NOTE

DEMOCRACY DIES IN . . . CHARITABLE DONATIONS? UNPACKING THE SUPREME COURT'S DECISION IN *AMERICANS FOR PROSPERITY V. BONTA*

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INTRODUCTION

One of the most pressing issues facing Montana's state legislators in February of 2015 was whether to pass a bill in the state's upcoming legislative session that would expand Medicaid to 70,000 low-income Montanans.[1] To target Republican state legislators who refused to sign a blanket pledge opposing the prospective bill, a conservative advocacy

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[1] John S. Adams and Briana Wipf, *AFP takes aim at Medicaid growth*, GREAT FALLS TRIBUNE (Feb. 8, 2015), https://www.greatfallstribune.com/story/news/politics/2015/02/09/afp-takes-aim-medicaid-growth/23103897/.

group began organizing "healthcare town halls" in the legislators' districts to persuade the legislators to "stand with us and vote NO on ObamaCare's Expansion in Montana."[2] There was only one problem with the town halls: the legislators themselves were not invited.[3]

Jeff Welborn, then a Republican member of the legislature and now a state senator, was one of these legislators.[4] Despite not receiving an invitation to the town hall, Representative Welborn decided to show up anyway.[5] He confronted the organizer of the meeting, demanding to know why he was not invited to an event that encouraged attendees to "tell Jeff Welborn to stand with us and vote NO on ObamaCare's Expansion in Montana."[6] When the organizer told Welborn that his office had reached out to him twice, he bluntly told him that he "was as full of shit as a Christmas goose."[7] In response, the organizer reminded Representative Welborn that "he didn't sign the card," implying that the town hall was a punitive response to Representative Welborn's failure to fall in line with the organization's agenda.[8]

The group responsible for organizing the healthcare town halls was not affiliated with local Montanans residing in the districts that the group targeted. The reality was far more troubling: the organization responsible was Americans for Prosperity Foundation (AFP), the political advocacy group at the center of the Koch brothers' vast political network.[9] Since the Kochs founded Americans for Prosperity in 2004, the political action group has been instrumental in tilting American politics to the right.[10] Today, it even rivals the Republican Party itself in size and influence.[11] In 2011, for example, AFP's members caused quite a stir in Wisconsin politics after their behind-the-scenes effort to hobble labor unions led Republicans in Wisconsin to pass a bill that eliminated the rights of virtually all public-sector workers to collectively bargain with Wisconsin's government.[12]

As AFP has gained in size and influence, it has done more than just lobby state legislators or advocate for its preferred policies. In 2021, AFP

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2 DARK MONEY (Big Sky Film Productions 2018).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 Alexander Hertel-Fernandez et al., *How the Koch brothers built the most powerful rightwing group you've never heard of*, THE GUARDIAN (Sep. 28, 2018), https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group.

10 *Id.*

11 *Id.*

12 *Id.*

successfully convinced the Supreme Court in *Americans for Prosperity v. Bonta*, a case that I will argue the Court wrongly decided, to declare unconstitutional a California law that required AFP to submit a list of its major donors to the state.[13] AFP's battle with California began in 2014. That year, it filed a motion in the U.S. District Court for the Central District of California to preliminarily enjoin California's Attorney General from demanding its Schedule B form, a tax form that includes all the names and addresses of every individual nationwide who donates more than $5,000 to a charity in a given tax year.[14] At the time, California law required charitable organizations such as AFP to disclose their Schedule Bs to the state in order to maintain charitable status.[15]

The case percolated through the lower federal courts until the U.S. Supreme Court granted certiorari in its October 2020 term.[16] The Court decided the case in favor of AFP in June of 2021. It held that California's Schedule B law unconstitutionally infringed on AFP's First Amendment right to the freedom of association.[17] The Court balanced California's interest in collecting the form with the chilling effect that disclosure might have on AFP's donors' willingness to make contributions to the organization.[18] The Court held that because AFP had offered compelling evidence that its donors might suffer threats and harassment if the public somehow discovered they were affiliated with or had contributed to the organization, California's interest in enforcing the law could not compensate for the severe burden it imposed on AFP's donors.[19] Significantly, the Court did not cabin its holding to the facts of AFP's case.[20] Instead, it struck the entire law down as unconstitutional, finding that in no instance could California constitutionally apply the law to the charitable organizations that call California home.[21]

The Court's decision in *Americans for Prosperity v. Bonta* is a blow for democracy and transparency in elections. The Court first erred by arbitrarily re-defining exacting scrutiny, the level of constitutional scrutiny that applies to laws that compel disclosure, to require that those laws be narrowly tailored toward the interests they promote.[22] The Court then compounded its error by finding that California's Schedule B law could not withstand its new version of exacting scrutiny because it was not

13 Ams. for Prosperity Found. v. Harris, 182 F.Supp.3d 1049 (C.D. Cal. 2016).

14 *Id.* at 1052.

15 *Id.*

16 *See* Grant of Writ of Certiorari, *Ams. for Prosperity Found. v. Bonta* (NO.19-251) https://www.supremecourt.gov/grantednotedlist/20grantednotedlist.

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

18 *Id.* at 2385.

19 *Id.* at 2388.

20 *Id*. at 2389.

21 *Id.*

22 *Id*. at 2384.

narrowly tailored toward the state's interest in policing charitable fraud.[23] And the Court provided the cherry on top to its arbitrary analysis by declaring that the Schedule B law was unconstitutional in all of its applications.[24] The Court's decision in *Americans for Prosperity* may now inspire voters and organizations to challenge laws that require candidates in political elections to disclose the names of donors to their campaigns, since courts also review these laws under exacting scrutiny.[25] This case may, in other words, further erode the democratic sanctity of state and federal elections.

I. PROCEDURAL POSTURE

From 2001 to 2010, AFP renewed its charitable status in California without including a Schedule B form in its Form 990, a non-profit organization's federal tax return.[26] But in 2013, with Kamala Harris serving as the state's attorney general, California finally informed AFP that its 2011 tax filing was incomplete.[27] AFP then filed a motion in the Central District of California to preliminarily enjoin AG Harris from enforcing its Schedule B law.[28] AFP argued that the law was unconstitutional both on its face and as applied to AFP because it deterred people from contributing to and freely associating with charitable organizations, a violation of their First Amendment right to the freedom of association.[29]

The district court granted AFP's motion for a preliminary injunction, a decision that AG Harris appealed and one that the Ninth Circuit quickly remanded on review.[30] Following a bench trial, the district court held in favor of AFP, finding the Attorney General's Schedule B disclosure requirement unconstitutional as applied to AFP.[31] The district court did not, however, grant AFP's facial challenge to the law.[32] AFP again appealed to the Ninth Circuit, this time in a consolidated appeal with the Thomas More Law Center, a conservative 501(c)(3) organization that had also secured an injunction against AG Harris on the same First Amendment grounds.[33] On review, a unanimous panel of the Ninth Cir-

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23 *Id.* at 2389.

24 *Id.*

25 *See generally* Fam. PAC v. McKenna, 685 F.3d 800 (9th Cir. 2012); Hum. Life of Wash., Inc. v. Brumsickle, 624 F.3d 990 (9th Cir. 2010); Worley v. Cruz-Bustillo, 717 F.3d 1238 (11th Cir. 2013).

26 Ams. for Prosperity Found. v. Harris, 182 F.Supp.3d 1049, 1052 (C.D. Cal. 2016).

27 *Id.*

28 *Id.*

29 *Id.* at 1058.

30 *Id.* at 1052.

31 *Id.* at 1058.

32 *Id.* at 1052.

