

# *Americans for Prosperity Foundation v. Bonta:* A First Amendment for the Sensitive

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## Introduction

Americans are living in a new age of “accountability,” or what others call “McCarthyism.”

Although its roots go much further back, this latest fit of “accountability” burst into mainstream politics in 2008. That year, an organization called Accountable America compiled data from campaign finance disclosure reports to send letters to nearly 10,000 conservative donors, threatening publication of their names and, in the words of the *New York Times*, “digging through their lives” if they continued their financial support of conservative candidates and causes. The group was “hoping to create a chilling effect that will dry up contributions,” the *Times* noted.<sup>1</sup> That same year, several websites popped up to facilitate the easy identification and targeting of supporters of Proposition 8, a California initiative that would have barred the state from recognizing same-sex marriages. Using contributor data filed with the state, websites combined information with interactive maps to display

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<sup>1</sup> Michael Luo, “Group Plans Campaign against G.O.P. Donors,” *N.Y. Times*, Aug. 8, 2008, <https://nyti.ms/3xhcIOG>.

directions to the homes of Prop 8 contributors. A website called “Californians Against Hate” provided addresses and telephone numbers for Prop 8 supporters. Another website allowed users to search for Prop 8 supporters who worked in the user’s place of employment.<sup>2</sup>

Marjorie Christoffersen, a manager at El Coyote Restaurant in Los Angeles, is a poster child for this new “accountability.” Ms. Christoffersen contributed \$100 to “Yes on 8,” the lead organization supporting the referendum. Christoffersen had worked without incident at El Coyote, a popular gay hangout, for years. On one occasion, when a regular customer passed away from AIDS, she had personally paid to fly his mother to California for the funeral. But when her contribution to Yes on 8 was publicly disclosed, gay activists boycotted and picketed the restaurant, causing revenues to plunge by 30 percent. A \$10,000 contribution by the owner to gay rights causes failed to mollify the boycotters. Eventually, to save the restaurant and the jobs of its 87 employees, Christoffersen tendered her resignation to the owner—her mother.<sup>3</sup>

Proposition 8’s opponents claimed many more powerful and higher profile victims than Marjorie Christoffersen, including Richard Raddon, director of the Los Angeles Film Festival, and Scott Eckhern, artistic director of the California Musical Theatre. Numerous accounts of vandalism and harassment aimed at supporters were documented.<sup>4</sup>

Now, less than 15 years after Proposition 8, stories and videos abound of persons both powerful and meek losing jobs, being harassed and threatened by internet mobs or live demonstrators, having their cars and property damaged, being screamed at in restaurants, and sometimes being physically attacked.

In a 2020 Cato Institute/YouGov poll, 62 percent of those under 35 and holding post-graduate degrees (i.e., the leaders of tomorrow) said that an executive who contributed to Donald Trump’s presidential campaign should be fired. Not surprisingly, 60 percent of Trump voters under 45 and with post-graduate degrees worried about losing their jobs or “missing out on job opportunities” if their

<sup>2</sup> See Thomas Messner, “The Price of Prop 8,” Heritage Found., Oct. 22, 2009, <https://herit.ag/3fmbwTT>.

<sup>3</sup> Steve Lopez, “Prop. 8 Stance Upends Her Life,” L.A. Times, Dec. 14, 2008, <https://lat.ms/3iien24>.

<sup>4</sup> See Messner, *supra* note 2.

political views became known. Overall, only a third of Americans had this concern.<sup>5</sup> In August 2017, a Harvard/Harris poll found that 42 percent of 18- to 34-year-olds believed that it was appropriate to fire a person who expressed views that “tend to reinforce gender stereotypes.”<sup>6</sup> Given the trend lines in polling prior to 2017, that percentage is likely higher today.

It is no wonder that in the Cato Institute/YouGov poll, 62 percent of respondents reported that the current climate for free speech had prevented them from stating their true beliefs on public affairs. Although this sentiment was strongest among Republicans (77 percent), a majority of independents (59 percent) and Democrats (52 percent) also reported self-censoring. By ideology, respondents identifying as “strong liberals” were the only group in which a majority disagreed with the statement that “the political climate these days prevents me from saying things I believe because others might find them offensive.” A solid majority of “liberals” agreed, as did 64 percent of “moderates.” Among both “conservative” and “strong conservative” respondents, 77 percent agreed. And in every category, including strong liberals, there was sharp movement toward self-censorship since Cato had asked the question in 2017.<sup>7</sup>

As this era of blacklists and boycotts matured, sometime in 2011 or 2012—the exact date is unclear—California Attorney General Kamala Harris began demanding that registered charities and other nonprofit organizations operating in the state annually file a list of their major donors as a precondition of continuing to solicit contributions in California. Protective of both their organizations’ and their donors’ privacy, and perhaps suspicious of the attorney general’s motivation, the Americans for Prosperity Foundation (AFPF) and the Thomas More Legal Center (TMLC) sued. The Supreme Court’s decision in favor of the plaintiffs, *Americans for Prosperity Foundation v. Bonta* (AFPF),<sup>8</sup> is arguably the most important decision on the rights of privacy and association in over 60 years.

<sup>5</sup> Emily Ekins, Poll: 62% of Americans Say They Have Political Views They’re Afraid to Share, Cato Inst./YouGov, July 22, 2020, <https://bit.ly/3fju8UK>.

<sup>6</sup> Monthly Harvard-Harris Poll: August 2017, Aug. 23, 2017, <https://bit.ly/3lo7X3k>.

<sup>7</sup> Ekins, *supra* note 5.

<sup>8</sup> 141 S. Ct. 2373 (2021). Rob Bonta is the current attorney general of California, having replaced Xavier Becerra, who replaced Harris after her election to the U.S. Senate in 2016.

At one level, *AFPP* turns on intricate questions about the proper level of judicial “scrutiny” to be applied, what that scrutiny then requires, and ultimately, what state interests might justify compelled disclosure of donors to and members of various nonprofit organizations. But the case was decided against the background of our social media and “cancel culture,” and the questions they raise: What does it mean for Americans to be held “accountable” for peaceful, lawful speech? Should Americans who express views different from our own be “punished” by boycotts, threats, and harassment? And most important for the Court, under what circumstances can government compel Americans to provide their adversaries with the information needed to harass them, and what protections do Americans have when the government itself may be the potential perpetrator of harassment in an effort to squelch views uncongenial to that government?

