonprofit, or similar organization spending more than $10,000 per election cycle to disclose all donors who contributed at least $10,000.[94] Additionally, the bill would require these organizations to disclose all campaign-related disbursements above $1,000, the name of the candidate supported or opposed by the disbursement, and a certification that the spending was not coordinated with any candidate.[95] Organizations could refrain from disclosing donor information if disclosure would subject the donor to serious threats of harassment or reprisal.[96] The Act passed in the House of Representatives on March 3, 2021, and it awaits approval in the Senate.[97] As of August 11, 2021, the bill has been placed on the Senate Legislative Calendar at number 123.[98]

2. Federal Disclosure Requirements

Federal disclosure requirements date back to 1910 when Congress first enacted a law requiring political campaign committees and "organizations operating to influence congressional elections in two or more States[] to

89. *Id.* at 370–71.

90. *Id.* at 370.

91. *Id.* (internal quotation marks omitted) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 259 (2003)) .

92. *See infra* notes 93–98 and accompanying text.

93. For the People Act of 2021, H.R. 1, 117th Cong. (2021).

94. *Id.* § 4111.

95. *Id.*

96. *Id.*

97. *H.R.1 – For the People Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/1/text (last visited Feb. 23, 2022).

98. *S.1 – For the People Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/senate-bill/1 (last visited Feb. 23, 2022).

disclose" the identities of all donors who contributed $100 or more.[99] Since then, Congress has expanded disclosure requirements to increase public transparency of campaign contributions.[100]

Federal disclosure requirements apply differently depending on an entity's tax status.[101] The Internal Revenue Service (IRS) applies different rules to individuals; businesses; the self-employed; charities; nonprofits; international taxpayers; government liaisons; federal, state, or local governments; and Indian tribal governments.[102] Charities and organizations are further categorized: Charitable organizations, churches and religious organizations, and private foundations most often qualify for tax-exempt status under Section 501(c)(3),[103] while political organizations are nonexempt entities subject to Section 527.[104] Section 501(c)(3) organizations are "prohibited from directly or indirectly participating in . . . political campaign[s].[105] These organizations may only conduct election-related activities in a non-partisan manner.[106] Social welfare organizations are also tax-exempt, but these organizations may engage in some political activities such as lobbying or political campaign activities, as long as that is not their primary activity.[107]

Tax-exempt organizations, nonexempt charitable trusts, and Section 527 political organizations must submit a Form 990 to the IRS.[108] Form 990 contains information about an organization's mission, leadership, finances, and contributions, but it does not ask for names of contributors or members.[109] An organization's completed Form 990 is generally available for public inspection as required by Section 6104.[110] Organizations that have

99. Buckley v. Valeo, 424 U.S. 1, 61 (1976) (per curiam).

100. *See* 52 U.S.C. §§ 30101–30146 (requiring political organizations to disclose donor and expenditure information in an array of circumstances).

101. *See infra* notes 102–118 and accompanying text.

102. *File*, INTERNAL REVENUE SERV. (July 14, 2021), https://www.irs.gov/filing.

103. 26 U.S.C. § 501(c)(3).

104. *Id.* § 527; *Exempt Organization Types*, INTERNAL REVENUE SERV. (June 1, 2021), https://www.irs.gov/charities-non-profits/exempt-organization-types.

105. *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax-Exempt Organizations*, INTERNAL REVENUE SERV. (Sept. 23, 2021), https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations.

106. *Id.*

107. *Social Welfare Organizations*, INTERNAL REVENUE SERV. (Sept. 7, 2021), https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations.

108. *Instructions for Form 990 Return of Organization Exempt from Income Tax (2020)*, INTERNAL REVENUE SERV. (Jan. 27, 2021), https://www.irs.gov/instructions/i990.

109. U.S. DEP'T OF TREAS., INTERNAL REVENUE SERV., FORM 990 (2021), https://www.irs.gov/pub/irs-pdf/f990.pdf.

110. 26 U.S.C. § 6104.

"over $1,500 of taxable interest or ordinary dividends" are also required to submit a Schedule B or Form 1040.[111] Schedule B requires 501(c)(3) organizations to disclose to the IRS the names and addresses of all donors who have contributed $5,000 or more during the taxable year if the amount exceeds two percent of the total contributions received by the organization during that year.[112] However, a tax-exempt organization under 501(c)(3) is not required to *publicly* disclose "the names or addresses of its contributors" on its annual return, including in its Schedule B.[113] This does not apply to private foundations under Section 509[114] or political organizations under Section 527,[115] which include political parties, campaign committees of candidates for federal, state or local office, and political action committees.[116] Political organizations must make the names of any person that contributes $200 or more in a given calendar available to the public.[117] Section 501(c)(4) social welfare organizations, on the other hand, are not required to disclose the names of significant donors on their Schedule B to their Form 990, despite their ability to engage in some political activity.[118]

3. California Disclosure Laws

California enacted a law that provided the Attorney General with the authority to "establish and maintain a register of charitable corporations" and "conduct whatever investigation is necessary."[119] To assist in maintaining a register, the law required that every charitable organization file "an initial registration form, under oath, setting forth information and attaching documents prescribed in accordance with rules and regulations of the

111. *About Schedule B (Form 1040), Interest and Ordinary Dividends*, INTERNAL REVENUE SERV. (Aug. 23, 2021), https://www.irs.gov/forms-pubs/about-schedule-b-form-1040.

112. U.S. DEP'T TREAS., INTERNAL REVENUE SERV., SCHEDULE B (2021), https://www.irs.gov/pub/irs-pdf/f990ezb.pdf; 26 C.F.R. §§ 1.6033-2(a)(2)(ii)(f), 1.6033-2(a)(2)(iii) (2020).

113. *Public Disclosure and Availability of Exempt Organizations Returns and Applications: Contributors' Identities Not Subject to Disclosure*, INTERNAL REVENUE SERV. (Sep. 7, 2021), https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organizations-returns-and-applications-contributors-identities-not-subject-to-disclosure [hereinafter *Public Disclosure of Exempt Organizations*].

114. 26 U.S.C. § 509.

115. *Id.* § 527; *Public Disclosure of Exempt Organizations*, *supra* note 113.

116. *Tax Information for Political Organizations*, INTERNAL REVENUE SERV. (Mar. 19, 2021), https://www.irs.gov/charities-non-profits/political-organizations.

117. *Public Disclosure of Exempt Organizations*, *supra* note 113.

118. Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31959, 31959–69 (May 28, 2020) (to be codified at 26 C.F.R. pts. 1, 56).

119. CAL. GOV'T CODE § 12584 (West 2018).

Attorney General."[120] The Attorney General was authorized to adopt and enforce rules and regulations regarding the registration forms.[121] Charitable organizations were required to file periodic written reports that included information about their charitable assets and administrative procedures.[122] Pursuant to this authority, the Attorney General required that every tax-exempt charitable corporation report IRS Form 990 with all attachments and schedules in the same form as filed with the IRS.[123]

C. Standard of Scrutiny in Challenges of Disclosure Laws

1. Determining the Appropriate Standard

In the 1958 case of *National Association of the Advancement of Colored People v. Alabama ex rel. Patterson* ("*NAACP v. Alabama*"),[124] the Supreme Court confronted a First Amendment challenge to a law requiring charitable organizations to publicly disclose the names of all its members, but it did not specify which standard of review should apply in such cases.[125] The Court simply stated that "state action which may have the effect of curtailing the freedom to associate is subject to the *closest* scrutiny."[126]

When a plaintiff challenges a law, the lowest level of scrutiny that a Court may apply is the rational basis test.[127] Under the rational basis test, a law is constitutional so long as a rational person might believe the law is more often than not rational, or, the instances where the law is rational are more important than the instances where it is not.[128] However, when legislation is inconsistent with the plain text of the Constitution, interferes with democratic or political processes, or violates the rights of "discreet and insular minorities," the Court is inclined to ratchet up the scrutiny.[129] In some instances, the Court may apply an intermediate scrutiny, which requires that the government establish that the law serves an important state interest that

120. *Id.* §12585(a).

121. *Id.* §12585(b).

122. *Id.* §12586(a).

123. CAL. CODE. REGS., tit. 11 § 301 (2020).

124. 357 U.S. 449 (1958).

125. *See id.* at 451.

126. *Id.* at 460–61 (emphasis added).

127. *See* Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955) (analyzing whether the regulation had a "rational relation" to an articulated objective).

128. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973) (stating that a regulation will survive rational basis scrutiny only if it "rationally furthers some legitimate, articulated state purpose"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

129. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

is "substantially related" to those objectives.[130] In other circumstances, the Court may deem it necessary to apply strict scrutiny, a more demanding standard, which requires the government to show that the law serves a compelling government interest and is a necessary or "narrowly tailored" means of achieving its goals.[131]

When confronting a First Amendment challenge, courts apply different levels of scrutiny depending on whether the regulation is content-neutral or content-based.[132] Content-based laws, which "single[] out specific subject matter for differential treatment,"[133] are subject to strict scrutiny.[134] Viewpoint-based laws, which attempt to regulate one side of a political controversy, are also subject to strict scrutiny.[135] Where a regulation is based on the content of the speech or on the viewpoint of the speaker, the Court scrutinizes it more carefully "to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'"[136] On the other hand, content-neutral laws are typically subject to an intermediate level of scrutiny because they impose only "an incidental burden on speech."[137]

In order to survive a First Amendment challenge under strict scrutiny, the "Government [must] prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[138] To achieve narrow tailoring, the government must adopt "the least restrictive means [necessary to achieve] a compelling state interest."[139] This requirement

130. United States v. Virginia, 518 U.S. 515, 532–33 (1996).

131. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (applying strict scrutiny to racial classifications, which "are constitutional only if they are narrowly tailored to further compelling governmental interests"); Johnson v. California, 542 U.S. 499, 505 (2005) (same); Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (same).

132. Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020) ("The Court's precedents allow the government to 'constitutionally impose reasonable time, place, and manner regulations' on speech, but the precedents restrict the government from discriminating 'in the regulation of expression on the basis of the content of that expression.'" (quoting Hudgens v. NLRB, 424 U.S. 507, 520 (1976))).

133. Reed v. Town of Gilbert, 576 U.S. 155, 169 (2015).

134. *Barr*, 140 S. Ct. at 2346.