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

cuit reversed and vacated the district court's decision.[34] The Ninth Circuit held that the California Attorney General's Schedule B requirement was constitutional because of its substantial relation to the state's important interest in policing charitable fraud.[35] The Supreme Court granted certiorari in October of 2020, and AFP ultimately prevailed on the last day of the Court's October 2020 term.[36]

When AFP first filed suit in 2014, the Office of California's Attorney General maintained an informal policy of treating Schedule B forms as confidential documents that the public could not access on the state's registry.[37] After the district court granted AFP's motion for a preliminary injunction in 2014, California's state legislature codified the confidentiality policy in a formal regulation, which today requires that donor information be maintained as confidential and undisclosed except under limited circumstances.[38] The Office of California's Attorney General then implemented several security measures to prevent future disclosures of Schedule B forms.[39] Still, AFP maintained that California's Schedule B law violated the constitution because of the chilling effect it would have on its members.[40]

The Ninth Circuit was sympathetic to AFP's concern about disclosure, since AFP had provided the district court with evidence that some of its members might be threatened or harassed if its Schedule B form leaked to the public.[41] But the court nevertheless rejected AFP's argument that it had shown a reasonable probability that compelled disclosure would produce the chilling effect it claimed it would.[42] It therefore concluded that AFP had failed to demonstrate that the Attorney General's cybersecurity protocols were so deficient, and the risk of leaked information so high, that it should release AFP from its obligation to submit its Schedule B form to the state, much less strike the whole law down as unconstitutional.[43]

A. Governing Law

The Court first articulated the constitutional principles that apply to state disclosure and reporting requirements in *NAACP v. Alabama ex rel.*

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34 *Id.* at 1005.

35 *Id.* at 1006.

36 Ams. for Prosperity Foundation v. Bonta, 141 S.Ct. 2373, 2389 (2021).

37 *Becerra*, 903 F.3d at 1005.

38 Thomas More Law Center v. Harris, No. CV 15-3048-R, 2016 U.S. Dist. WL 6781090, at *1, *15, (C.D. Cal. Nov. 16, 2016).

39 *Id.* at *15-16.

40 *Bonta*, 141 S.Ct. at 2378.

41 *Becerra*, 903 F.3d at 1017-18.

42 *Id.* at 1019.

43 *Id.*

Patterson.[44] *NAACP v. Alabama* was decided at the height of the civil rights movement in 1958, just two years after the NAACP's local chapter in Alabama had organized the year-long Montgomery bus boycott under Martin Luther King, Jr.'s leadership.[45] With the bus boycott ongoing, John Patterson, then the Attorney General of Alabama, filed a civil action in state court to enjoin the NAACP from conducting any activity in Alabama.[46] Before the court could hold a hearing on the merits of the case, AG Patterson moved for a court order to require the NAACP's Alabama chapter to produce the names and addresses of all of its members and agents.[47]

The NAACP appealed to the Supreme Court, and the Court held in favor of the NAACP.[48] Writing for a unanimous court, Justice Harlan determined that the Court should first look past the NAACP's nonprofit corporate form—it should pierce its "corporate veil"—and consider the effects that disclosure would have on the associational rights of the NAACP's members to "pursue their collective effort to foster beliefs which they admittedly have the right to advocate."[49] Justice Harlan felt it was appropriate to pierce the NAACP's corporate veil because it was a voluntary, nonprofit membership organization that merely acted as the members' representative.[50] As its representative, the NAACP bore the constitutional rights of its members, and thus deserved the same judicial treatment that a member would receive if she had individually sued Alabama's Attorney General.[51]

The Court then ruled that the production order imposed a substantial restraint upon the NAACP's right to freely associate.[52] The NAACP convinced the Court that disclosure would likely expose its members to economic reprisal, loss of employment, physical threats, and public hostility.[53] It also rejected Alabama's argument that the NAACP should nevertheless be forced to disclose its members' identities because any threats or harassment its members might suffer would be a result of private community pressures.[54] The Court said that the "interplay of gov-

44 NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 459 (1958).

45 Lee E. Goodman, *The First Amendment Right to Political Privacy Chapter 4 – NAACP v. Alabama*, WILEY (MAY, 2019), https://www.wiley.law/newsletter-The-First-Amendment-Right-to-Political-Privacy-Chapter-4-NAACP-v-Alabama.

46 *Id.*

47 *Id.*

48 *Patterson*, 357 U.S. at 466-67.

49 ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS 273 (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462-63 (1958)).

50 *Id.* at 274.

51 *Id.*

52 *See id.*

53 *Patterson*, 357 U.S. at 462-63.

54 *Id.*

ernmental and private action" was enough to implicate the NAACP's First Amendment rights.[55] *NAACP v. Alabama* thus remains a landmark case in First Amendment law for its recognition that private activity can chill speech and association just as effectively as governmental action.[56] Today, state laws that do not themselves directly restrain speech but instead enable private actors to deter it fall within the scope of First Amendment prohibitions.[57]

Two years later, in *Shelton v. Tucker*, the Court found unconstitutional an Arkansas statute that required teachers to annually file an affidavit listing every organization to which they belonged or regularly contributed.[58] Like the law at issue in *NAACP*, the statute in *Shelton* was designed to identify teachers affiliated with the NAACP.[59] Writing for a divided Court, Justice Stewart held that the statute impermissibly infringed on the teachers' fundamental personal liberties because its scope was "completely unlimited": teachers were required, for example, to disclose every church to which they belonged, every political organization they had contributed to over a five-year period, and any other conceivable kind of associational tie they maintained.[60] The problem for the Court, then, was that the means by which the State pursued what might have been a legitimate objective broadly stifled the teachers' fundamental personal liberties.[61] The Court thus might have upheld the statute if it had achieved its purpose by less drastic means.[62]

The Supreme Court's decisions in *NAACP v. Alabama* and *Shelton v. Tucker* suggested that the Court would subject compelled disclosure laws to a standard of constitutional scrutiny resembling strict scrutiny.[63] But it was not until *Buckley v. Valeo*, a case the Supreme Court decided in 1974, that the Court would expressly articulate what kind of scrutiny actually applies to laws that compel disclosure.[64] *Buckley v. Valeo* established the campaign and political disclosure framework for campaign finance jurisprudence.[65] In *Buckley*, the Court reviewed several challenges to the Federal Election Campaign Act (FECA), the landmark statute that

55 *Id.* at 463.

56 Dale E. Ho, *NAACP v. Alabama and False Symmetry in the Disclosure Debate*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 412 (2012).

57 *Id.*

58 Shelton v. Tucker, 364 U.S. 479, 480 (1960).

59 *Shelton v. Tucker*, LAW.JRANK, https://law.jrank.org/pages/22820/Shelton-v-Tucker-Significance.html.

60 *Shelton*, 364 U.S. at 487-88.

61 *See id.* at 488.

62 *Id.* at 490.