Part I of this article traces the modern legal development of the right to privacy in speech and group association. Part II reviews the political background against which the *AFPP* litigation took place. In part III I discuss the litigation itself, and in part IV I consider claims that *AFPP* was merely a “stalking horse” for eviscerating campaign finance laws. A brief conclusion follows.

## I. A Brief History of a Right

### A. *NAACP to McIntyre*

Anonymous speech has a long and often honored history in the United States—think the *Federalist Papers*.<sup>9</sup> But the idea of using compulsory disclosure to silence unwanted speech and shut down unwanted activity is hardly new. Indeed, in the 1950s compulsory disclosure of memberships, financial support, and affiliations was a core strategy in southern segregationists’ “massive resistance” to *Brown v. Board of Education*, as well as a tool to root out communists and “subversives” in government and elsewhere in public life.

<sup>9</sup> See, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *id.* at 358–71 (Thomas, J., concurring in the judgment) (citing numerous examples of anonymous speech in the Founding period); Jonathan Turley, Registering Publius: The Supreme Court and the Right to Anonymity, 2001–2002 *Cato Sup. Ct. Rev.* 57 (2002); Bradley A. Smith, In Defense of Political Anonymity, 20 *City J.* 74 (2010).

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In 1956, as part of an investigation into whether the National Association for the Advancement of Colored People (NAACP) was conducting business in violation of the state's foreign corporation registration statute, Alabama's attorney general demanded that the organization hand over a list of names and addresses of its members. The NAACP refused and was held in contempt by Alabama state courts. The U.S. Supreme Court reversed.<sup>10</sup>

"It is hardly a novel perception," wrote the Supreme Court:

that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective [] restraint on freedom of association. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.<sup>11</sup>

The Court was "unpersuaded" by the state's unspecific claim that the information might prove helpful in its investigation. Citing the NAACP's "uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," the Court concluded that, "[u]nder these circumstances, we think it apparent that compelled disclosure of petitioner's . . . membership is likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate."<sup>12</sup>

In a series of decisions over the next decade, the Court built on *NAACP v. Alabama* to recognize a robust right to keep one's memberships and associations private from government.<sup>13</sup>

<sup>10</sup> NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

<sup>11</sup> *Id.* at 461–462.

<sup>12</sup> *Id.* at 464.

<sup>13</sup> See *Bates v. Little Rock*, 361 U.S. 516, 525 (1960) (holding unconstitutional a city tax ordinance requiring certain groups, including the NAACP, to publicly disclose donors, and holding that even an otherwise legitimate statute must "bear[] a reasonable relationship to . . . the governmental purpose asserted as its justification"; and further demanding that a court look behind stated reasons where First Amendment rights are at stake: "governmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion in the preamble of an ordinance"); *Shelton v. Tucker*, 364 U.S. 479 (1960) (holding facially unconstitutional a state requirement that public school teachers list all organizations

In 1976, however, in *Buckley v. Valeo*,<sup>14</sup> the Supreme Court backed off this commitment, at least as it pertained to contributions to and expenditures by candidates for political office. The Court upheld the disclosure provisions of the Federal Election Campaign Act (FECA) citing three government interests “sufficiently important to outweigh” the burden on First Amendment rights:<sup>15</sup>

- An “informational interest”: Knowing the source of campaign funds and how they were spent by the candidate would aid voters in evaluating candidates, placing them on the political spectrum and “alert[ing] the voter to the interests to which a candidate is most likely to be responsive and thus facilitat[ing] predictions of future performance in office.”<sup>16</sup>
- An anti-corruption interest: Disclosure of contributions would “deter actual corruption and avoid the appearance of corruption.”<sup>17</sup>
- An enforcement interest: Reporting would help detect violations of the law’s limits on the size and sources of campaign contributions.<sup>18</sup>

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to which they had belonged or contributed in the past five years, even though the list was not public; and requiring a “less drastic means” be used when possible to accomplish the state objective); *Talley v. California*, 362 U.S. 60, 65 (1960) (holding facially unconstitutional a city ordinance requiring handbills to identify financial supporters, and requiring only a reasonable probability that “identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance” to satisfy the First Amendment burden on plaintiff).

See also *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (overturning contempt conviction where a teacher refused to answer questions regarding memberships and names of other members, during investigation into subversive activities); *Gibson v. Fla. Legis. Investigation Comm.*, 372 U.S. 539 (1963) (contempt citation overturned where head of local NAACP refused to divulge members’ names during legislative investigation into communist infiltration of civil rights movement, on grounds that demand lacked an “adequate foundation for inquiry”); *Gremillion v. NAACP*, 366 U.S. 293 (1961) (finding unconstitutional a Louisiana statute requiring nonprofit organizations to file a membership list with the state); *Roberts v. Pollard*, 393 U.S. 14 (1968) (summarily affirming district court decision enjoining subpoena demanding names of political party donors where there was no showing of relevance to prosecutor’s investigation).

<sup>14</sup> 424 U.S. 1 (1976).

<sup>15</sup> *Id.* at 66–68.

<sup>16</sup> *Id.* at 66–67.

<sup>17</sup> *Id.* at 67.

<sup>18</sup> *Id.* at 67–68, 81.

Against these “sufficiently important” government interests, the Court found it significant that the plaintiffs had not tendered record evidence of actual, specific harassment or threats “of the sort proffered in *NAACP v. Alabama*.”<sup>19</sup> Given the “magnitude” of the government interests identified and the “speculative” nature of harms to the plaintiffs, the Court upheld the disclosure requirements targeting political committees.<sup>20</sup>

But *Buckley*'s constitutional blessing of disclosure was not so extensive as is often claimed. The originally sweeping disclosure provisions of FECA were upheld in their original form only for “political committees”—groups formed with “the major purpose” of electing candidates, such as candidate campaign committees, political parties, and political action committees (PACs). When it came to groups and organizations that were not political committees—charities, nonprofits, think tanks, trade associations, and community groups—*Buckley* substantially curtailed FECA's disclosure provisions to protect the rights of anonymous association and speech.