135. Boos v. Barry, 485 U.S. 312, 319 (1988).

136. Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980) (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring)).

137. Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 661–62 (1994).

138. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)). "Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* (internal quotation marks omitted) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007)) (applying strict scrutiny to '[l]aws that burden political speech").

139. McCullen v. Coakley, 573 U.S. 464, 478 (2014).

prevents a statute from sweeping too broadly and inhibiting protected freedoms outside of the public interest it seeks to meet.[140] Alternatively, intermediate scrutiny in the First Amendment context requires that the law further an important or substantial government interest that is not related to the suppression of free expression and is narrowly tailored such that the regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests."[141] Intermediate scrutiny is a slightly less burdensome standard to meet, as it does not require a state to adopt the least restrictive law to achieve its goals.[142]

Since *NAACP v. Alabama*, the Court has consistently applied what is known as exacting scrutiny to First Amendment associational challenges, a standard that is often considered less restrictive than strict scrutiny but slightly more restrictive than intermediate scrutiny.[143] In *Buckley v. Valeo*,[144] the Court addressed a challenge to a law requiring election candidates to publicly disclose contributions and expenditures above a certain threshold.[145] The Court applied exacting scrutiny and required the government to show more than a legitimate governmental interest.[146] There must be a "relevant correlation" or "substantial relation" between the governmental interest and the information that the government requires an organization to disclose.[147] The Court reinforced this standard in *Doe v. Reed*,[148] citing to its precedential cases considering First Amendment challenges to disclosure requirements in the electoral context.[149] The Court made clear that, to survive this scrutiny,

140. *See* Frisby v. Schultz, 487 U.S. 474, 485 (1988) ("A statute is narrowly tailored if it targets and eliminates no more than the exact source of 'evil' it seeks to remedy." (quoting City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 808–10 (1984))).

141. *Turner Broad. Sys.*, 512 U.S. at 662 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

142. *Id.*

143. *See* Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam) ("Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny."); Doe v. Reed, 561 U.S. 186, 196 (2010) ("We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed 'exacting scrutiny.'"); Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008) ("[W]e have closely scrutinized disclosure requirements . . . . [T]here must be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed, and the governmental interest must survive exacting scrutiny." (quoting *Buckley*, 424 U.S. at 64) (internal quotation marks omitted).

144. 424 U.S. 1 (1976).

145. *Id.* at 7.

146. *Id.* at 64.

147. *Id.*

148. 561 U.S. 186 (2010).

149. *Id.* at 196 (citing *Buckley*, 424 U.S. at 64; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008); Buckley v. Am. Const. L. Found., Inc., 525 U.S. 182, 204 (1999)).

"the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."[150]

In First Amendment challenges of laws that restrict political or professional speech, the Court has applied a form of exacting scrutiny that also requires that the restriction be narrowly tailored, a more stringent standard to meet.[151] The Court also required narrow tailoring in *McCutcheon v. Federal Election Commission*,[152] which involved laws limiting contributions to political candidates.[153] However, the Court has explicitly stated that "disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities'[154] and 'do not prevent anyone from speaking.'"[155] Thus, the Court has historically refrained from requiring narrow tailoring for disclosure requirements.[156] Despite these precedents, there is an existing contention as to whether laws compelling disclosure of an organizations' members or contributors requires narrow tailoring.[157]

2. Application of Exacting Scrutiny to Disclosure Laws

When applying the exacting scrutiny standard to associational challenges to determine a law's constitutionality, the Court engages in a balancing of governmental interests and the actual burden on First Amendment.[158] In *NAACP v. Alabama*, the challenged law required the

150. *Id.* (quoting *Davis*, 554 U.S. at 744).

151. Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015); *see, e.g.*, Nat'l Inst. Family & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) ("Content-based regulations [that] 'target speech based on its communicative content' . . . 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015))); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) ("When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.").

152. 572 U.S. 185 (2014).

153. *Id.* at 218.

154. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010) (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) (per curiam)).

155. *Id.* (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003)).

156. *See id.* at 366–67 ("The Court has subjected these requirements to 'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." (quoting *Buckley*, 424 U.S. at 64, 66)).

157. *Compare* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383–84 (2021) (stating that exacting scrutiny always requires narrow tailoring), *with* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2398 (2021) (Sotomayor, J., dissenting) (noting that exacting scrutiny does not *necessarily* require narrow tailoring).

158. *See* Doe v. Reed, 561 U.S. 186, 196 (2010) ("To withstand [exacting] scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" (quoting Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008))).

National Association for the Advancement of Colored People ("NAACP") to disclose the names of its members to the Alabama Attorney General, which exposed them to "economic reprisal, loss of employment, threat of physical coercion," and other forms of public hostility.[159] The Court reasonably concluded that the threats could prompt members to disassociate from the NAACP and dissuade others from joining, and these harms were not outweighed by any state interest in compelling disclosure.[160] Similarly, in *Shelton v. Tucker*,[161] the disclosure requirement compelled all public school teachers to submit a list of every organization to which they belonged or contributed to in the state of Arkansas, which included the NAACP.[162] The Court first established that the state had a right to "investigate the competence and fitness of those" it hired as teachers, and thus, there was a substantially relevant correlation between the governmental interest and the law.[163] Next, the Court evaluated the disclosure law's impairment on teachers' associational rights and deemed that the burden was significant because the disclosure was public and used to make hiring decisions each year.[164] Because the Court determined that the harms were so substantial in this case, it required the state to prove that the law was narrowly tailored to the interest it sought to promote.[165] The Supreme Court has made clear that an evaluation of the burdens and harms on personal liberties that result from the challenged law is vital to the exacting scrutiny analysis.[166]

D. Appropriateness of Facial Challenges to Disclosure Regimes

A facial challenge to a congressional act requires that the challenger show "that no set of circumstances exists under which the [a]ct would be valid."[167] A court may invalidate a law that abridges First Amendment freedoms if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[168] However, courts are hesitant to rule that a law is facially unconstitutional because "[c]laims of facial invalidity often rest on speculation."[169] As a result, courts

159. 357 U.S. 449, 451, 462 (1958).
160. *Id.* at 463.
161. 364 U.S. 479 (1960).
162. *Id.* at 480–81.
163. *Id.* at 485.
164. *Id.* at 485–86.
165. *Id.* at 488.
166. *Id.* at 488.
167. United States v. Salerno, 481 U.S. 739, 745 (1987).
168. United States v. Stevens, 559 U.S. 460, 473 (2010) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008)).
169. *Wash. State Grange*, 552 U.S. at 450.

run the risk of prematurely interpreting statutes without a factual record to prove that future applications will present the same First Amendment issues.[170] Additionally, the Supreme Court has noted that facial challenges undermine "the fundamental principle of judicial restraint."[171] Facial challenges also threaten ideals of federalism—they undermine the democratic process in which the people elect their representatives to create laws "in a manner consistent with the Constitution."[172] Thus, a court should not anticipate future questions of constitutional law nor should it rule outside the scope of the specific facts in front of it.[173]

III. THE COURT'S REASONING

Writing for the majority, Chief Justice Roberts explained that California's disclosure law, which demanded the submission of Schedule B forms to the Attorney General, was facially unconstitutional.[174] In reaching its conclusion, the Court created a new version of the exacting scrutiny standard that required narrow tailoring and determined that, in every application, the disclosure regime could not stand.[175] Justice Alito and Justice Thomas concurred in the judgment.[176] Writing for the dissent, Justice Sotomayor criticized the majority's departure from precedent when it set a new standard for disclosure requirements.[177] The dissent argued that the disclosure regime was constitutional, even under the restraints of the majority's exacting scrutiny standard, and, thus, should have survived both the as-applied and facial challenges.[178]

First, the Court addressed the Law Center's argument that a strict scrutiny standard should apply because it would better protect the associational rights of charities, while the exacting scrutiny standard is reserved for the electoral context.[179] Based on its interpretation of precedent, the Court decided that exacting scrutiny did apply to First Amendment challenges to compelled disclosure and was not exclusively reserved for electoral disclosure laws.[180] The Law Center and the Foundation argued that even if exacting scrutiny applied, the standard should incorporate the least

170. *Id.* (citing Sabri v. United States, 541 U.S. 600, 609 (2004)).
171. *Id.* at 450.
172. *Id.* at 451.
173. *Id.* at 450–51.
174. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2389 (2021).
175. *Id.* at 2384, 2387.
176. *Id.* at 2391–92 (Alito, J., concurring); *id.* at 2389–91 (Thomas, J., concurring).
177. *Id.* at 2392 (Sotomayor, J., dissenting).
178. *Id.* at 2392, 2401.
179. *Id.* at 2383 (majority opinion).
180. *Id.*

restrictive means test.[181] To the contrary, the Attorney General argued that exacting scrutiny should not require any more tailoring than the substantial relationship test required.[182] The Court determined that exacting scrutiny does not require that the disclosure requirement be the least restrictive means to achieve the desired goal.[183] However, the requirement must be narrowly tailored to the government's declared interest in order to account for the potential First Amendment harms that could result from requiring a charitable organization to disclose its donors.[184]

The Foundation and the Law Center's primary argument was that the obligation to disclose Schedule Bs to the Attorney General was facially unconstitutional and unconstitutional as applied to them.[185] Regarding the as-applied claim, the Court explained that, under the exacting scrutiny standard, the disclosure requirement must have a substantial relation to a sufficiently important government interest and must be narrowly tailored to the interest it promotes.[186] The Court reasoned that, although protecting the public from charitable fraud was a significant government interest, the disclosure rule did not meet the narrow tailoring requirement because Schedule B collection did not serve an integral part in "investigative, regulatory or enforcement efforts."[187] The Attorney General argued that alternatives to obtain Schedule B information were insufficient and ineffective.[188] However, the Court noted that the record showed that California had not considered any of the plentiful alternatives to disclosure requirements.[189] Because it seemed that the objective of the disclosure requirement was to ease administrative duties rather than to initiate investigations into charitable fraud, the Court held that the burden on the donors' associational rights outweighed California's interests in collecting Schedule B information.[190]

Next, the Court responded to the Attorney General's argument that the burden on donors was not so severe as to result in "any broad-based chill[ing]" of their associational rights.[191] The Court reasoned that because