63 *See* NAACP v. Alabama *ex rel.* Patterson, 377 U.S. 288, 307 (1964); *see also* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

64 Buckley v. Valeo, 424 U.S. 1, 24-25 (1974).

65 Trevor Potter, *Buckley v. Valeo: Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 73 (2000).

created a comprehensive system of federal campaign finance regulation.[66] FECA's disclosure provisions required political committees, political parties, and candidates to register with the Federal Election Commission (FEC) and provide the agency with a list of its donors and the amount of those donors' contributions; individuals and groups other than political committees and candidates were also required to report independent expenditures of over $100 to the FEC.[67]

The *Buckley* Court held that FECA's disclosure provisions were constitutional.[68] The Court first recognized that *NAACP* and *Shelton* clearly established that compelled disclosure can infringe on the freedom of association and privacy that the First Amendment protects.[69] A mere showing of some legitimate interest, therefore, was not enough for the *Buckley* Court to find that the government's disclosure requirement was constitutional.[70] Instead, the Court affirmed that there must be a "relevant connection" or "substantial relation" between the government's interest and the information that people had to disclose.[71] To determine whether such a connection existed, the Court would subject the subordinating interests of the government to "exacting scrutiny."[72] If the government's interests were sufficiently important to survive exacting scrutiny, the Court would uphold the disclosure requirement.[73] In *Buckley*, the Court found that FECA's disclosure provisions survived exacting scrutiny because the disclosures provided voters with the necessary information to evaluate those who seek federal office and deterred actual corruption and the appearance of corruption.[74]

Fast-forward 36 years to the Supreme Court's term in 2010, when disclosure was a hot topic on the Court's docket. That year, the Court heard two significant challenges to compelled disclosure laws.[75] In *Doe v. Reed*, the Court considered a facial challenge to a Washington law that authorizes private parties to obtain copies of referendum petitions and their signatories.[76] To challenge a law by referendum, roughly four percent of voters in Washington must sign a petition before the state will place a referendum on the ballot; the petition must also include the

66 *Id.*

67 *Id.*

68 *Buckley*, 424 U.S. at 71-72.

69 *Id.* at 64.

70 *Id.*

71 *Id.*

72 *Id.* at 64-65.

73 *See id.*

74 *Id.* at 66-67.

75 *See* Doe v. Reed, 561 U.S. 190, 191 (2010); *see also* Citizens United v. FEC, 130 S.Ct. 876, 886 (2010).

76 *Doe*, 561 U.S at 191.

names and addresses of all the petition's signatories.[77] The referendum petition at issue in *Doe v. Reed* challenged a state law that extended certain benefits to same-sex couples.[78] The issue before the Court was whether disclosure of referendum petitions would violate the First Amendment.[79]

The Court in *Doe* relied on its precedents that also evaluated First Amendment challenges to disclosure requirements in the electoral context.[80] The Court affirmed that it reviews such challenges under "exacting scrutiny," which, according to the Court, requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.[81] For a disclosure law to withstand exacting scrutiny, "the strength of the government's interest must also reflect the seriousness of the actual burden on First Amendment rights."[82] The Court then held that Washington's law withstood exacting scrutiny because disclosure helped prevent certain types of petition fraud and ensured that the only signatures counted were those that should be counted.[83]

The Court considered the other major challenge to a disclosure law in *Citizens United v. FEC*. Citizens United is a right-leaning nonprofit corporation.[84] In 2008, it produced a 90-minute documentary film about Hillary Clinton that was essentially a negative political ad urging viewers to vote against her in the upcoming primary election.[85] The problem with the documentary was not that it was one-sided, but that Citizens United had partly funded the movie with corporate contributions.[86] At the time, the Bipartisan Campaign Reform Act (BCRA) prohibited corporations from drawing on their general treasury funds to finance electioneering communications: ads running 30 days before a primary election that clearly refer to an identified candidate for federal office.[87] Anticipating that the FEC would consider *Hillary: The Movie* an electioneering communication, Citizens United sought declaratory and injunctive relief in federal court, arguing that BCRA's provision restricting corporations from funding electioneering communications was unconstitutional as applied to *Hillary: The Movie*.[88]

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77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.* at 195.
81 *Id.*
82 *Id.* at 196.
83 *Id.* at 198-199.
84 Citizens United v. FEC, 130 S.Ct. 876, 915 (2010).
85 *Id.* at 887.
86 *See* WINKLER, *supra* note 49 at 309.
87 *Id.* at 328.
88 *Id.* at 341.

Citizens United also argued that BCRA's disclaimer and disclosure provisions, which required political advocacy groups who funded a televised electioneering communication to include a disclaimer in the communication that they were responsible for the content, were unconstitutional as applied to its advertisements for *Hillary: The Movie*.[89] The Court examined BCRA's disclosure requirements under exacting scrutiny.[90] It noted that exacting scrutiny requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest, and held that BCRA's disclosure provisions were constitutional under this test.[91] It explained first that BCRA's disclosure provisions helped ensure that voters are fully informed about the kinds of people and groups who are speaking about candidates shortly before an election takes place.[92] It then rejected the organization's argument that BCRA's disclosure requirements would chill their donors by exposing them to retaliation.[93] Although the Court recognized that disclosure requirements can have such a chilling effect, it held that Citizens United had failed to show one because it identified no instances of its members facing harassment or retaliation after their identities were disclosed to the public.[94]

II. THE COURT IN *Americans for Prosperity v. Bonta*

The Supreme Court in *Americans for Prosperity v. Bonta* held that California could not constitutionally require charities and other nonprofit organizations to submit their Schedule B forms before they could lawfully solicit contributions.[95] The Court agreed with AFP that the law was unconstitutional both on its face and as applied to AFP.[96] Writing for the Court, Chief Justice John Roberts first affirmed that the Court reviews laws that compel disclosure requirements under exacting scrutiny, regardless of the type of association at issue.[97] He then wrote that exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends; in other words, exacting scrutiny does not require the government to obtain no more information than is necessary to achieve the precise purpose for which it imposed a disclosure requirement.[98] Instead, according to Roberts, exacting scrutiny only requires

89 *Citizens United*, 130 S.Ct at 915.
90 *Id.* at 914.
91 *Id.*
92 *Id.*
93 *Id.* at 916.
94 *Id.*
95 Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2389 (2021).
96 *Id.* at 2389.
97 *Id.* at 2383.
98 *Id.* at 2383.

that a disclosure regime be narrowly tailored to the interest it promotes.[99] Disclosure regimes, he stated, must be narrowly tailored even if they do not actually impose a burden on a party's First Amendment rights.[100] The Court held that *Shelton* instructs courts to consider first whether a disclosure law is narrowly tailored because only then can they reasonably assess whether the burdens the law imposes are actually necessary.[101]

The Court then held that California's law was not narrowly tailored and thus did not withstand exacting scrutiny.[102] The Court found that there was a dramatic mismatch between the interest that California's AG sought to promote by enforcing the Schedule B law against charities and the means by which the law achieved that interest.[103] The State failed to persuade the Court that collecting Schedule Bs was integral to its disclosure regime because it did not show that it used Schedule Bs to initiate investigations of charitable fraud.[104] Collecting Schedule Bs, then, appeared to be more about "ease of administration" for the State.[105] Mere administrative convenience, according to the Court, was not enough to outweigh the serious burdens that the demand for Schedule Bs imposed on donors' associational rights.[106] Because the Court found the State's interest in administrative convenience to be insufficient in a substantial number of the law's applications, it held that the up-front collection of Schedule Bs was facially unconstitutional as well.[107]

Justice Sotomayor, joined by Justices Breyer and Kagan, wrote the only dissenting opinion in the case.[108] Justice Sotomayor argued that the Court had arbitrarily abandoned its requirement that plaintiffs demonstrate that a disclosure law actually chills their associational rights before the Court examines that law under exacting scrutiny.[109] For her, the Court had instead erroneously baked into its disclosure jurisprudence a presumption that all disclosure requirements impose associational burdens on those they regulate.[110] She would have found this development less troubling if the Court had not, in her view, adopted the new rule that every reporting or disclosure requirements be narrowly tailored.[111] She argued that it was only under that new rule that the Court was able to

99 *Id.*
100 *Id.* at 2384.
101 *Id.*
102 *Id.* at 2386.
103 *Id.*
104 *Id.* at 2387.
105 *Id.*
106 *Id.*
107 *Id.*
108 *See id.* at 2392 (Sotomayor, J., dissenting).
109 *Id.* at 2396.
110 *Id.* at 2395.
111 *Id.* at 2400.