The Court held that for organizations that were not “political committees,” the disclosure requirements could constitutionally apply only to “expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”<sup>21</sup> And the Court elsewhere in *Buckley* defined “to expressly advocate” this way: as “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”<sup>22</sup> This combination severely truncated the reach of FECA's disclosure provisions regarding any organization that was not a “political committee.” Further, the Court held that even when making expenditures “expressly advocating” the election or defeat of a candidate, these organizations only needed to report making those specific expenditures. They did not need to report on donors to their organizations unless those donors had specifically earmarked their contribution for the express advocacy of election or defeat of a candidate.<sup>23</sup>

<sup>19</sup> *Id.* at 71.

<sup>20</sup> *Id.* at 66, 70.

<sup>21</sup> *Id.* at 79–80.

<sup>22</sup> *Id.* at 44 n.52.

<sup>23</sup> *Id.* at 79–80.

Since these organizations, not being political committees, were not subject to contribution or spending limits,<sup>24</sup> the government's "enforcement" interest in tracking contributions and expenditures disappeared. And because no money flowed directly to the candidate or the campaign, the anti-corruption interest was, as the Court demurely put it, "significantly different" than when discussing contributions to political committees.<sup>25</sup> Thus, for these organizations, the restrictions that were upheld were justified solely on the basis of the "informational" interest. But that interest was narrowly defined by the Court as helping voters "define a candidate's constituencies,"<sup>26</sup> and, therefore, "the interests to which a candidate is most likely to be responsive."<sup>27</sup> That interest was satisfied simply by knowing the organization doing the spending—little was to be gained from the names of individual donors. The "informational interest," in other words, lay in predicting how a candidate would act in office—it did not encompass public curiosity or the possibility that knowing the source of funding might make some voters more or less skeptical of the merits of the argument. It was certainly not about assuring "accountability" on the part of contributors. To have understood the "informational" interest as some generic "right to know," or as a means to evaluate the merit of arguments, would have undermined *NAACP*, as it would effectively have conceded that Alabama had an important state interest in simply knowing who was funding the NAACP's speech.

In *McIntyre v. Ohio Elections Commission*,<sup>28</sup> the Court again emphasized the narrow reach of the "informational interest." Margaret McIntyre was distributing handbills opposing a local school tax levy. With no candidate in the race, and hence no limits on contributions, both the anti-corruption and enforcement interests were missing. And, with no candidate, there was no compelling informational interest either:

Insofar as the interest in informing the electorate means nothing more than the provision of additional information that may either buttress or undermine the argument in a

<sup>24</sup> *Id.* at 54–58.

<sup>25</sup> *Id.* at 81.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 67.

<sup>28</sup> 514 U.S. 334.



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document, we think the identity of the speaker is no different from other components of the document's content that the author is free to include or exclude.<sup>29</sup>

Further, the Court held that McIntyre really had no need to prove threats or harassment, or even to state a reason for preferring anonymity at all:

The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.<sup>30</sup>

### B. *Citizens United to Bonta*

The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* is generally known as the case that, on First Amendment grounds, upheld the right of corporations to make political expenditures.<sup>31</sup> But *Citizens United*, the nonprofit corporation at the center of the case, also challenged a statutory requirement, included in the Bipartisan Campaign Reform Act of 2002,<sup>32</sup> mandating that it disclose its donors for a small subset of its advertising.

*Citizens United* went beyond the narrow disclosure regime that had emerged from *Buckley* in two ways. First, it upheld the compulsory disclosure of names and addresses of donors even if those donors did not earmark their contributions for the organization's limited political communications.<sup>33</sup> Second, it upheld disclosure for

<sup>29</sup> *Id.* at 348.

<sup>30</sup> *Id.* at 341–42.

<sup>31</sup> *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

<sup>32</sup> Pub. L. 107-155 (2002).

<sup>33</sup> 558 U.S. at 368. It should be noted, however, that the Court had already crossed this bridge seven years before, in *McConnell v. Federal Election Commission*. 540 U.S. 93 (2003). There, the Court rejected a facial challenge to the same rules. As a practical matter, *McConnell* had not had great effect on this point, mainly because the Federal Election Commission had interpreted the provision narrowly, limiting it, for the most part, to earmarked contributions from donors, consistent with *Buckley*. See 11 C.F.R. § 114.20(c)(9); *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486 (D.C. Cir. 2016) (upholding same).

speech, independent from a candidate's campaign, a political party, or a PAC, that did not constitute "express advocacy" or its "functional equivalent"—broadcast ads costing in excess of \$10,000 and naming a candidate within 60 days of an election.<sup>34</sup> Still, these holdings were not radical departures from *Buckley*, *McIntyre*, and the *NAACP* line of cases, at least in that they required a tight nexus between the speech and an identified political candidate, during an election season.

But *Citizens United's* greatest impact came less from these holdings than from its brief discussion of the so-called "informational" interest. The majority quoted *Buckley* for the point that the informational interest in compelled disclosure was to "insure that the voters are fully informed"<sup>35</sup>—but then added something *Buckley* did not say—"about the person or group who is speaking."<sup>36</sup> *Buckley*, in contrast, had stated that the purpose was to inform voters about "the interests to which a candidate is most likely to be responsive."<sup>37</sup> The *Citizens United* opinion then quoted a single sentence of *dicta* from a footnote in *First National Bank of Boston v. Bellotti*, a 1978 case that did not involve a challenge to disclosure laws, for the proposition that "identification of the source of advertising may be required so that the people will be able to evaluate the arguments to which they are being subjected."<sup>38</sup>

Thus, whereas *Buckley* and *McIntyre* had defined the interest in terms of providing information to voters on how candidates were likely to prioritize once in office, *Citizens United* appeared to re-center the interest around an evaluation of the credibility of the speaker. That raised the question: if the purpose of compulsory disclosure is to help the public evaluate the credibility of a speaker, is there any need to restrict it to speech about candidates? Might "information" be helpful to the public—and thus an important government interest—in a variety of settings?

<sup>34</sup> 558 U.S. at 368–69. The ads were defined as "electioneering communications." The allowance for compelled disclosure of the "functional equivalency" of express advocacy was also first set forth in *McConnell v. FEC*. 540 U.S. at 206.