181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.*
185. *Id.* at 2385.
186. *Id.*
187. *Id.* at 2385–86 (quoting Ams. for Prosperity Found. v. Harris, 182 F. Supp. 1049, 1055 (C.D. Cal. 2016).
188. *Id.* at 2386.
189. *Id.*
190. *Id.* at 2387.
191. *Id.* 2387–88.

the law was not tailored to California's investigative goal, in every instance in which it collected Schedule B forms, each demand for Schedule B disclosure might "chill association."[192] Thus, the Court determined that the law was unconstitutionally overbroad.[193]

The Court was not persuaded by the Attorney General's argument that, because Schedule B information is confidential and must be reported to the IRS, there was no broad-based chill on association.[194] The Court reasoned that exacting scrutiny is triggered by a disclosure requirement that presents even the *possibility* of curtailing the freedom to associate, and the promises of confidentiality do not eliminate such possibility.[195] The Court acknowledged the petitioner's evidence that they and their supporters had faced "bomb threats, protests, stalking, and physical violence."[196] The Court reiterated that a plaintiff is not required to show that the requirement would subject "donors to a *substantial* number of organizations" to harassment since the requirement was not narrowly tailored to a significant government interest.[197] Thus, the Court concluded that the disclosure requirement's burden on associational rights could not be justified on the basis that it was narrowly tailored to investigate fraud or provide administrative convenience.[198] The mere risk of a chilling effect on association is enough to withstand a First Amendment facial challenge.[199]

Writing in concurrence, Justice Alito, joined by Justice Gorsuch, agreed that the disclosure requirement failed exacting scrutiny.[200] However, Justice Alito thought that it was unnecessary for the Court to decide whether exacting or strict scrutiny should apply in all cases in which a petitioner challenges the disclosure of associations under the First Amendment.[201] Justice Thomas also concurred in the judgment, but he stated that precedent required that the strict scrutiny standard apply to disclosure laws that impact First Amendment associational rights.[202] He criticized the majority's conclusion that compelled disclosure laws were facially invalid in all circumstances because

192. *Id.* at 2388.

193. *See id.* ("The disclosure requirement 'creates an unnecessary risk of chilling' in violation of the First Amendment, indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous." (quoting Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 968 (1984))).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 2389 (emphasis added).

198. *Id.*

199. *Id.*

200. *Id.* at 2391 (Alito, J., concurring).

201. *Id.*

202. *Id.* at 2389–90 (Thomas, J., concurring).

the Court lacked the authority "to enjoin the lawful application of a statute" on the grounds that it may be unlawful in other circumstances.[203] In Justice Thomas's view, courts do not have the appropriate authority to solve the legal issues of individuals who have not come before them.[204] However, Justice Thomas concurred that the law was unconstitutional as applied to Petitioners.[205]

Writing for the dissent, Justice Sotomayor, joined by Justice Breyer and Justice Kagan,[206] concluded that Supreme Court precedent required plaintiffs to show that the disclosure requirement was likely to expose their donors and supporters to definite consequences in order to establish an actual burden.[207] Only then could the Court apply a "means-end tailoring proportional to that burden."[208] The dissent was troubled by the Court's interpretation of precedent when it held that disclosure regimes require narrow tailoring, especially because the Court failed to demand a strong showing of associational burdens.[209] Justice Sotomayor criticized the Court's holding as presuming "that all disclosure requirements impose associational burdens."[210]

Even considering this new "'one size fits all' test," the dissent would have held that California's Schedule B requirement was constitutional because the petitioners did not show that the nonpublic reporting requirement would burden their associational rights.[211] Justice Sotomayor emphasized that the petitioners failed to establish any burdens that would result *directly* from the law, in part because the law kept the donor information confidential from the public and only allowed state officials to access it.[212] Thus, because the First Amendment burden was slight, California was merely required to make a modest showing that the law achieved its governmental interests.[213] The dissent would have held that the reporting requirement was properly tailored to achieve California's efforts to monitor charitable fraud, and it would be unreasonable for officials to obtain this information by alternative means.[214]

203. *Id.* at 2390 (emphasis omitted).
204. *Id.*
205. *Id.* at 2391.
206. *Id.* at 2392 (Sotomayor, J., dissenting).
207. *Id.* at 2394.
208. *Id.*
209. *Id.* at 2398.
210. *Id.* at 2395.
211. *Id.* at 2398.
212. *Id.* at 2400.
213. *Id.*
214. *Id.* at 2402.

The dissent noted that the Court inappropriately struck down the requirement in all applications, despite the lack of evidence showing that it would chill a substantial number of donors from giving to charities.[215] The dissenters suggested that average donors likely have no feelings about having their information confidentially reported to the Attorney General and pointed to studies showing that "the vast majority of donors prefer to publicize their charitable contributions."[216] In the event that an organization is unpopular or controversial, confidentiality measures are adequate to safeguard against any retaliation or threat from the public.[217] The dissent rebuked the Court for turning its back on its longstanding recognition that disclosure requirements do not directly interfere with First Amendment rights and for invalidating a regulation entirely without significant evidence to show that it is likely to burden associational rights of a substantial proportion of donors.[218] Justice Sotomayor warned that the Court's decision "mark[ed] reporting and disclosure requirements with a bull's-eye."[219]

IV. ANALYSIS

The holding in *Americans for Prosperity Foundation v. Bonta* was the result of the Supreme Court's decision to deny deference to state legislatures in enacting laws that protect the public interest.[220] The Court inappropriately applied the overbreadth doctrine, setting the stage for a national attack on disclosure requirements for all types of organizations.[221] As the dissent noted, the majority created a standard that deems disclosure requirements a direct burden on associational rights and makes it difficult for any disclosure requirements to stand, regardless of whether the harms to personal liberties are minimal.[222] In doing so, the Court inadequately considered the significant governmental interests involved in enacting disclosure requirements for charitable organizations, which include preventing charitable fraud and maintaining transparency in charitable spending.[223]

What the Justices in both the dissent and the majority failed to recognize is that this decision has implications for election spending, as well,

215. *Id.* at 2403.
216. *Id.*
217. *Id.* at 2404.
218. *Id.* at 2405.
219. *Id.* at 2392.
220. *See infra* Sections IV.A–IV.D.
221. *See Bonta*, 141 S. Ct. at 2388.
222. *See id.* at 2384–85 ("Because, in the dissent's view, the petitioners have not shown such a [severe] burden here, narrow tailoring is not required.").
223. *See id.* at 2385.

considering that many organizations subject to disclosure engage in political campaign activity.[224] Mandating disclosure of an organization's expenditures and contributors not only prevents charitable fraud, but informs the public about its political interests and any connections it may have to elected officials.[225] Without it, election spending by wealthy individuals and organizations remains in the dark.[226] By failing to narrow its holding to 501(c)(3) organizations, the Court places all disclosure laws for both political and non-political organizations in jeopardy, stripping states of their last remaining avenue for combating dark money in politics.[227]

This Analysis section will proceed as follows. First, Section IV.A challenges the Court's departure from precedent when determining the scope and application of the exacting scrutiny standard.[228] Then, Section IV.B highlights the Court's failure to give proper weight to state governmental interests in enacting disclosure requirements.[229] Next, Section IV.C emphasizes the need for litigants to demonstrate legitimate harms and advocates for applying the precedential balancing test when analyzing challenges to disclosure requirements.[230] Finally, Section IV.D highlights the devastating consequences that the *Bonta* Court's application of the overbreadth doctrine has for the integrity of democratic elections.[231]

A. The Reed Rejection: Departing From Past Precedent in Applying an Altered Exacting Scrutiny Standard

The Court erred when it failed to apply the exacting scrutiny balancing test set forth in *Doe v. Reed* and other precedential cases involving First Amendment associational challenges to disclosure requirements.[232] In *Doe v. Reed*, the Supreme Court applied exacting scrutiny, requiring "a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[233] Rather than follow its precedent, the *Bonta* Court incorrectly added that exacting scrutiny requires that disclosure regimes "be narrowly tailored to the government's asserted interest."[234]

224. *See infra* Section IV.D.
225. *Id.*
226. *Id.*
227. *Id.*
228. *See infra* Section IV.A.
229. *See infra* Section IV.B.
230. *See infra* Section IV.C.
231. *See infra* Section IV.D.
232. *See supra* Section II.C.2.
233. 561 U.S. 186, 196 (2010) (internal quotation marks omitted) (quoting Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010)).
234. *Bonta*, 141 S. Ct. at 2383.

In requiring narrow tailoring, the Court relied on an erroneous interpretation of *Shelton v. Tucker*.[235] As Justice Sotomayor noted in her dissent, the *Bonta* majority "cherry-picked"[236] *Shelton*'s proposition that "even a 'legitimate and substantial' governmental interest 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'"[237] In *Bonta*, the Court interpreted this to mean that the government may only regulate the First Amendment with narrow specificity, in all circumstances.[238] This interpretation was incorrect.[239] The *Shelton* Court did not hold that narrow tailoring was always necessary for a disclosure regime to survive.[240] Rather, the *Shelton* Court reasoned that narrow tailoring was necessary because of the extreme burden that the requirement in that case imposed.[241]

In *Shelton*, the challenged law required teachers to disclose a list of "every conceivable kind of associational tie" to the state.[242] The Court noted that "such relationships could have no possible bearing upon the teacher's occupational competence or fitness."[243] The Court concluded that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[244] The Court simply held that the law went "far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers."[245] It was only because Arkansas' attempt to ensure teachers were qualified seriously infringed on First Amendment rights that the Court demanded Arkansas more narrowly achieve its interest.[246] At no point did the Court suggest that all disclosure laws must be narrowly tailored in the absence of significant associational burdens.[247] The *Bonta* Court failed to recognize this important concept, and erroneously decided that narrow tailoring is required in all

235. *See id.*

236. *Id.* at 2398 (Sotomayor, J., dissenting).

237. *Id.* at 2384 (majority opinion) (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1960)).

238. *Bonta*, 141 S. Ct. at 2385.

239. *See id.* at 2398 (Sotomayor, J., dissenting) (refuting the majority's interpretation of *Shelton*).

240. *Id.* at 2398 n.5.

241. *Shelton*, 364 U.S. at 488.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.* at 490.