offer any plausible argument that it should strike the law down on its face.[112] The Court would otherwise not be able to claim that the law was unconstitutional in a substantial number of its applications, the test under which the Court evaluates facial challenges to a law.[113]

The dissent also argued that the Court gave short shrift to the State's interest in requiring non-profits to submit their Schedule Bs.[114] Justice Sotomayor wrote that the Court trivialized the State's disclosure requirement by reducing it to a law that merely makes charitable regulation easier.[115] She pointed out that the Court has previously recognized that an interest in efficiency can be critical to the effective operation of state agencies, and that audit letters and subpoenas can alert charities to an investigation and cause them to hide assets or destroy documents.[116] For the dissent, the State's interest in ensuring that the subject of an investigation does not destroy evidence necessary for a prosecution was surely compelling enough to require charities to disclose their donors.[117]

III. ANALYSIS

A. The Court Arbitrarily Mischaracterized and Re-defined Exacting Scrutiny to Require Narrow Tailoring. It Then Compounded its Error by Applying it to the Facts of this Case

In anticipation of the Court's opinion in *Americans for Prosperity v. Bonta*, Professor Rick Hasen, a scholar of election law, asked an important and prescient question: "Will [Chief Justice Roberts] Pull the Same Switcheroo on Exacting Scrutiny as He Did in McCutcheon?"[118] *McCutcheon v. FEC* involved the constitutionality of aggregate contribution limits, which are evaluated under exacting scrutiny.[119] Before *McCutcheon*, the Court had upheld a number of laws that imposed contribution limits based upon little evidence of corruption.[120] But in *McCutcheon*, the Court held that Congress may only target "quid pro quo" corruption.[121] Under this new definition of corruption, aggregate contribution laws would require more evidence of a legitimate governmental interest to withstand exacting scrutiny.[122] The Court thus made exacting scrutiny

112 *Id.* at 2402.
113 *Id.*
114 *Id.* at 2401.
115 *Id.* at 2402.
116 *Id.*
117 *Id.*
118 Rick Hasen, *If CJ Roberts Has the Opinion in Americans for Prosperity v. Bonta, Will He Pull the Same Switcheroo on Exacting Scrutiny as He Did in McCutcheon?*, ELECTION LAW BLOG (June 29, 2021), https://electionlawblog.org/?p=122908.
119 *Id.*
120 *Id.*
121 McCutcheon v. FEC, 572 U.S. 185, 192 (2014).
122 Hasen, *supra* note 118.

harder to satisfy and, as Professor Hasen observed, harder to distinguish from strict scrutiny.[123] Professor Hasen predicted that the Court's decision in *Americans for Prosperity v. Bonta* might again make it more difficult for compelled disclosure laws to withstand exacting scrutiny.[124] Sadly, Professor Hasen was right.

As I will demonstrate below, the Court misreads its prior case law to justify making exacting scrutiny a more stringent standard to meet. It first relies on an erroneous reading of *Shelton v. Tucker* to support its conclusion that exacting scrutiny has always required narrow tailoring.[125] It then misreads previous cases in which it applied exacting scrutiny, such as *Doe v. Reed*, to explain why California's Schedule B law fails exacting scrutiny when the laws at issue in those cases did not.[126]

As Justice Sotomayor notes in her dissent, the Court struggles mightily to find a precedent for requiring that a disclosure law reviewed under exacting scrutiny be narrowly tailored, regardless of whether the law actually imposes any burdens.[127] She points out that the Court misreads *Shelton* to support this conclusion,[128] and she is right. The Court in *Shelton* stated that the government cannot pursue a legitimate and substantial purpose by means that broadly stifle personal liberties if that purpose can be more narrowly achieved.[129] In the following line, it restated this proposition by declaring that "the breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose."[130] For Chief Justice Roberts, this suggested that "broadly stifle" refers to the scope of a challenged disclosure law, not the severity of the burden it imposes on a party.[131] But as Justice Sotomayor points out in her dissent, stifle suggests quelling or suppressing by force;[132] in fact, Merriam Webster's definition of stifle is "to withhold from circulation or expression."[133] Roberts' conclusion also enjoys little support from the sources that the Court in *Shelton* actually relied on to support its claim, that "the breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[134]

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123 *See id.*

124 *See id.*

125 *See generally* Shelton v. Tucker, 364 U.S. 479 (1960).

126 *See generally* Doe v. Reed, 364 U.S. 479 (2010).

127 *See* Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2392 (2021) (Sotomayor, J., dissenting).

128 *See id.* at 2398-99.

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

130 *Id.*

131 *See Bonta*, 141 S.Ct at 2385.

132 *See id.* at 2398 (Sotomayor, J., dissenting).

133 *Id.* at 2398; Stifle, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/stifle (last visited Jan. 27, 2023).

134 Shelton v. Tucker, 364 U.S. 479, 499 (1960).

The *Shelton* Court cited first Professor Paul A. Freund's article on competing freedoms in American Constitutional Law.[135] Professor Freund argues in this article that laws in the First Amendment context must be viewed "in the light of the availability of less drastic means."[136] The examples he provides are illustrative. He argues that a legislature could not, in an effort to avoid unsightly littering, outright prohibit the distribution of leaflets because doing so would inevitably burden those who distribute leaflets of a religious or political character.[137] In another example, he argues that a state could not ban all "uncomic comic books" in order to achieve the legitimate goal of keeping salacious or inappropriate material out of the hands of children.[138] For Professor Freund, the issue in both of these hypotheticals is not just that the law would cast a wide net, but that it would unavoidably infringe on a person's First Amendment rights.[139] In the leaflet scenario, for example, the law would suppress political and religious speech, which are clearly protected under the First Amendment;[140] in the comic book scenario, the law would suppress potentially pornographic material that is not obscene, which also enjoys First Amendment protection.[141] In short, the laws in each of Professor Freund's examples were problematic, not just because of their scope, but because they inevitably infringed on protected First Amendment rights.

The Court in *Americans for Prosperity v. Bonta* apparently failed to consider the other two sources that the *Shelton* Court cites for the proposition that "the breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."[142] One of the authors the Court cites also contemplates a law that bans the distribution of handbills in order to reduce litter on the streets.[143] The author argues that the government could instead punish people who litter the handbills on the street, or add additional trash cans to the streets, or simply stimulate citizen pride in clean streets.[144] Implicit in the author's argument is the assumption that banning the distribution of handbills

135 *Id.* at n.9.

136 Paul A. Freund, *Competing Freedoms in American Constitutional Law,* Conference on Freedom and the Law, May 7 1953: Fiftieth Anniversary Celebration at 33 (1953).

137 *Id.*

138 *Id.*

139 *Id.*

140 *See generally* Widmar v. Vincent, 454 U.S. 263, 269 (1981); *see also* O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712, 718 (1996).

141 *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413 (1966).