<sup>35</sup> 558 U.S. at 368 (quoting *Buckley*, 424 U.S. at 76).

<sup>36</sup> *Id.*

<sup>37</sup> 424 U.S. at 67.

<sup>38</sup> 558 U.S. at 368 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792, n.32 (1978)).

Five months later, in *Doe v. Reed*, the Court considered a Washington state law compelling publication of the names and addresses of persons who signed a petition to put a marriage referendum, similar to Prop 8, on the statewide ballot.<sup>39</sup> The Court upheld the requirement, but based its decision solely on the state's interest in "preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability." It specifically did not address the state's asserted informational interest.<sup>40</sup> But the various opinions of the justices—six all told—left many believing that the life had gone out of the *NAACP* line.

Justice Samuel Alito noted the breathtaking sweep of the state's asserted informational interest—"Were we to accept [the state's] asserted informational interest, the State would be free to require petition signers to disclose all kinds of demographic information, including the signer's race, religion, political affiliation, sexual orientation, ethnic background, and interest-group memberships"<sup>41</sup>—and discussed at length the record evidence of harassment and the problems of post-disclosure as-applied challenges.<sup>42</sup> But the other justices seemed not to share his concern. Justice Sonia Sotomayor, joined by Justices John Paul Stevens and Ruth Bader Ginsburg, was dismissive of plaintiffs, characterizing their First Amendment burden as "minimal."<sup>43</sup> Next, Justice Stevens, joined by Justice Stephen Breyer, authored a separate opinion arriving at the same conclusion.<sup>44</sup> And Justice Antonin Scalia concluded his concurring opinion with a ringing denunciation of anonymity: "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."<sup>45</sup>

<sup>39</sup> *Doe v. Reed*, 561 U.S. 186 (2010). Two organizations, with the bland but, in the circumstances, rather ominous names "Whosigned.org" and "KnowThyNeighbor.org," sought the information from the state for the purpose of placing it online in a searchable format. *Id.* at 193.

<sup>40</sup> *Id.* at 197.

<sup>41</sup> *Id.* at 202, 207 (Alito, J., concurring).

<sup>42</sup> *Id.* at 205–07.

<sup>43</sup> *Id.* at 212, 214 (Sotomayor, J., concurring).

<sup>44</sup> *Id.* at 216 (Stevens, J., concurring in part and concurring in the judgment).

<sup>45</sup> *Id.* at 228 (Scalia, J., concurring in the judgment).

Although both *Citizens United* and *Doe* called for “exacting scrutiny” in reviewing compulsory disclosure regulations, lower courts picked up on the generally lax tenor of the opinions. The “exacting scrutiny” standard of review—a standard intended to be, well, “exacting”—began to look much like the deferential “rational basis” test reserved for economic legislation,<sup>46</sup> with sweeping, vague state interests accepted at face value, privacy interests dismissed as inconsequential or even nonexistent, and no requirement that the state tailor its demands to its asserted interests.<sup>47</sup>

## II. The Political Backdrop to the *AFPF* Litigation

As *Citizens United*'s holding on disclosure changed the way judges seemed to think about what was needed to justify compelled disclosure under the “exacting scrutiny” test, its holding that corporations and unions had a constitutional right to spend money to promote their views on candidate elections sent shockwaves through the body politic.

The decision came during a particularly rough patch for the Democratic Party. January 2010 polling showed President Barack Obama with the lowest net approval rating after one year in office of any president in 56 years,<sup>48</sup> with approval for his handling of his signature issue, health care, falling to 37 percent.<sup>49</sup> On January 18, Massachusetts Republican Scott Brown scored a stunning upset in a special election for U.S. Senate. It was the first victory for a Republican in a Massachusetts Senate race in 38 years, and it ended the Democrats' filibuster-proof majority. It also had enormous symbolic impact—the seat was known as “the Kennedy seat,” having been held by Edward Kennedy for 47 years until his death five months before, and prior to that by John F. Kennedy.

<sup>46</sup> See *United States v. Carolene Products*, 304 U.S. 144 (1938).

<sup>47</sup> See *Ctr. for Competitive Politics*, 784 F.3d 1307, a facial challenge to the same practice challenged in *Bonta*. See also *Del. Strong Families v. Denn*, 793 F.3d 304 (3d Cir. 2015), cert. denied, 136 S. Ct. 2376 (2016); *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018); *Rio Grande Found. v. Santa Fe*, 437 F. Supp. 3d 1051 (2021).

<sup>48</sup> Lydia Saad, “Obama Starts 2010 with 50% Approval,” Gallup, Jan. 6, 2010, <https://bit.ly/3C7Ktp1>. See also Stephanie Condon, “Poll: Obama Ends First Year with 50% Approval Rating,” CBS News, Jan. 18, 2010, <https://cbn.ws/3C4QUt6>.

<sup>49</sup> Jeffrey M. Jones, “Obama Approval on Terrorism Up to 49%,” Gallup, Jan. 13, 2010, <https://bit.ly/3xiVAaY>.

Less than 72 hours after Brown's upset win, the Supreme Court announced *Citizens United*.<sup>50</sup> Coming when it did, to a Democratic Party with much of its base conditioned to view corporate America as its enemy, the psychological impact was enormous. It is not an exaggeration to say that hysteria gripped many on the left. Sen. Russ Feingold (D-WI), for example, warning that the net assets of U.S. corporations were in excess of \$23 trillion dollars, claimed, "that is quite a war chest that may soon be unleashed on our political system," as if corporations could or would spend all their assets on political communications.<sup>51</sup>

Within days, however, a strategy to limit unwanted speech began to emerge on the political left: compulsory disclosure. Writing at SCOTUSblog, the *éminence grise* of liberal law professors, Harvard's Laurence Tribe, called for corporate ads to include a statement by the company's chief executive revealing how much was being spent and certifying the CEO's personal conclusion that the expenditure would significantly advance the corporation's business interests. "The impact of a campaign ad," wrote Tribe, "would be cut down to size." He further called for a federally created private cause of action against those corporate CEOs for "corporate waste," with "double or treble damages" and attorney's fees.<sup>52</sup> The intent would be to create an *in terrorem* effect on corporate executives that would prevent corporate ads from being aired at all.