246. *See id*. ("The statute's comprehensive interference with associational freedom goes far beyond what might be justified in the exercise of the State's legitimate inquiry into the fitness and competency of its teachers.").

247. *Bonta*, 141 S. Ct. at 2397 (Sotomayor, J., dissenting); *Shelton*, 364 U.S. at 488.

instances in which a disclosure requirement is challenged, regardless of the gravity of the burden on personal liberties.[248]

The Court also incorrectly relied on its precedent in *McCutcheon v. Federal Election Commission*,[249] which applied an exacting scrutiny standard that required narrow tailoring to political contribution limits.[250] As Justice Sotomayor pointed out, the Court already established a clear difference between its approach to laws that limit political contributions and disclosure laws.[251] In relying on these distinguishable cases, the Court, again, failed to follow its precedent in *Reed* and, instead, created a more stringent rule requiring that all disclosure regimes be narrowly tailored, no matter if the associational burdens are nonexistent or severe.[252] This version of the exacting scrutiny standard functionally operates as strict scrutiny and essentially places disclosure requirements on the chopping block, making it incredibly hard for them to survive in court.[253]

Further, this form of exacting scrutiny allows little room for a balancing of government interests and harms, which would typically allow for some flexibility in weighing the government's interests and the burdens on the plaintiff.[254] In the First Amendment context, exacting scrutiny requires that "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights."[255] The flexibility of this test is beneficial because courts can apply it to any set of rights or interests, and it provides an opportunity to appropriately give deference to state legislatures.[256] Because of the variability that exists in conducting this

248. *Bonta*, 141 S. Ct. at 2385 (majority opinion).

249. 572 U.S. 185 (2014).

250. *Id.* at 218.

251. *Bonta*, 141 S. Ct. at 2399 (Sotomayor, J., dissenting) (quoting Buckley v. Valeo, 424 U.S. 1, 64 (1976) for explaining that "unlike contribution limits, 'disclosure requirements impose no ceiling on campaign-related activities' and concluding only that compelled disclosure 'can' infringe associational rights").

252. *Id.* at 2399.

253. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (noting that, up until about 2006, the rate at which laws survive strict scrutiny review was between twenty-two and thirty-three percent).

254. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 211–12 (2016) (noting that the Court has declared that exacting scrutiny may require narrow tailoring, but in doing so the Court is actually applying the standard strict scrutiny test); *see also Bonta*, 141 S. Ct. at 2397–98 (Sotomayor, J., dissenting) (noting that, had the Court in *Doe v. Reed* required narrow tailoring, it is unlikely the disclosure requirement would have survived).

255. Doe v. Reed, 561 U.S. 186, 196 (2010) (quoting Davis v. Fed. Election Comm'n, 554 U.S. 724, 744 (2008)).

256. *See* Wright, *supra* note 254, at 214 ("[E]xacting scrutiny offers greater built-in, formal, legitimate adaptability, or inherent flexibility, than does strict scrutiny, or than standard fixed intermediate scrutiny, or than any version of minimum scrutiny."); *see also* Nixon v. Shrink Mo.

balancing and proportionality test, there is a general sense of indeterminacy in the outcome of cases.[257] Such indeterminacy illuminates the importance of maintaining a consistent and clear standard of exacting scrutiny in each case in which a court applies it.[258] Although the balancing of interests and harms may result in varying outcomes, a clear exacting scrutiny standard at least puts state legislatures on notice when enacting laws that pose the possibility of burdening First Amendment rights and provides litigants with a foundation on which to rest their challenges and defenses.[259] To make the standard even more muddled, the Court noted that, although exacting scrutiny does not require that the law be the least restrictive means of achieving the governmental interests, it does instruct that the law cannot be overbroad.[260] "Overbroad" is an unclear term that requires the court to predict how the law would apply in other situations outside of the one before them,[261] so this standard makes it even more difficult for states to craft laws that protect the public *and* survive in court.[262]

B. Judicial Restraint: The Court's Failure to Properly Weigh States' Interests in Enacting Disclosure Laws

The *Bonta* majority failed to properly weigh and give deference to California's interest in enacting its Schedule B requirement as required by exacting scrutiny.[263] The Court erroneously focused on how often Schedule

Gov't PAC, 528 U.S. 377, 391 (2000) (holding that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised").

257. Wright, *supra* note 254, at 227–28.

258. *See id.* at 231 ("The basic problem . . . is not actually one of judicial unpredictability. . . . Rather, the basic problem with the standard formulations of exacting scrutiny is the inherent lack of institutional legal guidance in characterizing, let alone resolving, the various arguably relevant moral, practical, predictive, scientific and other empirical, statistical, and deeply prudential problems that attend constitutional adjudication.").

259. *See id.* at 214–15 ("[G]iven the availability of exacting scrutiny, there is no reason for a court to change the formal test, or the formal level or degree of constitutional scrutiny, depending upon the rights and interests thought to be at stake in the particular case.").

260. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2384 (2021).

261. United States v. Stevens, 559 U.S. 460, 473 (2010) ("In the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." (internal quotation marks omitted) (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449, n.6 (2008)); *see id.* at 473–77 (engaging in a lengthy analysis as to how broadly to construe a statute banning the depiction of animal cruelty in order to determine its constitutionality).

262. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1303 (2007) ("Not surprisingly, uncertainty and confusion have arisen about which version the Court will apply in cases in which differences among the tests would result in different outcomes.").

263. *Bonta*, 141 S. Ct. at 2401–02 (Sotomayor, J., dissenting).

Bs are actually used in investigations rather than the overall governmental interest in collecting Schedule B forms.[264] The Court acknowledged that "California has an important interest in preventing wrongdoing by charitable organizations," especially considering that "[t]he Attorney General receives complaints each month that identify a range of misconduct" by charitable organizations.[265] These complaints include "misuse, misappropriation, and diversion of charitable assets, to false and misleading charitable solicitations, to other improper activities by charities soliciting charitable donations."[266] The Court even conceded that "[s]uch offenses cause serious social harms" and "the Attorney General is the primary law enforcement officer charged with combating them under California law."[267] However, the Court diminished the significance of these governmental interests by overemphasizing that the Attorney General only used Schedule Bs in small number of cases, could access similar information using alternative methods, and merely preferred access to Schedule Bs to ease administrative burdens.[268]

Where the legislature has particular expertise in an area of regulation, such as managing charitable organizations, courts should defer to legislative judgments.[269] However, the majority placed too little weight on testimony from California officials that Schedule Bs have been useful in several investigations of charitable fraud in the past.[270] Policing charitable fraud is a legitimate governmental interest.[271] Schedule B information helped California detect charitable fraud in an organization "serving animals after

264. *Id.* at 2387 (majority opinion) ("California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints.").

265. *Id.* at 2385–86.

266. *Id.* at 2386.

267. *Id.*

268. *Id.* at 2386–87.

269. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 230 (2008) (Souter, J., dissenting) ("[W]here a legislature has significantly greater institutional expertise, as, for example, in the field of election regulation, the Court in practice defers to empirical legislative judgments." (quoting Randall v. Sorrell, 548 U.S. 230, 285 (2006) (Souter, J., dissenting))); *see also Crawford*, 553 U.S. at 208 (Scalia, J., concurring) ("It is for state legislatures to weigh the costs and benefits of possible changes to their election codes, and their judgment must prevail unless it imposes a severe and unjustified overall burden upon the right to vote, or is intended to disadvantage a particular class. Judicial review of their handiwork must apply an objective, uniform standard that will enable them to determine, *ex ante*, whether the burden they impose is too severe.")

270. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1011 (9th Cir. 2018); *Bonta*, 141 S. Ct. at 2386.

271. *See Scams and Safety*, FBI, https://www.fbi.gov/scams-and-safety/common-scams-and-crimes/charity-and-disaster-fraud (last visited Nov. 27, 2021); Federal Trade Commission, *FTC and States Combat Fraudulent Charities that Falsely Claim to Help Veterans and Servicemembers*, FED. TRADE COMM'N (July 19, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/ftc-states-combat-fraudulent-charities-falsely-claim-help.

Hurricane Katrina," as well as fraud in a cancer charity and other non-profit organizations.[272] Moreover, California demonstrated that access to Schedule B information provided a more efficient and effective means of investigating charitable fraud.[273] Members of the Charitable Trusts Section testified that access to Schedule B information obviates the need for a subpoena, which protects the integrity of an investigation.[274] Subpoenas give organizations upfront notice that law enforcement is interested in their business matters, which provides them time to hide assets, destroy documents, and tamper with the investigation.[275] In addition, obtaining a Schedule B through an audit letter is time-consuming, expensive, and provides charities with time to fabricate records and engage in dilatory tactics.[276]

Courts have held that these interests support a conclusion that Schedule B disclosure requirements bear a substantial relation to a sufficiently important government interest.[277] The Supreme Court, in particular, has acknowledged the substantial government interest in disclosure requirements before weighing those interests against potential First Amendment burdens.[278] Placing more weight on personal liberties at the expense of a state's interests is appropriate in instances of egregious rights violations.[279] However, where the government interest is in the public good, like preventing wealthy organizations from exploiting vulnerable populations, the

272. *Becerra*, 903 F.3d at 1011.

273. *Id.* at 1012.

274. *Id.* at 1010.

275. *Id.*

276. *Id.* at 1010–11.

277. *See, e.g.*, Ctr. for Competitive Pol. v. Harris, 784 F.3d 1307, 1317 (9th Cir. 2015) ("The Attorney General has provided justifications for employing a disclosure requirement instead of issuing subpoenas. She argues that having immediate access to Form 990 Schedule B increases her investigative efficiency, and that reviewing significant donor information can flag suspicious activity."); Citizens United v. Schneiderman, 882 F.3d 374, 382 (2d Cir. 2018) (agreeing with the state that "[b]ecause [f]raud is . . . often revealed not by a single smoking gun but by a pattern of suspicious behavior, disclosure of the Schedule B can be essential to New York's interest in detecting fraud" (second alteration in original) (internal quotation marks and citations omitted)).

278. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (per curiam) (noting that the governmental interests sought in enacting disclosure requirements include increasing transparency, deterring actual corruption, and recordkeeping and reporting as a "means of gathering the data necessary to detect violations of the [law]"); Doe v. Reed, 561 U.S. 186, 198–99 (2010) (acknowledging that disclosure laws help prevent fraud that is "otherwise difficult to detect" and promotes transparency and accountability); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370 (2010) (discussing how disclosure requirements can provide citizens with "the information needed to hold corporations and election officials accountable").