142 Shelton v. Tucker, 364 U.S. 479, 499 (1960).

143 Elliot L. Richardson, *Freedom of Expression and the Function of Courts,* 65 HARV. L. REV. 1, 24-25 (1951).

144 *Id.*

would inevitably burden speech because some citizens would not be able to garner support for a cause.[145]

The third source that the *Shelton* Court cites for its apparently significant claim argues that courts must first "assay the goal of a given legislative action, and then determine whether means less harmful to First Amendment rights might be used to reach it."[146] Like the other articles, this article contemplates a law that is necessarily harmful to the First Amendment. The authors write that even if the end is proper, Congress cannot pursue it by means that abridge First Amendment freedoms if Congress could conceivably achieve its goal by less burdensome means.[147] Again, the authors do not contemplate a law that is broad in scope and merely inconvenient; they contemplate a law that abridges First Amendment freedoms.[148]

Shelton thus does not clearly support the notion that "broadly stifle" refers to the scope of challenged restrictions rather than the severity of any demonstrated burden.[149] *Shelton* especially does not support the Court's conclusion that disclosure laws reviewed under exacting scrutiny be narrowly tailored, regardless of whether the law actually abridges First Amendment freedoms.[150] It is true, as Roberts notes, that the *Shelton* Court cited the "unlimited and indiscriminate sweep of the statute" as a factor for declaring it unconstitutional.[151] But the Court also considered that the statute did not require that the school board keep confidential the organizations to which their teachers belonged, and that the teachers served at the absolute will of those to whom they disclosed their affiliations.[152] So the *Shelton* Court did not simply have an issue with the scope of the statute; it also took issue with the reality that the statute, by permitting members of a school board to terminate teachers based on who they affiliated with, would inevitably abridge the teachers' First Amendment freedoms.[153]

As Justice Sotomayor points out in her dissent, the Court's approach to the statute at issue in *Shelton* is characteristic of how the Court used to evaluate laws that it reviewed under exacting scrutiny.[154] The Court would begin its analysis by determining whether the challenged law im-

145 *Id.*

146 Yale Law Journal, *Legislative Inquiry into Political Activity,* 65 YALE L.J. 1159, 1173-1174 (1956).

147 *Id.*

148 *Id.* at 1174-75.

149 *See generally* Shelton v. Tucker 364 U.S. 479 (1960).

150 *Id.*

151 *Id.* at 490-491.

152 *Id.* at 486.

153 *Id.* at 487.

154 Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2397 (2021) (Sotomayor, J., dissenting).

posed a burden on the plaintiff.[155] If the Court established that it did, it would then examine whether the means by which the law achieved its end, such as requiring teachers to disclose their club memberships in order to evaluate their fitness to teach, was proportional to the burden it imposed on the challenger.[156] Justice Sotomayor refers to this approach as "means-end tailoring."[157]

Consider, for example, the Court's decision in *NAACP v. Alabama*, from which the *Buckley* Court derived the exacting scrutiny test.[158] The Court in *NAACP* assessed whether Alabama's demand for the NAACP's membership lists would impose a substantial restraint upon the organization's right to freely associate.[159] The Court concluded that it did, so it then considered whether the means by which Alabama's law achieved the state's end—asking the NAACP to disclose all of its members to Alabama's Attorney General so that he could enforce Alabama's corporate charter statute—was proportional to that burden.[160] It determined that the law was not properly tailored because Alabama's interest in demanding the NAACP's membership lists did not outweigh the substantial deterrent effect that such a demand would have on the NAACP.[161] The *NAACP* Court did not invalidate the law simply because it asked the NAACP to disclose too much information; it invalidated the law because the State's purported interest in enforcing it against the NAACP did not outweigh the substantial chilling effect the law had on the NAACP's members.[162]

At best, then, only a surface-level reading of *Shelton*, without consideration of context and the sources that the *Shelton* Court relied on for a conclusion central to its holding, supports the Court's new requirement that exacting scrutiny requires a disclosure law to be narrowly tailored, notwithstanding any burdens it actually imposes.[163] But the proper reading of *Shelton*, combined with a consideration of the disclosure cases that the Court decided before *Americans for Prosperity v. Bonta*, make very plain that the Court arbitrarily re-defined exacting scrutiny.

The Court claimed that the version of exacting scrutiny it applied in *Americans for Prosperity v. Bonta* was the same test that it has always applied to compelled disclosure requirements.[164] But the inconsistent

155 *Id.*

156 *Id.*

157 *Id.*

158 Buckley v. Valeo, 424 U.S. 1, 64 (1976) (citing NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 453 (1958)).

159 *NAACP*, 357 U.S. at 453.

160 *Id.* at 462-464.

161 *Id.*

162 *Id.* at 462.

163 *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960).

164 Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2382-83 (2021).

outcomes that the test yields in *Americans for Prosperity*, *Doe v. Reed* and *Citizens United* suggests that the Court actually departed from the traditional exacting scrutiny test when it evaluated California's Schedule B law.[165]

Consider, first, the Court's decision in *Doe v. Reed*.[166] Chief Justice John Roberts, writing for the Court in that case, did not mention narrow tailoring once in his decision.[167] Nor does he, when reviewing Washington's law under exacting scrutiny, invalidate it for not being narrowly tailored.[168] Indeed, the Court held that the law was constitutional under exacting scrutiny even though the public could observe the secretary of state verify and canvass the names on a petition.[169] If the law had been narrowly tailored to achieve the State's purpose of preventing petition fraud, then the Court likely would have barred the public from seeing a list of all the names of those who signed a petition referendum.

The Court's approach to the disclosure provision at issue in *Citizens United v. FEC* is also hard to reconcile with its decision in *Americans for Prosperity v. Bonta*. The Court in *Citizens United* reviewed the disclosure provision under what was, until *Americans for Prosperity*, the standard formulation of exacting scrutiny: the Court would examine whether there was a substantial relation between the disclosure requirement and a sufficiently important governmental interest.[170] The Court did not once mention narrow tailoring.[171] Among other reasons, the Court then held that §201 of the BCRA was constitutional because Citizens United had failed to provide any evidence that its members would likely be harassed or threatened if the organization had to disclose in its advertisements that it was responsible for the content.[172] The Court also made a point of mentioning that §201 *would* be unconstitutional as applied to an organization if there were a reasonable probability that the group would face threats, harassment, or reprisals.[173] Thus, the disclosure provision in *Citizens United* was constitutional because the broad means by which it achieved its end—requiring Citizens United to disclaim responsibility for all of its advertisements in order to provide voters with more information—was proportional to the very low burden it imposed on the organization.[174] But those same means would be disproportionate—and thus

165 *See id.*; Doe v. Reed, 561 U.S. 186, 201 (2010); Citizens United v. FEC, 558 U.S. 310, 367 (2010).
166 Doe v. Reed, 561 U.S. 186 (2010).
167 *Id.*
168 *Id.*
169 *Id.* at 198.
170 Citizens United v. FEC, 130 S.Ct. 876, 914 (2010).
171 *Id.*
172 *Id.* at 916.
173 *Id.* at 914.
174 *Id.*

unconstitutional—if Citizens United *could* have shown that its members would be threatened.[175] In short, before *Americans for Prosperity v. Bonta*, the Court did not require narrow tailoring until a party could show an actual burden on its First Amendment freedoms.[176]

The Court's claim that exacting scrutiny has always required narrow tailoring also enjoys little support from legal scholarship. Take, as the primary example, Professor George Wright's thorough analysis of exacting scrutiny in "A Hard Look at Exacting Scrutiny,"[177] a piece he published shortly after AFP had filed its first complaint. Professor Wright acknowledges that because exacting scrutiny has received little critical attention since its inception, it is a murky and often ambiguous constitutional test.[178] But despite this ambiguity and murkiness, he is nevertheless able to conclude that it "often requires something like a substantial relationship between the challenged government regulation and a government interest that is . . . of sufficient importance."[179] He notes, moreover, that most formulations of exacting scrutiny require the regulation at issue to bear something like a substantial relation to a sufficiently important governmental interest.[180] Thus, despite all the murkiness, Professor Wright still articulates a definition of exacting scrutiny that is consistent with what Justice Sotomayor argued was the prevailing standard before *Americans for Prosperity v. Bonta*.[181]

B. The First Circuit Recently Confirmed that the Court's Decision in Americans for Prosperity Requires Them to Grapple with a New Version of Exacting Scrutiny

The lower federal courts' recent treatment of exacting scrutiny confirms what this paper has thus far argued: *Americans for Prosperity v. Bonta* has altered the compelled-disclosure landscape by making exacting scrutiny a more difficult test to satisfy.[182] In *Gaspee Project v. Mederos*,[183] the Gaspee Project and Illinois Opportunity Project challenged the constitutionality of two Rhode Island laws that require 501(c)(4) organizations to annually disclose their top five donors and anyone else who contributed $1,000 or more to the organization.[184] The Gaspee Project and Illinois Opportunity Project are two conservative

175 *Id.* at 916.
176 Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2385 (2021).
177 George R. Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207 (2016).
178 *Id.*
179 *Id.* at 207.
180 *Id.*
181 *Bonta*, 141 S.Ct. at 2401 (Sotomayor, J., dissenting).
182 *See infra* note 186.
183 Gaspee Project v. Mederos, 482 F.Supp.3d 11, 14 (D.R.I. 2020), *aff'd*, 13 F.4th 79 (1st Cir. 2021).
184 *Id.* at 15.