In Congress, Democrats quickly introduced the DISCLOSE Act,<sup>53</sup> the first of many attempts to impose extensive new disclosure requirements on civic organizations engaged in public discourse beyond the

<sup>50</sup> 558 U.S. 310.

<sup>51</sup> See Sean Parnell, "Senator Feingold Completely Loses Track of Reality," Inst. for Free Speech, Oct. 26, 2009, <https://bit.ly/3zYmBCn>. For a few other examples, see, e.g., Sean Parnell, "Waiting for ExxonMobil's One Percent," Inst. for Free Speech, Sept. 7, 2010, <https://bit.ly/3jaAmHq>; Bradley A. Smith & Allen Dickerson, The Non-Expert Agency: Using the SEC to Regulate Partisan Politics, 3 Harv. Bus. L. Rev. 419, 423–24 (2013).

<sup>52</sup> Laurence H. Tribe, "What Should Congress Do about Citizens United?," SCOTUSblog, Jan. 24, 2010, <https://bit.ly/3jbgpQN>.

<sup>53</sup> H.R. 5175 and S. 3295, 111th Cong., 2d Sess. (2010). "DISCLOSE" was an acronym created by the gimmicky title, "Democracy Is Strengthened by Casting Light on Spending in Elections."

traditional definitions of political spending.<sup>54</sup> Introducing the legislation, Sen. Chuck Schumer (D-NY) argued that “the deterrent effect [of compulsory disclosure] should not be underestimated.”<sup>55</sup>

Elsewhere, liberal activists attempted to pressure a variety of federal agencies, including the Federal Election Commission (FEC), the Federal Communications Commission, and the Securities and Exchange Commission (SEC), into issuing expansive new disclosure requirements.<sup>56</sup> Rep. Chris Van Hollen (D-MD) unsuccessfully sued the FEC twice to try to force it to compel added disclosure.<sup>57</sup> A number of states—mainly, though not exclusively, under Democratic political control—passed new compulsory disclosure laws.

It must be stressed that *Citizens United* made no change to disclosure laws. Corporate PACs would still have to report their contributions and expenditures to the FEC, for public consumption. Any corporation spending money from its treasury on ads expressly advocating the election or defeat of a candidate, or falling within the Bipartisan Campaign Reform Act’s definition of “electioneering communications,” would be required to disclose those expenditures.

<sup>54</sup> For an analysis of DISCLOSE, which has been introduced in each succeeding Congress, see Eric Wang, “Analysis of the DISCLOSE Act of 2017 (S. 1585): New Bill, Same Plan to Crack Down on Speech,” Inst. for Free Speech, Sept. 2017, <https://bit.ly/3rUHBr6>.

<sup>55</sup> T.W. Farnam, “Disclose Act Could Deter Involvement in Elections,” Wash. Post, May 13, 2010.

<sup>56</sup> See Fed. Election Comm’n, Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797, Oct. 21, 2014. For the full history of what began as Rulemaking 2010-01, see Fed. Election Comm’n, Reg. 2010-01 at <https://sers.fec.gov/fosers/>, and see Fed. Election Comm’n, Statement of Vice Chair Ann Ravel on the *Citizens United v. FEC* and *McCutcheon v. FEC* Rulemakings, Oct. 9, 2014, <https://bit.ly/3jaAzKI>. See also Campaign Legal Ctr., Common Cause, and Sunlight Foundation, Letter to Tom Wheeler, Chair, Fed. Commc’ns Comm’n., Oct. 29, 2015, <https://bit.ly/3xsZ1B7>; Comm. on Disclosure of Corporate Political Spending, Petition for Rulemaking, Aug. 3, 2011, <https://bit.ly/3C6l8ef>. Unions and liberal advocacy groups ginned up literally hundreds of thousands of form letters, many of which were little more than rants against the decision in *Citizens United*, in support of this petition to the SEC. See Smith & Dickerson, *supra* note 51, at 445–47; Bradley A. Smith, “Did Hundreds of Thousands of ‘Investors’ Really Write ‘Personally’ to the SEC on Corporate Disclosure? No, Not Really,” Inst. for Free Speech, Dec. 22, 2013, <https://bit.ly/3fD7t5Z>.

<sup>57</sup> See *Van Hollen v. Fed. Election Comm’n*, 811 F.3d 486 (D.C. Cir. 2016); *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).

Any donations to other people or organizations earmarked for political ads would have to be disclosed.

What, then, was the intended purpose of all this newly proposed, compulsory disclosure? One purpose appears to have been simply to burden speakers and interfere with their message, as in some of Professor Tribe's proposals. Another, however, was to expand the definition of "political" discussion to encompass all spending and memberships that were part of public discourse—including, for example, the type of activities engaged in by past plaintiffs before the Supreme Court, including the NAACP, the anti-discrimination picketer Talley, the teacher Tucker, and the leafleteer McIntyre.<sup>58</sup> This meant greater disclosure of contributions and dues to trade associations, nonprofit advocacy organizations, think tanks, and politically incorrect charities, such as the Boy Scouts. None of this spending had previously counted as "political" or been covered by disclosure laws. The colloquial, loaded term for this spending became "dark money." Well aware of the harassment of donors to conservative ballot initiatives in California and Washington state, the actions of groups such as Accountable America, and the statements and occasional actions of Sen. Schumer and other elected officials in the nation's capital,<sup>59</sup> many conservatives began to see in these demands for compulsory disclosure an effort to "name and shame" and use public pressure to drive conservative voices from the public debate.<sup>60</sup>

It was in this environment that California Attorney General Harris began demanding that charities and other nonprofits supply her office

<sup>58</sup> See *supra* note 13.

<sup>59</sup> For example, in 2013, in the wake of the controversial shooting of an unarmed black teenager, Trayvon Martin, Sen. Dick Durbin (D-IL) sent a letter to some 300 businesses and advocacy organizations. In the letter, Sen. Durbin demanded to know if they supported the American Legislative Exchange Council, a bipartisan but predominately Republican organization of state legislators that Democrats viewed as a facilitator of conservative legislation. He also demanded to know if they supported so-called "stand-your-ground" laws, which Democrats at the time denounced as "racist." Durbin let it be known that he would announce their answers publicly in connection with a hearing on "stand-your-ground" laws, one that featured Martin's mother as the star witness. See Sen. Dick Durbin, Letter to Companies on "Stand Your Ground," Aug. 6, 2013, <https://bit.ly/3rQq7fw>. Patrick Howley, "Dick Durbin Calls in Trayvon Martin's Mother for Anti-ALEC Testimony," Daily Caller, Sep. 19, 2013, <https://bit.ly/3zTF8jg>.