279. *See, e.g.,* United States v. Virginia, 518 U.S. 515, 531 (1996) ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, our Nation has had a long and unfortunate history of sex discrimination." (internal quotation marks omitted) (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973))).

Court should give it substantial weight.[280] Instead, the Court diminished California's legitimate interests by criticizing the ways in which the Attorney General conducted investigations of charitable fraud and unnecessarily put the public good at risk.[281]

C. Balancing Concrete Harms and Legitimate Interests

Exacting scrutiny requires that litigants show "a reasonable probability that the compelled disclosure of . . . contributors' names will subject them to threats, harassment, or reprisals."[282] These harms must be concrete and objective rather than speculative and subjective.[283] The Supreme Court has considered whether an alleged threat or harassment is substantiated or merely hypothetical when determining how much weight it deserves in the exacting scrutiny analysis.[284] This analysis is imperative in order to determine whether an exacting scrutiny standard requiring narrow tailoring applies.[285]

In *Bonta*, the Court neglected to inquire whether the Law Center or the Foundation experienced substantial harms as a result of the California law before considering whether to apply narrow tailoring.[286] Instead, the Court suggested that disclosure requirements are inherently overly burdensome on First Amendment freedoms.[287] Although disclosure requirements are not intrinsically free of any First Amendment infringements,[288] it is often unclear how a disclosure regime will impact associational rights.[289] The Court in *Buckley* suggested that, although public disclosure of donors will deter some

280. *See Citizens United*, 558 U.S. at 370 (noting that disclosure requirements may burden political speech, but the significant governmental interests in providing the public with transparency in electoral spending outweighs that burden).

281. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2387 (2021).

282. *Buckley*, 424 U.S. at 74.

283. Larid v. Tatum, 408 U.S. 1, 13–14 (1972).

284. *See, e.g.*, *Buckley*, 424 U.S. at 70–71.

285. *See supra* notes 241–248 and accompanying text.

286. *See Bonta*, 141 S. Ct. at 2394 (assuming that disclosure requirements were inherently burdensome).

287. *Id.* at 2388.

288. *See supra* note 69.

289. *See Bonta*, 141 S. Ct. at 2393–94 (Sotomayor, J., dissenting) (noting that "privacy can be particularly important to 'dissident' groups because the risk of retaliation against their supporters may be greater . . . [but] [f]or groups that promote mainstream goals and ideas, on the other hand, privacy may not be important at all"); *see also* Timothy J. McClimon, *Should Nonprofits Be Required to Publicly Disclose Their Donors?*, FORBES (Sept. 16, 2019), https://www.forbes.com/sites/timothyjmcclimon/2019/09/16/should-nonprofits-be-required-to-publicly-disclose-their-donors/?sh=d33b9a1528a2 (discussing how some nonprofit leaders "disclose all their donors unequivocally, and do not accept anonymous contributions[,] [while] [o]thers respect the right of donors to be private, and worr[y] that some donors might shy away from supporting their organization if their gifts were made public").

individuals who may otherwise contribute and may subject some contributors to harassment or retaliation, there must be "record evidence of the sort proffered in *NAACP v. Alabama*."[290]

The Court failed to recognize the stark differences between the threats posed by the laws in *NAACP v. Alabama* and *Shelton v. Tucker* and the California disclosure law in *Bonta.*[291] Both *NAACP v. Alabama* and *Shelton* were set in the political climate of the Jim Crow South when people of color and those associated with the Civil Rights Movement faced state-sanctioned violence on a day-to-day basis.[292] In *NAACP v. Alabama*, the law requiring the NAACP to disclose the names of its members to the Alabama Attorney General exposed them to "economic reprisal, loss of employment, threat of physical coercion, and other [forms] of public hostility."[293] The Court reasonably concluded that the threats could prompt members to disassociate from the NAACP and deter others from joining.[294] Similarly, in holding that the disclosure law unduly burdened associational rights, the Court in *Shelton* emphasized that the required disclosure of every teachers' associational tie could be used by the school board to fire those who belonged to unpopular or minority organizations, like the NAACP.[295] The *Shelton* Court also held that the harms were substantiated because members of the Capital Citizens Council, an organization in support of school segregation, had testified that the group intended to access teachers' affidavits and eliminate any teacher from the school who supported organizations that were unpopular with the Council.[296] These threats infringed upon both the teacher's associational rights and their freedom to contract because it was known that the legislature used disclosure information to make hiring and firing decisions each year.[297] It was clear that disclosure of NAACP membership in the South created a

290. Buckley v. Valeo, 424 U.S. 1, 71 (1976) (per curiam).

291. *See infra* notes 292–306 and accompanying text.

292. *See* Emma Waitzman, *Free Ride on the Freedom Ride: How "Dark Money" Nonprofits Are Using Cases from the Civil Rights Era to Skirt Disclosure Laws*, 100 TEX. L. REV. 115, 130 (2022) (discussing the substantial threats that those associated with the NAACP and other civil rights groups faced during the 1950s); *see also Massive Resistance*, EQUAL JUST. INITIATIVE, https://segregationinamerica.eji.org/report/massive-resistance.html ("After the local council circulated the roster of NAACP members in Clarendon County, South Carolina, those listed promptly lost their jobs, credit, and suppliers. . . . [B]ombings claimed the lives of NAACP activists . . . . [S]tates passed some 230 laws . . . [that] explicitly barred NAACP members from public employment, especially as school teachers[,] [and] the NAACP and its members were harassed with criminal prosecutions and bar association disciplinary proceedings . . . .").

293. 357 U.S. 449, 462 (1958).

294. *Id.* at 463.

295. Shelton v. Tucker, 364 U.S. 479, 486–87, 490 (1960).

296. *Id.* at 486 n.7.

297. *Id.* at 482, 485–86.

deterrent effect.[298] Because of the environment of extreme violence and hatred towards Civil Rights activists, the NAACP's membership in the South decreased by 50,000 between 1950 and 1957.[299] The NAACP described in its brief to the Court that its members had lost their jobs, experienced physical violence, and had even lost their lives because of their affiliation with the organization.[300] By striking down the laws in *NAACP v. Alabama* and *Shelton*, the Court was establishing protections for people of color and those involved in the efforts of the Civil Rights Movement.[301]

In *Bonta*, the Court relied on Civil Rights era cases to protect the interests of a few wealthy donors and charity board members who wholly failed to allege harms even remotely of the sort proffered in *NAACP v. Alabama* and *Shelton*.[302] The Law Center and the Foundation provided some evidence that select members, including the CEO, COO, and members on the Board of Directors, had received death threats for their affiliations with the organizations.[303] The Law Center and the Foundation alleged that they received critical letters and that a donor's business was boycotted as a result of his association.[304] The CEO and Vice President of the Foundation testified that some prospective contributors were afraid to have their information disclosed to the public.[305] However, reliance on the fears of individual contributors based on the nonpublic reporting requirements does not constitute a substantial burden because they are speculative.[306] Moreover, a showing that just a few people refused to make contributions because of the possibility of disclosure or that some people may think twice about donating is not sufficient to establish a significant First Amendment burden.[307] It certainly does not show that disclosure would result in "the likelihood of a substantial restraint upon the exercise by [their contributors] of their right to freedom of association."[308] The potential burdens, if any, were minimal, and they certainly did not compare to the severity of the harms that the plaintiffs

298. *See* Waitzman, *supra* note 292, at 130 (discussing the impact that disclosure had on NAACP membership).

299. *Id.*

300. *Id.* at 130 n.95 (citing Brief for Petitioner at 15, NAACP v. Alabama, 357 U.S. 449 (1958)).

301. *See* Waitzman, *supra* note 292.

302. *Compare* Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1015–16 (9th Cir. 2018), *with Shelton*, 364 U.S. at 486–87, 490, and NAACP v. Alabama, 357 U.S. 449, 462 (1958).

303. *Becerra*, 903 F.3d at 1015–16.

304. *Id.* at 1016.

305. *Id.* at 1013.

306. Buckley v. Valeo, 424 U.S. 1, 71 (1976) (per curiam).

307. *Becerra*, 903 F.3d at 1014 (citing *Buckley*, 424 U.S. at 72).

308. *Id.* (alteration in original) (citing NAACP v. Alabama, 357 U.S. 449, 462 (1958)).

faced in *NAACP v. Alabama* or *Shelton*.[309] The employees of the Law Center and the Foundation did not allege that they were at risk of losing their positions as a result of submitting their Schedule B information, nor did they show that donors were at risk of retaliation by California officials.[310] By analogizing the Law Center and the Foundation to the plaintiffs in those cases, the Court failed to appreciate the undeniable social and economic differences between members of the NAACP in the 1950s and 1960s who were at risk of losing their teaching positions and experiencing violent threats and the organizations' members and donors in *Bonta*.[311]

The petitioners also failed to show that these harms were the result of the disclosure requirement itself.[312] The Attorney General ensured that the Schedule B information would remain confidential and would only be used to investigate fraud.[313] When taking this into account, it is hard to see how that requirement would be the catalyst for such burdens.[314] Moreover, information about the leaders and board members of Americans for Prosperity Foundation is already readily accessible to the public on the internet,[315] and the petitioners failed to show that the *disclosure requirement* exposes them to the threats.[316] In permitting such a weak showing of harm, the Supreme Court not only minimized the seriousness of the harms presented in *NAACP v. Alabama* and *Shelton*, but also signaled to organizations that they can successfully cite to any potential threat or instance

309. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2400 (2021) (Sotomayor, J., dissenting).

310. *See id.*

311. *See, e.g.*, Gloster B. Current, *The Significance of the N.A.A.C.P. and Its Impact in the 1960s*, 19 BLACK SCHOLAR 9, 13 (1988) (explaining that efforts to achieve equal rights "caused reprisals against NAACP leaders and units," such as the bombing of an NAACP president's home resulting in severe injuries and the shooting of an NAACP activist during a march to stimulate voter registration); Timothy J. Minchin, *Making Best Use of the New Laws: The NAACP and the Fight for Civil Rights in the South, 1965–1975*, 74 J.S. HIST. 669, 675, 689–90 (2008) (discussing the social isolation that NAACP lawyers experienced in the South and the racial harassment that NAACP members faced at their places of employment, such as confronting racist graffiti and a fake lynching of a doll).