501(c)(4) organizations that wanted to spend thousands of dollars on Rhode Island's 2020 elections, but they feared that complying with the disclosure laws would subject their members to threats, harassment, and career damage.[185] They argued that the laws therefore violated their First Amendment rights and had no constitutional application to other 501(c)(4) organizations as well.[186]

Judge Mary S. McElroy, writing for the District Court of Rhode Island, subjected Rhode Island's laws to exacting scrutiny.[187] She considered whether Rhode Island had a sufficiently important governmental interest in passing the disclosure laws and whether there was a substantial relation between those laws and the state's interest.[188] Put simply, she applied exacting scrutiny as virtually every other federal court had applied it before *Americans for Prosperity v. Bonta*. She then held that the law withstood exacting scrutiny.[189]

The First Circuit affirmed the district court, but because it reviewed the case after *Americans for Prosperity v. Bonta*, it could not simply uphold Judge McElroy's application of exacting scrutiny.[190] Instead, the First Circuit had to subject Rhode Island's laws to the Court's new version of the test.[191] The First Circuit expressly recognized this development, noting that under the Court's refined articulation of exacting scrutiny—which it referred to as "a more muscular test"—the challenged requirement now had to be narrowly tailored to the interest it promotes.[192] In other words, the First Circuit acknowledged what the Supreme Court did not: by requiring that laws examined under exacting scrutiny be narrowly tailored to serve an important governmental interest, the Court's decision in *Americans for Prosperity v. Bonta* was not consistent with precedent, but a departure from the standard approach to compelled disclosure requirements.[193]

C. California's Schedule B Requirement Should Have Withstood Exacting Scrutiny Even Under the Court's New Definition of the Standard

The Court's opinion in *Americans for Prosperity v. Bonta* was wrongly decided even if we accept, for the sake of argument, that *Shelton* does require that disclosure laws reviewed under exacting scrutiny be

185 *Id.* at 14.
186 *Id.*
187 *Id.* at 16.
188 *Id.* at 17-18.
189 *Id.* at 20.
190 Gaspee Project v. Mederos, 13 F.4th 79, 85 (1st Cir. 2021).
191 *Id.*
192 *Id.*
193 *See id.*

narrowly tailored to the state's governmental interest. The facts of *Shelton* provide a good starting point for this analysis. Assume, as Chief Justice Roberts argued,[194] that the major problem the *Shelton* Court had with the Arkansas law was its scope. Indeed, the *Shelton* Court did take issue with Arkansas asking its teachers to disclose every organization with which they were affiliated over a five-year period in order to assess their fitness and competence.[195] So despite the State's important interest in vetting its teachers, the law at issue in *Shelton* was insufficiently tailored and thus unconstitutional.

California's Schedule B requirement, however, was far less intrusive in its scope.[196] First, non-profit organizations are already required by federal law to submit Schedule Bs to the IRS, regardless of whether they are subject to similar state laws.[197] Thus, California merely asked these non-profit organizations to submit a form they are legally obligated to submit anyway.[198] Arkansas's teachers, on the other hand, were not previously required to provide the Department of Education with a list of every organization to which they had donated or with which they were affiliated.[199] Next, each Schedule B form contains information only about a charity's top donors—those who annually give more than $5,000.[200] The law in *Shelton*, however, swept under its scope every teacher in the state.[201] Next, California's Schedule B did not require donors to disclose every single organization they associated with, unless, of course, they annually contributed more than $5,000 to many organizations registered as non-profits in California.[202] But the amount of people who fell in this class was likely so miniscule that the law can hardly be called aggressive in its scope for this reason. Indeed, the average charitable deduction among 37 million tax returns in 2018 was $5,508,[203] so it is likely that very few citizens in California made an appearance on a charity's Schedule B, much less on multiple charities' Schedule Bs.

California's Schedule B requirement was thus not insufficiently tailored for demanding too much of those it regulated or casting too wide a

194 Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2378 (2021).

195 *Shelton*, 364 U.S. at 487-88.

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

197 *Schedule B Rules Eased for Associations, Others NPOs,* THE NONPROFIT TIME (Aug. 13, 2018), https://www.thenonprofittimes.com/npt_articles/schedule-b-rules-eased-for-associations-others-npos/.

198 *Id.*

199 *Shelton*, 364 U.S. at 482.

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

201 *Shelton*, 364 U.S. at 480–81.

202 *Bonta*, 141 S.Ct. at 2379–80.

203 Matthew Frankel, *Here's How Much the Average American Taxpayer Gives to Charity—and Why It Could Fall in 2018,* THE MOTLEY FOOL (July 2, 2018), https://www.fool.com/taxes/2018/07/02/heres-how-much-the-average-american-taxpayer-gives.aspx.

net in its reach. Consider, then, a law that the Court held did meet the narrow tailoring requirement under exacting scrutiny; note that the case law here is thin, because before *Americans for Prosperity v. Bonta*, narrow tailoring was virtually never mentioned in a case involving exacting scrutiny. In *Williams-Yulee v. Florida Bar*, the Court, in an opinion by Chief Justice Roberts, upheld under exacting scrutiny a Florida law that prohibited judges from soliciting campaign contributions for elected office.[204] Florida passed the law in order to maintain public confidence in the integrity of the judiciary.[205] The defendant presented the Court with several, less restrictive, alternatives to the law, but the Court held that it would not "wade into [the] swamp" of line-drawing because narrowly tailored laws do not have to be "perfectly tailored."[206] For the Court, the First Amendment did not require that a State "address evils in their most acute form."[207] In other words, there may have been more restrictive means by which Florida could have preserved confidence in its judiciary—the law could have been perfectly tailored toward the State's goal of achieving that end—but banning all personal solicitations by judicial candidates was at least narrowly tailored to accomplish the objective, so it was adequate under exacting scrutiny.[208]

The Court's reasoning in *Americans for Prosperity v. Bonta* is inconsistent with the Court's reasoning in *Williams-Yulee*. Like the law at issue in *Williams-Yulee*, California's Schedule B requirement furthered, among many other interests, the state's intangible interest in preserving public confidence in the integrity of charities.[209] It had good reason to do so, too: as of June 2018, charities registered in California reported a whopping $295 billion in annual income and, even more astonishingly, net assets of $851 billion.[210] Supervising thousands of entities responsible for managing such a massive sum of assets is no easy task, so California required these charities to provide its Attorney General with a form that listed its major donors.[211] This requirement made sense in light of the State's interest: Schedule B forms helped California's Attorney General uncover whether the charity's officers engaged in self-dealing and whether charities improperly used their donors' contributions.[212] California, moreover, kept the charities' Schedule Bs confidential.[213] California conceivably could have used less restrictive means to further

204 Williams-Yulee v. Fla. Bar, 575 U.S. 433, 433 (2015).
205 *Id.* at 454.
206 *Id.*
207 *Id.*
208 *Id.*
209 *Compare Bonta*, 141 S.Ct. at 2385–86 *with Williams-Yulee*, 575 U.S. at 454.
210 *Bonta*, 141 S.Ct. at 2400 (Sotomayor, J., dissenting).
211 *Id.*
212 *Id.*
213 *Id.*

its interest in preserving public confidence in its charities; it might have, for example, asked only those charities with over $500 million to submit Schedule Bs to its Attorney General. But under *Williams-Yulee*, exacting scrutiny does not require that the challenged law be perfectly tailored.[214] California only asked its charitable entities to do the bare minimum and submit a form they were already federally obligated to submit.[215] The law was not perfectly tailored, but it was narrowly tailored.