<sup>60</sup> See generally Kimberly Strassel, *The Intimidation Game: How the Left Is Silencing Free Speech* (2016).

with copies of “Schedule B,” a simple form that lists the names, addresses, and amounts given by donors of over \$5,000<sup>61</sup>—as a prerequisite to continuing to do business in the state.<sup>62</sup>

### III. The AFPF Litigation

#### A. *The Lower Courts*

AFPF and TMLC were two of the many conservative organizations that began receiving deficiency notices from the attorney general’s office starting in the spring of 2012. Eventually threatened with deregistration and fines, both organizations sued. The district court granted preliminary injunctions prohibiting the state from requiring the donor list<sup>63</sup> but was overruled by a Ninth Circuit panel, which remanded the cases for trial.<sup>64</sup>

At the ensuing bench trials, the state asserted a compelling interest in enforcing the law and protecting the public from “self-dealing, improper loans, interested persons, or illegal or unfair business practices.”<sup>65</sup> The main problem was, it wasn’t really true. The court summarized the testimony of the state’s own witness, a supervising auditor:

[O]ut of the approximately 540 investigations conducted over the past ten years . . . only five instances involved the use of a Schedule B. In fact, as to those five investigations identified, the Attorney General’s investigators could not recall whether they had unredacted Schedule Bs on file before initiating the investigation. And even in instances where a Schedule B was relied on, the relevant information it contained could have been obtained from other sources.<sup>66</sup>

<sup>61</sup> Schedule B is an attachment to the IRS’s primary charitable reporting form, Form 990. Although Form 990 is a public document, Schedule B, because of the sensitive nature of donor information, is not; IRS officials are prohibited by law from releasing filed Schedule Bs. 26 U.S.C. §§ 6014(b) & 6014(d)(3)(A).

<sup>62</sup> At about the same time, New York’s Democratic Attorney General Eric Schneiderman also began demanding information on donors from charities and other nonprofits seeking to solicit contributions in New York. See Schneiderman, 882 F.3d 374. Thus, nonprofit organizations unwilling to disclose donors found themselves in danger of being shut out of two of the largest, wealthiest states in the union.

<sup>63</sup> *Ams. for Prosperity Found. v. Harris*, 2015 WL 768778 (No. 14-09448) (C.D. Cal. Feb. 23, 2015).

<sup>64</sup> *Ams. for Prosperity Found. v. Harris*, 809 F.3d 536 (9th Cir. 2015).

<sup>65</sup> *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1053 (C.D. Cal. 2016).

<sup>66</sup> *Id.* at 1054.



“The record,” concluded the court, “lacks even a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General’s investigative, regulatory or enforcement efforts.”<sup>67</sup>

Eschewing any reliance on the “informational interest,” the state instead countered that the bulk collection of Schedule Bs did not constitute a First Amendment harm at all because the information was not disclosed to the public. The primary flaw in this argument, however, was that the trial record showed that nearly 1,800 Schedule Bs had been publicly posted on the state’s website.<sup>68</sup> And as the district court pointed out, once such information is disclosed, “it cannot be clawed back.”<sup>69</sup>

As to the harm from this disclosure, the district court cited in detail extensive testimony of harassment, non-idle death threats, physical assaults, economic boycotts, and threats to family members, aimed at members and contributors to the two organizations.<sup>70</sup> The court entered judgment for both plaintiffs.

The Ninth Circuit again reversed both decisions on appeal.<sup>71</sup> Although the court claimed to apply the relatively demanding “exacting scrutiny” standard,<sup>72</sup> it actually employed something more akin to the “rational basis” standard typically used in evaluating economic regulation. Except that may be unfair to the “rational basis” test—the Ninth Circuit’s actual standard was more akin to a “credulous acceptance” standard of review.

In response to the district court’s factual findings that for over a decade the state had not used Schedule B information to police charitable activity, the court of appeals noted that, well, someday it might find it handy to “flag suspicious activity” or improve “efficiency.” It also

<sup>67</sup> *Id.* at 1055.

<sup>68</sup> *Id.* at 1057.

<sup>69</sup> *Id.* at 1058.

<sup>70</sup> See *id.* at 1055–56; see also *Thomas More Law Ctr. v. Harris*, 2016 WL 6781090 (No. 15-3048), at \*4 (C.D. Cal. Nov. 16, 2016). These included business boycotts; obscene and threatening calls and emails; death threats, including at least one in which the perpetrator was found taking pictures of AFPF employees’ autos in the parking garage; numerous physical attacks, including collapsing a heavy event tent on members; pushing; spitting; and threats to grandchildren.

<sup>71</sup> *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018).

<sup>72</sup> *Id.* at 1008, 1020.

credited testimony that the state might be able to use Schedule Bs in various hypothetical situations over the testimony that it didn't actually use Schedule B in real situations, and, in fact, had apparently not even noticed for years that many charities were not including Schedule B in their filings.<sup>73</sup> As for the fact that the state had publicly posted almost 1,800 copies of confidential Schedule Bs—and further recognizing that in fact over 350,000 Schedule Bs were readily accessible to any hacker with a modicum of computer knowledge<sup>74</sup>—the court blithely accepted the state's promise that it wouldn't happen again.<sup>75</sup> And in a curious defense of the state's proven inability to maintain confidentiality, the court noted that “[n]othing is perfectly secure on the internet.”<sup>76</sup> The plaintiffs were undoubtedly comforted by that bit of wisdom.

The court of appeals then simply dismissed the record of threats, reprisals, and harassment: “Ultimately, we need not decide whether the plaintiffs have demonstrated a reasonable probability that the compelled disclosure of Schedule B information would subject their contributors to a constitutionally significant level of threats, harassment or reprisals . . . [because] we are not persuaded that there exists a reasonable probability that the plaintiffs’ Schedule B information will become public.”<sup>77</sup>

Over the objections of five judges, a petition for rehearing *en banc* was denied.<sup>78</sup>

### B. The Supreme Court

The Supreme Court granted certiorari on January 8, 2021,<sup>79</sup> heard arguments in late April, and reversed the Ninth Circuit in a 6-3 decision on July 1, the last day of the term.<sup>80</sup>

Much of the justices’ energy was devoted to debating the proper standard of review and the proper application of that standard.