312. *Bonta*, 141 S. Ct. at 2400 (Sotomayor, J., dissenting).

313. *See supra* note 194 and accompanying text.

314. *See* Shelton v. Tucker, 364 U.S. 479, 486–87 (1960) (discussing how the school board's access to a teacher's political ties because of the non-confidential disclosure requirement could result in pressure to "discharge teachers who belong to unpopular or minority organizations").

315. *About*, AMS. FOR PROSPERITY FOUND., https://americansforprosperity.org/about/ (last visited Apr. 3, 2022).

316. *See Bonta*, 141 S. Ct. at 2381 (noting that members of the Law Center and the Foundation had alleged that they faced threats and harassment in the past for their affiliations but failed to make any connection between those allegations and the confidential disclosure requirement).

of harassment to avoid disclosure, even if it is unclear how those harms resulted from the disclosure law itself.[317]

The Court should have applied the exacting scrutiny balancing test and weighed the character and magnitude of the injury to First Amendment rights against the governmental interests that the state cites as justification for those burdens before imposing a narrow tailoring requirement.[318] In alignment with the exacting scrutiny standard, the Court should have taken into consideration the extent to which the governmental interests made it necessary to burden First Amendment rights.[319] The State made clear that the Attorney General uses the Schedule B information in its investigations of charitable fraud.[320] The governmental interests in protecting the public from charitable fraud far outweigh the slight and highly speculative burdens that may result from handing over Schedule B information to the Attorney General, especially given that nearly a quarter of the United States' charitable assets are held by charities registered in California.[321] Further, when evaluating whether there is a substantial relation between these interests and the disclosure law as instructed by exacting scrutiny precedent, it is clear that the law promotes the state interests.[322] Thus, a narrow tailoring requirement is not necessary.[323] The Court placed far too much weight on harms that may be wholly unrelated to the disclosure regime and disregarded the substantial interests set forth by the Attorney General.[324] By allowing unrelated harms to support its holding, the Court has provided charitable organizations an easy avenue to strike down any disclosure requirement, threatening the public interest.[325]

317. *Id.*

318. Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citing Anderson v. Celebrezze, 460 U.S. 780, 788–89 (1983)).

319. *Id.*; *see supra* Section IV.B.

320. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1004 (9th Cir. 2018).

321. *Bonta*, 141 S. Ct. at 2392 (Sotomayor, J., dissenting).

322. *See, e.g.*, Doe v. Reed, 561 U.S. 186, 199 (2010) ("Public disclosure . . . promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we . . . conclude that public disclosure . . . is substantially related to the important interest of preserving the integrity of the electoral process.").

323. *See supra* Section IV.A.

324. *Bonta*, 141 S. Ct. at 2394–95 (Sotomayor, J., dissenting).

325. *See infra* Section IV.D.1.

D. Dark Money: Threats to State Disclosure Requirements Are Threats to Democracy

1. Facial Challenges Threaten All State Disclosure Requirements

The *Bonta* Court made hasty generalizations in striking down the California disclosure law as facially unconstitutional.[326] The Court held that every demand of disclosure runs the risk of chilling, or deterring, associational rights, and a mere risk or possibility of deterrence is enough to constitute a burden on First Amendment rights.[327] In doing so, the Court struck down the California disclosure requirement as overbroad and held that it failed exacting scrutiny in every application.[328] The Court discarded the requirement that litigants show actual harm[329] and inappropriately exercised its power by enjoining the lawful application of a disclosure requirement simply because it "*might* be unlawful as-applied in other circumstances."[330] Moreover, the Court failed to make any distinctions between 501(c)(3) organizations and other organizations that are allowed to engage in political spending.[331] The Court's analysis "marks reporting and disclosure requirements with a bull's-eye."[332]

It is difficult to imagine how any state disclosure requirement can withstand this new, stricter standard.[333] In *Citizens United v. Schneiderman*,[334] the Second Circuit applied exacting scrutiny to a New York disclosure requirement instructing 501(c)(3) and (4) organizations to submit a set of yearly disclosures to the Attorney General.[335] The Second Circuit held that the Attorney General had a legitimate interest in collecting Schedule B forms to investigate charitable fraud, in part, because collecting this information "facilitate[d] investigative efficiency."[336] The court held that the possibility of harm in the event of accidental public disclosure could not outweigh those interests.[337] Had this case come before the Second Circuit

326. *Bonta*, 141 S. Ct. at 2387 (majority opinion).

327. *Id.* at 2383.

328. *Id.* at 2387.

329. *Id.* at 2392 (Sotomayor, J., dissenting).

330. *Id.* at 2390 (Thomas, J., dissenting) (emphasis added).

331. *See id.* at 2384 (majority opinion) (holding that all disclosure requirements, regardless of who they are targeting, are subject to exacting scrutiny and "[w]here exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes").

332. *Id.* at 2392 (Sotomayor, J., dissenting).

333. *See infra* notes 335–347 and accompanying text.

334. 882 F.3d 374 (2018).

335. *Id.* at 379, 382–83.

336. *Id.* at 382.

337. *Id.* at 384–85.

after *Bonta*, it may not have survived.[338] The Second Circuit would have likely rejected administrative efficiency as a sufficient government interest, as the Supreme Court did in *Bonta*, and held that the possibility of public disclosure based on the Attorney General's past mistakes was sufficient to outweigh any governmental interest.[339]

Other states' disclosure laws are at risk under the exacting scrutiny framework set forth in *Bonta*. The State of Maryland has disclosure requirements in the electoral context.[340] "[A]ny person who makes aggregate independent expenditures of $5,000 or more in an election cycle on campaign material" is to register with the State Board of Elections.[341] A "person" includes an individual, an association, a corporation, or any other organization or group of persons.[342] This Independent Expenditure Report must include the name and address of the person making the expenditure, as well anyone who is directing that person to make the expenditure and anyone "who made cumulative donations of $6,000 or more to the person making the [expenditure]."[343] Although this law is targeted at organizations that do engage in political activity and expenditures, in the event of a constitutional challenge, a court is compelled to apply the exacting scrutiny standard set forth in *Bonta*.[344] If the plaintiff showed even the slightest harm, Maryland would have a high bar to meet in showing that the substantial governmental interest in enforcing this law justifies those burdens.[345] The threat to disclosure regimes like this one inhibits states from monitoring charitable and electoral spending to protect the integrity of their elections.[346] The Court's holding threatens to put all campaign expenditures in the dark.[347]

2. Dark Money and Democracy

The Supreme Court has long recognized that transparency in the electoral context is a compelling and substantial governmental interest because it provides for an informed electorate and prevents corruption of the

338. *See infra* note 339 and accompanying text.

339. *See supra* note 190 and accompanying text.

340. *Independent Expenditure Requirements*, MD. STATE BD. OF ELECTIONS, https://elections.maryland.gov/campaign_finance/independent_expenditures.html (last visited Dec. 13, 2021); MD. CODE ANN. ELEC. LAW § 13-306(b).

341. MD. CODE ANN. ELEC. LAW § 13-306(b).

342. *Id.* § 13-306(a)(5)(i).

343. *Id.* § 13-306(e).

344. Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (holding that *all* disclosure requirements must be "narrowly tailored to the government's asserted interest").

345. *See id.*

346. *See supra* notes 90–91 and accompanying text.

347. *See infra* Section IV.D.2.

political process.[348] The *Bonta* decision does not explicitly diminish that principle, but it has the potential to cast another veil on big spending in elections.[349] Although 501(c)(3) organizations are not permitted to engage in political activity, this decision is not exclusive to disclosure requirements for 501(c)(3) organizations;[350] it created a stricter standard for all disclosure requirements, regardless of the organizations they target.[351]

Big spending in elections is spending by wealthy corporations, charitable organizations, political groups, or individuals that is meant to influence its outcome.[352] Big spending is a legitimate concern for the legislature, the Court, and the general public because this spending, whether it be directly to a candidate or through a charity or political action committee, allows the wealthy to unfairly influence elections.[353] Although the Court has struck down expenditure limits in campaigns,[354] the "concern over the corrosive influence of concentrated . . . wealth" in politics is still very relevant and "reflects the conviction that it is important to protect the integrity of the marketplace of political ideas."[355]

Dark money is any political spending that is "meant to influence the decision of a voter," where the donor's identity is not disclosed and the source of the funding is unknown to the public.[356] Because political organizations are not legally obligated to disclose their donors, many choose not to and, thus, qualify as dark money groups.[357] This spending may also consist of "outside spending," which is defined as political expenditures made by corporations, unions, and individuals independent of any candidate.[358] Since *Citizens United*, organizations that are not political parties are permitted to accept unlimited sums of money from individuals, corporations, or unions and use those donations to engage in political activities, including buying

348. Buckley v. Valeo, 424 U.S. 1, 69–70 (1976) (per curiam); *see supra* notes 90–91 and accompanying text.

349. *See supra* Section IV.D.1.

350. *Bonta*, 141 S. Ct. at 2373.

351. *Id.* at 2389.

352. *Influence of Big Money*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics/influence-big-money (last visited Nov. 16, 2021).

353. Karl Evers-Hillstrom et al., *More Money, Less Transparency: A Decade Under Citizens United*, OPENSECRETS (Jan. 14, 2020), https://www.opensecrets.org/news/reports/a-decade-under-citizens-united.

354. *See supra* notes 80–88 and accompanying text.

355. Federal Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 257 (1986).

356. *Dark Money Basics*, OPENSECRETS, https://www.opensecrets.org/darkmoney/dark-money-basics.php (last visited Nov. 16, 2021).