Of course, the analysis above would not be necessary if the Court had not so abruptly departed from precedent in *Americans for Prosperity v. Bonta*.[216] Nevertheless, the law should have withstood exacting scrutiny even under the new Court's new definition of the standard.[217] It was less demanding in its scope than the statute in *Shelton*, and it just as precisely—if not more precisely—achieved its goal as the law in *Williams-Yulee.*

At the very least, the Court should have rejected petitioners' facial challenge to California's Schedule B law and granted only as-applied relief to Americans for Prosperity and the Thomas More Law Center.

As Justice Sotomayor expresses in her dissent, the Court's reasoning in *Americans for Prosperity v. Bonta* would be more persuasive if it had simply held that the law was unconstitutional as applied to the two organizations who refused to comply with it. But the Court took it a step further by invalidating the law down in all of its applications.[218] Today, California can no longer ask its charities to submit Schedule Bs because, according to the Court, there is no conceivable situation in which the law is constitutional.[219] The Court's rationale for granting the petitioners' facial challenge is worth unpacking.

The dissent notes that facial challenges can only succeed if a plaintiff shows that the law is unconstitutional in a substantial number of its applications.[220] The majority replies that plaintiffs are only required to bear this evidentiary burden if the disclosure regime is narrowly tailored to an important government interest, and that such a showing is not necessary if a disclosure law fails to meet this criterion.[221] To support its claim, the Court cites to a previous part of its opinion at pg. 2384-2385.[222] There, the Court says virtually nothing about why this requirement for facial challenges does not apply if a law is not narrowly tai-

214 *Williams-Yulee*, 575 U.S. at 454.
215 *Bonta*, 141 S.Ct. at 2389.
216 *See* discussion *supra* Part II.
217 *See Bonta*, 141 S.Ct. at 2384-85.
218 *See id.* at 2405 (Sotomayor, J., dissenting).
219 *Id.* at 2385.
220 *Id.* at 2402-03 (Sotomayor J., dissenting).
221 *Id.* at 2389.
222 *Id.*

lored.[223] Instead, the Court introduces its argument that exacting scrutiny requires narrow tailoring to do so.[224]

So, the Court declines to consider whether California's law is unconstitutional in a substantial number of its applications because that law was not narrowly tailored.[225] To support this claim, it cites a previous part of its opinion where it imposes, in a substantial departure from its own precedent, a requirement that all disclosure laws examined under exacting scrutiny be narrowly tailored, notwithstanding whatever burden the law actually imposes.[226] To make matters worse, it supports its conclusion by citing a case that hardly supports the proposition it advances.[227] The end result is that the Court dodges the tough issue that facial challenges demand the Court resolve: whether the law is unconstitutional as applied to a substantial number of the people or entities that fall within its scope.

The proposition that California's Schedule B law fails this test is, to put it charitably, implausible. Consider that roughly 60,000 charities renew their charitable registration with California each year.[228] Under the Court's standard test for facial challenges, then, California's Schedule B law would have to be unconstitutional as applied to more than 30,000 of California's charities. In this reality, the State's interest in passing the law would have to be so weak, and the means-end tailoring so loose, that even the most modest First Amendment burden would suffice to make the law unconstitutional. In fact, this is precisely what the Court suggested: "the lack of tailoring to the State's investigative goals is categorical—present in every case—as is the weakness of the State's interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny."[229]

Aside from again trivializing the State's perfectly legitimate interest in requesting Schedule Bs, the Court presumes that the law would have a chilling effect on more than 30,000 charities.[230] As Justice Sotomayor points out, research shows that the vast majority of donors to charities prefer to publicize their contributions, and there has been an explosion in charitable naming rights since the mid-1990s.[231] Moreover, California keeps the Schedule B forms confidential,[232] so the law would still be

223 *See id.* at 2384-85.
224 *Id.*
225 *Id.* at 2388-89.
226 *Id.* at 2384-2385.
227 *See* discussion *supra* Part II.
228 *Bonta*, 141 S.Ct. at 2380.
229 *Id.* at 2387.
230 *Id.* at n.11.
231 *Id.* at 2403.
232 *Id.* at 2400.

narrowly tailored—and thus constitutional—even if some of these charities offered evidence that they might face threats and harassment similar to those that Americans for Prosperity speculated it might face. What little the Court does offer of its facial challenge analysis,[233] therefore, depends on the faulty premises that the State asks charities for Schedule Bs to simply make administration easier and that exacting scrutiny requires narrow tailoring regardless of whether the disclosure law imposes a burden on those it regulates.

The Court also found persuasive the ideologically diverse filings of the hundreds of organizations as *amici curiae* in support of Americans for Prosperity and the Thomas More Law Center.[234] Some of these organizations included the ACLU, the NAACP, PETA, and the Council on American-Islamic Relations to the Zionist Organization of America, and they do indeed span the ideological spectrum.[235] But hundreds of filings hardly amounts to a substantial number when there are more than 60,000 charities registered in California.[236] The Court essentially acknowledges this fact, writing that "the deterrent effect feared by these organizations is real and persuasive, even if their concerns are not shared by every single charity operating or raising funds in California."[237] These organizations did not offer evidence that California's reporting requirements would subject them to threats and harassment.[238] But even if they had, they would comprise only a vanishingly small fraction of the affected entities—hardly enough for the Court to find that the law is unconstitutional "in a substantial number of . . . applications . . . judged in relation to the statute's plainly legitimate sweep."[239]

At least one close reading of these amicus briefs does not even support the Court's holding that the law is facially unconstitutional. In a statement released on July 1, 2021, the day that the Court published its opinion in *Americans for Prosperity v. Bonta*, the NAACP Legal Defense and Education Fund released a statement that the Court's holding is "broader than, and inconsistent with, the arguments in the amicus brief LDF joined."[240] In the brief that LDF joined, the organizations argued that California's disclosure requirement should be treated as a *de facto* public disclosure law because of California's history of improperly se-

233 *Id.* at 2385-89.

234 *Id.* at 2388.

235 *Id.*

236 *Id.* at 2380.

237 *Id.* at 2388.

238 *Id.*

239 United States v. Stevens, 559 U.S. 460, 473 (2010).

240 LDF Media, *U.S. Supreme Court Rules that California's Donor Disclosure Law is Unconstitutional*, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. (July 1, 2021), https://www.naacpldf.org/wp-content/uploads/FINAL-APF-v.-Bonta-Semi-Favorable.pdf.

curing the Schedule Bs' confidentiality.[241] On that basis, the organizations argued that the law should be unconstitutional *only* as applied under the specific facts of the case.[242] The NAACP's Legal Defense and Education Fund also noted in its statement that California had a legitimate interest in investigating self-dealing or fraud by charitable organizations.[243] The Council on American-Islamic Relations, one of the other organizations the Court explicitly mentions in support of its holding, also does not advocate for striking the law down on its face.[244] It appears, then, that even if positions advanced by *amici curiae* were persuasive sources for the Court to consider in challenges to the facial constitutionality of a law—they are not—the Court lacks support on this claim from at least two of the organizations on which it relies.