<sup>73</sup> *Id.* at 1010.

<sup>74</sup> By altering a single URL digit, over 350,000 Schedule Bs were readily available through the state’s website. *Id.* at 1018.

<sup>75</sup> *Id.* at 1019.

<sup>76</sup> *Id.* at 1018.

<sup>77</sup> *Id.* at 1017.

<sup>78</sup> *Ams. for Prosperity Found. v. Becerra*, 919 F.3d 1177 (9th Cir. 2019).

<sup>79</sup> 141 S. Ct. 973 (2021).

<sup>80</sup> *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021).

The lower courts had applied “exacting scrutiny.”<sup>81</sup> The TMLC (but not AAFP) urged the Court to apply “strict scrutiny,” the Court’s most demanding standard.<sup>82</sup> Although “strict scrutiny” generally applies in the First Amendment context, and there are powerful arguments that it should apply to cases of compelled disclosure,<sup>83</sup> the argument for “exacting scrutiny” in the context of compelled disclosure was also strong. Although *NAACP* had used the term “closest scrutiny,” *Buckley* declared, “[s]ince *NAACP v. Alabama* we have required that the . . . interests of the State must survive exacting scrutiny.”<sup>84</sup> Similarly, *McIntyre* and *Doe* had applied “exacting scrutiny.”<sup>85</sup> In the end six justices—Chief Justice John Roberts, joined by Justices Brett Kavanaugh and Amy Coney Barrett, and the three liberal dissenters—opted for “exacting scrutiny.” Justice Clarence Thomas would have applied “strict scrutiny”; Justices Alito and Neil Gorsuch left open the possibility that “strict scrutiny” might be applied in the future but believed that it was not necessary to decide the issue in this case because the rule failed under either test.

More important than the standard of review may have been the majority’s interpretation of the “exacting scrutiny” standard. Roberts’s group, now joined by Justices Alito and Gorsuch, insisted that “exacting scrutiny” has real teeth,<sup>86</sup> while the dissenters, like the Ninth Circuit, interpreted it as little different from “rational basis.”

As in *NAACP* and its classic progeny, the majority was skeptical of the state’s asserted interest. It recognized, of course, that law enforcement could be an “important” and “substantial” state interest

<sup>81</sup> 903 F.3d at 1003; 182 F. Supp. 3d at 1053.

<sup>82</sup> 141 S. Ct. at 2383. The “strict scrutiny” standard generally requires the state to demonstrate a “compelling” government interest in its restriction and to “narrowly tailor” that restriction to arrive at the “least restrictive means” of solving the problem. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). For an in-depth review of the standard and its application, see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267 (2007).

<sup>83</sup> See, e.g., *Buckley v. Am. Const. L. Found.*, 525 U.S. 182, 206–09 (1999) (Thomas, J., concurring in the judgment).

<sup>84</sup> 424 U.S. at 64.

<sup>85</sup> *McIntyre*, 514 U.S. at 334–35; *Doe*, 561 U.S. at 196.

<sup>86</sup> 141 S. Ct. at 2391 (Alito, J., concurring in part and concurring in the judgment). Justice Thomas’s strict scrutiny test would, of course, encompass the majority’s version of “exacting scrutiny.”

as required under “exacting scrutiny.” But the majority looked at the record, and the trial court’s findings, and simply doubted that that was really the case. The Court noted the trial court’s findings that the state, in fact, rarely if ever used Schedule B to detect or investigate fraud; that only two other states require filing of Schedule B; and that California and those other states had rarely enforced the requirement at all prior to 2010. It concluded, “California’s interest is less in investigating fraud and more in ease of administration.”<sup>87</sup> And ease of administration simply is not a compelling interest sufficient to override First Amendment burdens.

While not requiring that the state use the “least restrictive means” to accomplish its objectives, the majority held that “exacting scrutiny” did require the statute to be “narrowly tailored” to achieving the state’s ends. By that, it appeared to mean something like “strict scrutiny light”—the statute or policy need not be the *least* restrictive, but it ought to be no more extensive in scope than reasonably necessary. Given the thousands of charitable filings in California and the almost nonexistent use of Schedule Bs in enforcement, the policy had no chance of meeting the narrow tailoring requirement.

Finally, the majority addressed the trial court’s lengthy record of harassment. But following cases such as *Talley v. California*, *Shelton v. Tucker*, and *McIntyre*, the majority rejected the suggestion that relief had to be conditioned on such evidence—a reasonable probability of harassment “creates an unnecessary risk of chilling” protected activity.<sup>88</sup> Even as it recited the stark evidence of harassment and threats against the plaintiffs’ members, the majority recognized that that would not be true in every case. But “[w]hen it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual’s ability to join with others to further shared goals. *The risk of a chilling effect on association is enough.*”<sup>89</sup>

In sum, the failure of the state to establish that its demands were at all necessary to its legitimate interests (as in *NAACP*, *Bates*, and *Gibson*), its unnecessarily broad sweep (as in *Talley* and *Shelton*), and the record of harassment (again, as in *NAACP* and *Bates*) made *AFPP*

<sup>87</sup> *Id.* at 2387.

<sup>88</sup> *Id.* at 2388.

<sup>89</sup> *Id.* at 2389 (emphasis added).

an easy case—as Justice Alito wrote in his concurrence, “[t]he question is not even close.”<sup>90</sup>

In contrast, the dissent, authored by Justice Sotomayor and joined by Justices Breyer and Elena Kagan, offered a very different version of “exacting scrutiny.” They would not have required “narrow tailoring,” but only a “substantial relationship” between the compelled disclosure and an “important” government interest.<sup>91</sup> This might work if “substantial relationship” were given serious consideration. But to the dissent, the term seemed to mean little more than “rational basis.” After all, a “rational basis” for a policy will almost always mean some “relationship” to a problem, and thus likely a “substantial one.” And once that is established, absent some tailoring requirement, there are no further checks on the state. The dissent’s version of “exacting scrutiny” was all but meaningless.