357. *Id.*

358. *Id.*

advertisements that advocate for or against a candidate, going door to door to campaign, or running phone banks.[359] Further, the Federal Election Commission only requires disclosure of persons who contributed $1,000 or more to groups running electioneering communications.[360] However, disclosure is only required if the donor specifically designates the contribution for electioneering communications,[361] allowing donors to avoid disclosure by contributing to an organization for general purposes rather than designating the money for political advertisements.[362] The Court could not have predicted the explosion of outside spending that erupted after its decision in *Citizens United*.[363] Organizations that do not disclose their donors increased their political spending from less than $5.2 million in 2006 to well over $300 million in the 2012 presidential cycle and more than $174 million in the 2014 midterms.[364] Since 2008, $1 billion of campaign contributions consist of dark money.[365] Both parties accept dark money: In 2020, Democrats received over $500 million in dark contributions, while Republicans accepted almost $200 million.[366]

Dark money, in conjunction with unlimited outside spending on political campaigns, allows the super-wealthy to influence elections, and the lack of disclosure prevents voters from knowing who is attempting to influence their political decisions.[367] Much of the country cannot counteract the influence of wealthy donors because the majority of voters cannot afford to donate such large sums of money to charitable organizations, political

359. *Id.*; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010) ("The appearance of influence or access . . . will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that the electorate will refuse 'to take part in democratic governance' because of additional political speech made by a corporation or any other speaker." (citation omitted) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 144 (2003))).

360. *How To Report Electioneering Communications*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/other-filers/electioneering-communications/ (last visited Apr. 4, 2022).

361. 52 U.S.C. § 30104(f).

362. *Why Our Democracy Needs Disclosure*, CAMPAIGN LEGAL CTR. (Aug. 17, 2011), https://campaignlegal.org/update/why-our-democracy-needs-disclosure.

363. *See infra* notes 364–366.

364. *Political Nonprofits (Dark Money)*, OPENSECRETS, https://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Nov. 16, 2021).

365. Ciara Torres-Spelliscy, *Dark Money in the 2020 Election*, BRENNAN CTR. FOR JUST. (Nov. 20, 2020), https://www.brennancenter.org/our-work/analysis-opinion/dark-money-2020-election.

366. Anna Massoglia & Karl Evers-Hillstrom, *'Dark Money' Topped $1 Billion in 2020, Largely Boosting Democrats*, OPENSECRETS (Mar. 17, 2021), https://www.opensecrets.org/news/2021/03/one-billion-dark-money-2020-electioncycle/.

367. *Influence of Big Money*, *supra* note 352.

campaigns, or PACs.[368] This is especially true for marginalized communities because the concentration of wealth in the United States is largely in the hands of the white male demographic.[369] Members of marginalized communities are also underrepresented in political positions of power and face huge disparities in their control of wealth.[370] Thus, the ideas and values of these groups are less likely to be heard in the political arena.[371] Because tackling the wealth gap, as well as systemic racism and sexism, poses a difficult and extensive challenge,[372] ensuring that these groups are informed about who is influencing the election is one important mechanism for enhancing voter participation in the political process and preserving democracy in the meantime.[373] Transparency about political spending is about "strengthening our democracy and disincentivizing both profiteering off of public resources and the manipulation of the government for private ends."[374] Keeping political spending in the public light also encourages donors and political candidates to refrain from exchanging donations for illegal actions, such as an ambassadorial appointment, a grant of a pardon, or other political favors.[375] Privacy for wealthy donors at the expense of

368. *See* Megan Leonhardt, *The Top 1% of Americans Have About 16 Times More Wealth than the Bottom 50%*, CNBC (June 23, 2021), https://www.cnbc.com/2021/06/23/how-much-wealth-top-1percent-of-americans-have.html ("The wealthiest 1% of Americans controlled about $41.52 trillion in the first quarter . . . . Yet the bottom 50% of Americans only controlled about $2.62 trillion collectively, which is roughly 16 times less than those in the top 1%.").

369. *See* Matthew Yglesias, *The Top 1 Percent Is Very White*, VOX (Apr. 29, 2014, 3:00 PM), https://www.vox.com/2014/4/29/5665272/the-top-one-percent-is-98-percent-male (noting that 97.8% of the top 1% is male and 95.3% of the top 10% is male. 90.9% of the top 1% is white and 84.9% of the top 10% is white).

370. *Id.*; Allie Boldt, *Putting Marginalized Communities at the Center of Money in Politics Conversations*, DEMOS (June 27, 2017), https://www.demos.org/blog/putting-marginalized-communities-center-money-politics-conversations.

371. Boldt, *supra* note 370.

372. *See* Vanessa Williamson, *Closing the Racial Wealth Gap Requires Heavy, Progressive Taxation of Wealth*, BROOKINGS (Dec. 9, 2020), https://www.brookings.edu/research/closing-the-racial-wealth-gap-requires-heavy-progressive-taxation-of-wealth/ ("Black people in America have been systematically stripped of the wealth they have produced. Only a transformative national agenda can address the racial wealth gap, because the disparity is the product of societal racism, compounded over generations . . . . It is impossible, of course, to design any policy agenda that would fully reverse the effects of centuries of racism.").

373. *See* Lear Jiang, Note, *Disclosure's Last Stand? The Need to Clarify the "Informational Interest" Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 520–22 (2019) (arguing that disclosure not only informs the electorate but also may also lead to more political engagement by encouraging voters to speak out against a candidate receiving financial support from a particular organization and "put pressure on both public officials and private actors wishing to influence policy").

374. Ciara Torres-Spelliscy, *Transparency for Democracy's Sake*, BRENNAN CTR. FOR JUST. (Dec. 21, 2020), https://www.brennancenter.org/our-work/analysis-opinion/transparency-democracys-sake.

375. *Id.*

transparency for people who do not have the means to meaningfully contribute to charities and elections is a danger to a fair and equitable democracy.[376]

3. Ability of Disclosure Requirements to Combat the Harms of Dark Money

Even as the Supreme Court was opening the floodgates for independent political spending, it identified and protected disclosure provisions as a mechanism for ensuring transparency in election spending.[377] The Court mentioned that disclosure of political expenditures allows "the electorate to make informed decisions and give proper weight to different speakers and messages."[378] In this ever polarizing political climate, there is one issue that most people agree with: Political corruption is a threat to democracy.[379] There is ample evidence to show that wealthy corporations and individuals attempt to persuade politicians to vote in their favor.[380] Congress is less concerned about the average constituent's interests than they are about business or lobbyist interests that offer hefty financial contributions.[381] Elected officials are more inclined to pass laws that benefit their mega-donors at the expense of the rest of the country.[382] While the average American voter

376. *See e.g.*, Michael Beckel, *Dark Money Spending Since Citizens United Set to Eclipse $1 Billion*, ISSUE ONE (Sept. 10, 2020), https://issueone.org/articles/dark-money-spending-since-citizens-united-set-to-eclipse-1-billion/ ("When either Democrats or Republicans use dark money to try to win elections, the American people lose. Voters want to know elected officials are listening to them, not secretive special interest groups.").

377. *See* Buckley v. Valeo, 424 U.S. 1, 81 (1976) (per curiam) (discussing that disclosure "increases the fund of information concerning those who support the candidates"); *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 196 (2003) (noting that the important state interests in upholding disclosure requirements include "providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions").

378. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010); *see also id.* at 361 ("If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences.").

379. Maggie Koerth, *Everyone Knows Money Influences Politics . . . Except Scientists*, FIVETHIRTYEIGHT (June 4, 2019), https://fivethirtyeight.com/features/everyone-knows-money-influences-politics-except-scientists/.

380. *America's Corruption Problem*, REPRESENTUS, https://represent.us/americas-corruption-problem/ (last visited Jan. 16, 2022) ("The opinions of 90% of Americans have essentially no impact at all [on our elected officials' decisions].").

381. *Id.* For example, over the past ten years, the pharmaceutical industry spent $2.16 billion to influence the government. *Id.* In addition, the energy industry spent $2.93 billion, the defense industry spent $1.26 billion, and the financial industry spent $4.29 billion. *Id.*

382. *Id.*

is distracted by false narratives about voter fraud,[383] their elected officials are engaging in genuine forms of deception.[384] For example, many Democratic candidates promise to address the student debt crisis.[385] However, student loan companies donate millions of dollars to political campaigns to pressure lawmakers not to fix the problem so that they can continue making profits from student loan payments.[386] The problem is that the general public is largely unaware of which politicians are accepting these sorts of donations.[387] The non-profit organization RepresentUS advocates for new disclosure laws that require "that all significant political fundraising and spending is immediately disclosed online and made easily accessible to the public."[388] They also advocate for laws that require "any organization that spends meaningful funds on political advertisements" to submit an "online report disclosing its major donors."[389] However, the Supreme Court's lack of support for disclosure requirements in *Bonta* makes it clear that states will have a difficult time using disclosure to rid their political systems of corruption.[390] Without strong state disclosure laws that limit and expose dark money in politics, Americans will continue to vote for politicians who are corrupted by big-moneyed interests.[391]

Big-moneyed interests also include charitable organizations, which further highlights the need for disclosure requirements for all tax-exempt entities.[392] Charitable organizations contribute substantial amounts of money

383. *The Myth of Voter Fraud*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression/myth-voter-fraud (last visited Jan. 16, 2022).

384. *Id.*

385. *See* Hannah Demissie, *Progressives Warn Inaction on Student Debt Could Hurt Democrats in Midterms*, ABC NEWS (Dec. 31, 2021), https://abcnews.go.com/Politics/progressives-warn-inaction-student-debt-hurt-democrats-midterms/story?id=81986814 ("During the 2020 election, Biden promised to forgive a minimum of $10,000 of federal student loans per borrower.").

386. Ed Helms & Joshua Graham Lynn, *To Solve Our Student Debt Crisis We Need to Fix Political Corruption*, FORTUNE (Feb. 4, 2021), https://fortune.com/2021/02/04/student-debt-crisis-corruption-ed-helms/.

387. *See Anti-Corruption Is What We Do*, REPRESENTUS, https://represent.us/anticorruption-act/ (last visited Jan. 16, 2022) (scroll down to "End Secret Money" and click "Immediately disclose political money online") ("Many donations are not disclosed for months, and some are never made available electronically, making it difficult for citizens and journalists to follow the money in our political system.").

388. *Id.*

389. *Id.* (click "Stop donors from hiding behind secret-money groups").

390. *See supra* Section IV.D.1.

391. *See The Strategy to End Corruption*, REPRESENTUS, https://represent.us/the-strategy-to-end-corruption/ (last visited Jan. 16, 2022) (noting that state laws that expose the source of campaign donations will allow Americans to "know who is buying political power").