Justice Thomas, in a concurring opinion, provides additional support for the argument here advanced that the Court acted arbitrarily in striking the Schedule B law down on its face.[245] Justice Thomas questions whether the Court even possesses the power to "pronounce that [a] statute is unconstitutional in all applications," even if it suspects that the law will likely be unconstitutional in *every* future application as opposed to just a substantial number of its applications.[246] Justice Thomas grounds his reasoning in case law that is beyond the scope of this argument,[247] but his concurrence is nevertheless worth mentioning because it captures the magnitude of the Court's decision to strike the law down on its face. Justice Thomas argues that there is no constitutional basis for the principle that application of a law is always unlawful "if a substantial number of its applications are unconstitutional"; he also takes issue with the notion that courts can resolve the legal rights of litigants not before them.[248] Putting aside the merits of these claims, Justice Thomas's doubts are valid because he recognizes how much speculation is involved when the Court considers facial challenges to a law. And in *Americans for Prosperity v. Bonta*, the Court certainly engages in speculative reasoning. It assumes, in part relying on the ideological diversity of *amici curiae* writing in support of the petitioners' argument, that more than 30,000 charities would be burdened by the Schedule B law.[249] It thus

241 *Id.*

242 *Id.*

243 *Id.*

244 *See* Brief for Council on American-Islamic Relations as Amicus Curiae in Support of Petitioner, Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373 (2021) (No. 19-251).

245 *See* Ams. for Prosperity Found. v. Bonta, 141 S.Ct. 2373, 2390 (2021) (Thomas J., concurring).

246 *Id.* at 2390.

247 *See* Borden v. United States, 141 S.Ct. 1817, 1835 (2021) *and* City of Chicago v. Morales, 119 S.Ct. 1849, 1869 (1999).

248 *Bonta*, 141 S.Ct. at 2390-91.

249 *Id.* at n.11.

would have served the Court well to pause and consider Justice Thomas's claims before granting such broad relief to the petitioners.

CONCLUSION

There are a few clear takeaways from the Court's decision in *Americans for Prosperity v. Bonta*.[250] First, courts examining disclosure laws under exacting scrutiny must now determine whether those laws are narrowly tailored to serve a sufficiently important governmental interest.[251] Indeed, the First Circuit confirmed this development in *Gaspee Project v. Mederos*, noting that the Court's decision in *Americans for Prosperity* heightened the exacting scrutiny standard by requiring that all challenged disclosure laws be narrowly tailored to the interests they promote.[252] Next, state officials must be prepared to articulate a substantially compelling governmental interest for their state's donor-disclosure laws if a litigant decides to challenge one of those laws in state or federal court. Finally, state laws that require non-profit organizations to submit Schedule B forms as a condition of charitable registration are unlikely to pass constitutional muster. Recognizing this, the attorneys general in New Jersey and New York have stopped collecting Schedule B forms, and Hawaii's Schedule B law is now also at risk.[253]

This case has, however, posed more questions than it answered. For starters, the reach of this case is certainly not clear in the non-profit realm. As Professor Joseph Mead points out, it remains to be seen whether the Court's decision will be limited by a distinction it drew between regimes that specifically target charities that claim tax-exempt status and regimes such as those in California, which target charities that merely operate and raise funds in a state.[254] Chief Justice Roberts said that both of these entities could raise issues that were not presented in the case.[255] Professor Colinvaux, a scholar of nonprofit law at Catholic University Columbus School of Law, speculates that the decision will simply make the job of under-resourced regulators harder.[256] He points out that many states have low budgets to enforce charitable fraud, and without the ability to justify gathering information, those enforcement rates will likely continue to drop.[257] This will, according to Professor Colinvaux,

250 *See generally id.* at 2373-2405.

251 Gaspee Project v. Mederos, 13 F.4th 79, 85 (1st Cir. 2021).

252 *Id.*

253 Jeffery Leon & Aysha Bagchi, *New York, Other State Donor Rules Imperiled by High Court Ruling,* BLOOMBERG L. (July 2, 2021, 4:45 AM), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X4DD3BQ0000000?bna_news_filter=US-law-week#jcite.

254 *Id.*

255 *Id.*

256 *Id.*

257 *Id.*

only embolden fraudsters who might otherwise have been deterred by compelled disclosure requirements.[258]

The implications of this case are especially unclear—and potentially most devastating—for the constitutionality of campaign contribution laws. Professor Rick Hasen touched on this troubling possibility in a piece for the New York Times. Courts review campaign contribution laws under exacting scrutiny, so now that exacting scrutiny requires narrow tailoring, lower courts may find that some campaign contribution laws are not narrowly tailored to prevent corruption or the appearance of corruption.[259] Alternatively, they may simply decide that these laws do not provide voters with enough valuable information to justify their deterrent effects on potential donors.[260] Whether parties will bring these claims, and whether the federal courts will be receptive to them, is harder to predict. The First Circuit's decision in *Gaspee*, which actually upheld the constitutionality of a donor disclosure law under the Court's new version of exacting scrutiny,[261] is certainly a positive sign. But given this conservative Supreme Court's general hostility to restrictions on election regulations—Professor Hasen more appropriately characterizes them as democracy-enhancing laws—the possibility that this Court will invalidate some laws that require candidates to disclose their donors is a realistic and troubling one.[262]

Back in 2015, Americans for Prosperity did not give Representative Jeff Welborn an opportunity to speak at the event that it had organized in his district.[263] So as AFP's representatives escorted Representative Welborn out of the building they gathered in, some of his constituents began to question whether AFP had been honest in advertising the meeting as a town hall.[264] After all, town halls typically encourage an open dialogue and open participation, but Americans for Prosperity refused to give a voice to the other side of the debate.[265] Over grumblings and pushback, one of AFP's representatives said that they evidently had "different definitions of a town hall."[266] AFP's decision to exclude Jeff Welborn from its "town hall," like its refusal to comply with California's Schedule B law or its behind-the-scenes effort to hobble Wisconsin's labor unions, inevitably forces us to consider whether AFP has something to hide. In-

258 *Id.*

259 *See* Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk,* N.Y. TIMES (July 1, 2021), https://www.nytimes.com/2021/07/01/opinion/supreme-court-rulings-arizona-california.html.

260 *See id.*

261 Gaspee Project v. Mederos, 13 F.4th 79, 95-96 (1st Cir. 2021).

262 See Hasen, *supra* note 259.

263 DARK MONEY (Big Sky Film Productions 2018).

264 *See id.*

265 *See id.*

266 *See id.*

deed, Jeff Welborn may very well have benefited from hearing AFP's thoughts on Medicaid expansion, and California made it state law to keep its charities' Schedule B forms confidential soon after AFP first filed suit in federal court.

Perhaps AFP has nothing to hide; perhaps it really did believe that California's Schedule B law would deter its donors from contributing and that a town hall in Jeff Welborn's district would be better off without Jeff Welborn there. Regardless, the final result in both cases was less information available to the public and less information available to the state officers tasked with ensuring that fraud and corruption don't infiltrate California's charities. If AFP argues next that its members will face retaliation if they have to disclose which candidates they contribute to, the courts may decide to shield certain political contributions from public disclosure. Without the ability to uncover who is funding our elected representatives' campaigns, we will also lack the ability to know who's potentially responsible for the policies that shape our lives. This is not an ideal reality—but it could very well be the reality toward which we are heading.