392. *See infra* notes 394–403 and accompanying text.

to campaigns, lobbying groups, and candidates themselves,[393] but there is a lack of transparency of this spending because organizations that are permitted to engage in some level of political activity are not subject to disclosure.[394] 501(c)(3) organizations are prohibited from participating in campaign activities directly or indirectly, while 501(c)(4) organizations are permitted to engage in some political campaign activity as long as it is not its main purpose.[395] However, the IRS does not specify how much political engagement is too much.[396] Because 501(c)(4) organizations are not political organizations, they are not required to disclose their donors to the IRS at all.[397] Even 501(c)(3) organizations that often advocate for specific political views which can, in turn, influence voter decisions, are not required to publicly disclose their donors.[398] For example, the NAACP, Center for American Progress, and the Natural Resources Defense Council are all examples of 501(c)(3) organizations.[399] Defending Democracy Together, the National Rifle Association, and Planned Parenthood are 501(c)(4) organizations.[400] Even though many of these organizations have separate

393. *Non-Profits, Foundations & Philanthropy*, OPENSECRETS, https://www.opensecrets.org/industries/indus.php?ind=W02 (last visited Jan. 16, 2022).

394. *See supra* Section II.B.1.

395. *See supra* Section II.B.1.

396. *See supra* Section II.B.1.

397. *See supra* Section II.B.1.

398. *See supra* Section II.B.1.

399. NAACP, https://naacp.org/ (last visited Nov. 16, 2021) ("We work to disrupt inequality, dismantle racism, and accelerate change in key areas including criminal justice, health care, education, climate and the economy."); CTR. FOR AM. PROGRESS, https://americanprogress.org/about-us/ (last visited Nov. 27, 2021) ("We develop new policy ideas, challenge the media to cover the issues that truly matter, and shape the national debate."); NAT. RES. DEF. COUNCIL, https://www.nrdc.org/how-we-work#advocacy (last visited Nov. 16, 2021) ("Creating blueprints for lasting environmental change isn't enough. We have to persuade decision makers to adopt those innovative solutions, so NRDC's advocates work at every level, from mayors' offices to the halls of Congress to international negotiating tables.").

400. DEFENDING DEMOCRACY TOGETHER, https://www.defendingdemocracytogether.org/about-us/ (last visited Nov. 16, 2021) ("We are dedicated to defending America's democratic norms, values, and institutions and fighting for consistent conservative principles like rule of law, free trade, and expanding legal immigration."); PLANNED PARENTHOOD, https://www.plannedparenthood.org/about-us/who-we-are (last visited Nov. 16, 2021) ("Planned Parenthood has 17 million supporters nationwide – activists and donors committed to helping us promote policies that protect and advance access to a full range of sexual and reproductive care and education."); NAT'L RIFLE ASS'N, https://home.nra.org/about-the-nra/ (last visited Nov. 16, 2021) (considering itself "a major political force and . . . America's foremost defender of Second Amendment rights"); *see also* Aaron Kessler, *Why the NRA is So Powerful on Capitol Hill, By the Numbers*, CNN (Feb. 23, 2018, 2:12 PM), https://www.cnn.com/2018/02/23/politics/nra-political-money-clout/index.html ("[E]ight lawmakers have been on the receiving end of at least $1 million in campaign contributions from the NRA over the courses of their careers."); Torres-Spelliscy, *supra* note 365 ("In the last presidential election in 2016, the National Rifle Association (NRA) made waves being the biggest dark money

funds that are registered as political action committees,[401] their 501(c)(3) and (4) counterparts are dedicated to influencing the views of voters and the actions of Congress.[402] Thus, disclosure laws ensure that these organizations are not misusing funds and acting outside of the scope of IRS guidelines.[403]

Organizations like 501(c)(4)'s who do not disclose their donors "use[] a range of tactics to underreport their political activities to the IRS."[404] 501(c)(4) organizations appear to meet the "requirements for promoting social welfare" when in actuality they are spending large sums of money on political activities.[405] Some organizations classify expenditures that support or criticize candidates "as 'lobbying,' 'education,' or 'issue advocacy' on their tax returns" to avoid disclosure.[406] ProPublica compared applications of seventy-two 501(c)(4) organizations with tax returns they filed at a later date.[407] They found that thirty-two groups that initially noted that they did not engage in political activity later "filed tax returns showing they had done the opposite."[408] Because the IRS does not specify how much political activity engagement is too much for 501(c)(4) organizations, there are seemingly no consequences for these organizations that spend large sums of

spender, spending $54 million."); Massoglia & Evers-Hillstrom, *supra* note 366 ("Anti-Trump 501(c)(4) nonprofit Defending Democracy Together also chipped in, spending more than $15 million opposing Trump or boosting Biden.").

401. *See, e.g.*, *Planned Parenthood Action Fund*, https://www.plannedparenthoodaction.org/ (last visited Apr. 4, 2022) (stating that its purpose is "to advance access to sexual health care and defend reproductive rights"); *NRA-PVF Political Victory Fund*, https://www.nrapvf.org/ (last visited Apr. 4, 2022) ("The NRA Political Victory Fund (NRA-PVF) is NRA's political action committee. The NRA-PVF ranks political candidates—irrespective of party affiliation—based on their voting records, public statements and their responses to an NRA—PVF questionnaire.").

402. *See supra* notes 399–401.

403. *See* Robert Barnes, *Supreme Court Strikes Down Calif. Law Requiring Charities to Disclose Top Donors to Attorney General*, WASH. POST (July 1, 2021, 4:25 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-california-charity-donors/2021/07/01/787d5c16-da6b-11eb-9bbb-37c30dcf9363_story.html.

404. Kim Barker, *How Nonprofits Spend Millions on Elections and Call It Public Welfare*, PROPUBLICA (Aug. 18, 2012, 11:25 PM), https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.* In 2008, American Future Fund reported to the IRS that it would not participate in politics. *Id.* Later, they "uploaded an ad to YouTube" supporting a Republican Senator. *Id.* The group later reported "$8 million in political spending in 2010." *Id.* Similarly, the "Republican Jewish Coalition told the FEC it spent more than $1.1 million on political ads," none of which was reported to the IRS. *Id.* The grants and "political advertising made up almost 40 percent of the total expenditures of the group." *Id.* The chair of the Coalition is a GOP super donor and casino tycoon Sheldon Adelson. *Id.* The Adelsons spent $92 million on GOP candidates in 2012 and $20 million on Trump's campaign in 2016. Christine Mai-Duc & Jazmine Ulloa, *These Are the Billionaires Hoping to Influence Elections that Will Determine Control of Congress*, L.A. TIMES (Nov. 5, 2018), https://www.latimes.com/politics/la-na-pol-midterm-election-billionaires-20181105-story.html.

money on politics.[409] It is clear that some 501(c)(3) and (4) groups are influencing elections by spending heavily on campaigns and the Federal Election Commission is not adequately monitoring this spending.[410] IRS officials have admitted that the rules surrounding what charitable organizations can do "are vague and difficult to enforce."[411] Disclosure requirements are key to providing the public oversight that the IRS clearly cannot.[412]

Ultimately, the *Bonta* Court should have preserved the exacting scrutiny standard as set forth in its prior disclosure cases, requiring the law to have a substantial relation to a sufficiently important government interest.[413] In applying that standard, it should have given due deference to the significant governmental interest in preventing charitable fraud and acknowledged the importance of disclosure regimes as it has in precedential cases.[414] As a result, the Court should have ruled that the petitioners' speculative and unrelated harms did not outweigh those significant interests and, thus, held that the disclosure requirement was constitutional.[415] In doing so, the Court should have reiterated the importance of disclosure to preserve transparency of political spending and the integrity of the American political system.[416]

V. CONCLUSION

States should have the opportunity to create disclosure requirements that protect donors from threats, harassments, or reprisal while ensuring that non-political organizations like Americans for Prosperity Foundation and the

409. *See* John D. Colombo, *The I.R.S. Should Eliminate 501(c)(4) Organizations*, N.Y. TIMES (May 15, 2013), https://www.nytimes.com/roomfordebate/2013/05/15/does-the-irs-scandal-prove-that-501c4s-should-be-eliminated/the-irs-should-eliminate-501c4-organizations ("The problem with the (c)(4) designation is that it is essentially a charity that is permitted to engage in unlimited lobbying and some significant amount of political campaign activity (as long as that activity isn't the organization's 'primary purpose') in exchange for denying the organization the ability to receive deductible charitable organizations. But the Internal Revenue Service will never be able to satisfactorily police the line at which political activity becomes 'primary.'").

410. *See supra* Section II.B.1.

411. Eric Lichtblau, *I.R.S. Expected to Stand Aside as Nonprofits Increase Role in 2016 Race*, N.Y. TIMES (July 5, 2015), https://www.nytimes.com/2015/07/06/us/politics/irs-expected-to-stand-aside-as-nonprofits-increase-role-in-2016-race.html ("Audits for excessive campaign work are extremely rare, even for groups spending huge chunks of their budgets to support candidates. Complaints about abuses can languish for years, records show. With scant enforcement, some nonprofits have become huge political operations.").

412. *See supra* notes 270–273 (noting that disclosure requirements can serve as a mechanism to police charitable fraud).

413. *See supra* Section IV.A.

414. *See supra* Sections IV.B, IV.C.

415. *See supra* Sections IV.B, IV.C.

416. *See supra* Section IV.D.

Thomas More Law Center are not using their donations for inappropriate endeavors, like political activities. The Supreme Court made that increasingly difficult by establishing a new version of exacting scrutiny that defied decades of precedent.[417] The *Bonta* majority placed the associational rights of wealthy donors above the fundamental tenets of democracy and improperly encroached on the state's ability to exercise its authority to protect the public from charitable fraud.[418] Also imperative is the important public interest in protecting disclosure requirements in the electoral process.[419] If the United States is to have free, fair, and transparent elections, the right of the public to know who is exercising influence over their vote and who they are voting for is crucial.[420] By requiring the application of a stricter standard to all disclosure laws, the Supreme Court's holding in *Americans for Prosperity v. Bonta* has threatened the survival of existing and future disclosure laws that regulate election spending, and, in turn, it has threatened democracy.[421]

417. *See supra* Section IV.A.
418. *See supra* Part III.
419. *See supra* Section IV.D.
420. *See supra* Section IV.D.
421. *See supra* Part IV.