Given the clear inadequacy of that approach to *AFPE*, the dissent decided not to address the absence of any meaningful state reliance on Schedule B for investigative purposes, the broad sweep of the state’s bulk collection of Schedule Bs, the proven failure of the state to keep the records out of the public realm, or the record of harassment developed at trial. Instead, the dissent opted to adjudicate a different case in which these problems just weren’t present.

“The majority holds that a California regulation requiring charitable organizations to disclose tax forms containing the names and contributions of their top donors unconstitutionally burdens the right to associate *even if the forms are not publicly disclosed*,” wrote the dissenters,<sup>92</sup> ignoring the fact that nearly 1,800 forms were publicly disclosed and tens of thousands of others were easily accessible. This inconvenient fact was brushed aside because “California has implemented security measures to ensure that Schedule B information remains confidential.”<sup>93</sup> The dissent didn’t consider the possibility of a second fail.

As to the record of harassment, Justice Sotomayor’s opinion borders on callous: “The same scrutiny the Court applied when NAACP members in the Jim Crow South did not want to disclose their membership for fear of reprisals and violence now applies equally in the

<sup>90</sup> *Id.* at 2391 (Alito, J., concurring).

<sup>91</sup> *Id.* at 2396 (Sotomayor, J., dissenting).

<sup>92</sup> *Id.* at 2392 (emphasis added).

<sup>93</sup> *Id.* at 2400.

case of donors only too happy to publicize their names across the websites and walls of the organizations they support.”<sup>94</sup> But if all these donors were “only too happy to publicize their names,” what was the case about? The notion that nothing short of a Jim Crow regime is enough to create meaningful First Amendment burdens ignores a century of jurisprudence and threatens to convert the hard-won victories of the civil rights movement into hollow memories. The *AFPF* record was replete with examples of harassment and physical violence. Would the dissenters have lynchings be a prerequisite to invoking the protections of the Constitution? Complaining that “the vast majority of donors prefer to publicize their charitable contributions”<sup>95</sup> makes no more sense than noting that the vast majority of people don’t take to the streets in peaceful protest, so maybe those rights don’t matter either. Of course, it may be that some donors were a bit “too happy to publicize their names,” but presumably the same could have been said about at least some donors to the NAACP, even back in 1957.

Oddly, in her concluding paragraph, Justice Sotomayor confessed, “[t]here is no question that petitioners have shown that their donors reasonably fear reprisals if their identities are publicly exposed.”<sup>96</sup> She just didn’t care.

#### IV. The Campaign Finance Stalking Horse

Early in her dissent, Justice Sotomayor may have revealed what was really bothering her. “Today’s analysis marks reporting and disclosure requirements with a bull’s-eye.”<sup>97</sup> Almost from the start, America’s liberal commentariat portrayed the case as one of “dark money” in politics.<sup>98</sup> Recall that Attorney General Harris

<sup>94</sup> *Id.* at 2393.

<sup>95</sup> *Id.* at 2403.

<sup>96</sup> *Id.* at 2405.

<sup>97</sup> *Id.* at 2392.

<sup>98</sup> See, e.g., *id.*; Brief of U.S. Senators as Amici Curiae in Support of Respondent, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255) (the 15 senators—all Democrats—managed to use the phrase “dark money” 42 times in the brief); Jon Skolnik, “Right-wing Funders Are Waging War to Keep Dark Money Secret. Some Liberals Are Joining Them,” *Salon*, May 12, 2021, <https://bit.ly/2TNsanP>; Matt Ford, “How Far Will the Roberts Court Go to Protect Shadowy Political Donors?,” *New Republic*, Jan. 10, 2020, <https://bit.ly/3ljPgxH>.

implemented the policy of requiring donor disclosure in the wake of *Citizens United* and in the midst of a concerted effort to expand disclosure beyond its traditional boundary of actual campaigns and elections. At oral argument, Justice Breyer raised the question directly, asking if the case was “really a stalking horse for campaign finance disclosure laws.”<sup>99</sup> And the decision was greeted by many—again, primarily on the left—as a major blow to democracy and a victory for “dark money.”<sup>100</sup>

The issue arises because charities and nonprofits of all types engage in many activities that affect public policy, and hence have the potential to affect elections. The NAACP’s agitation, education, and litigation for civil rights certainly affected American politics and elections, but the organization was at all times in its battles against compelled disclosure a recognized charity. Think tanks such as the Brookings Institution and the Heritage Foundation are intimately involved in public policy. Recognized charities such as the League of Women Voters, the American Society for the Prevention of Cruelty to Animals, and Judicial Watch are well-known entities in public policy debates. Nonpartisan voter registration has long been a staple activity of many charities. Churches preach their teaching on justice and are often intimately involved in political causes. Even what were once the most mainstream of charities, such as the Boy Scouts of America, may become embroiled in hot cultural—and hence, political—disputes. As Justice Oliver Wendell Holmes once put it, “every idea is an incitement. It offers itself for belief and if believed it is acted on.”<sup>101</sup> Such action might include voting.

The plaintiffs, AFPF and TMLC, are conservative in their orientation but—like the NAACP in 1958—both are charitable organizations operating under section 501(c)(3) of the Internal Revenue Code. As such, they are prohibited from engaging in partisan political activities

<sup>99</sup> Transcript of Oral Argument at 50, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255) (“I’d like to know what you think of the argument raised in several of the amici briefs anyway that this case is really a stalking horse for campaign finance disclosure laws.”).

<sup>100</sup> See, e.g., Alison Durkee, “Supreme Court Sides with Conservative Groups, Empowers Dark Money Groups with Ruling Striking Down California Donor Law,” *Forbes*, July 1, 2021, <https://bit.ly/3l1xg6k>; Ian Millhiser, “The Supreme Court Just Made *Citizens United* Even Worse: It’s a Great Day for Dark Money,” *Vox*, July 1, 2021, <https://bit.ly/3iiUYhG>.

<sup>101</sup> *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

and campaigns. “Dark money” in politics is, by definition, not money expended by charities. To the extent that *AFPF v. Bonta* was about campaign finance, then, it was not about the plaintiffs attempting to roll back laws, but about efforts of the political left to dramatically expand the reach of campaign finance law to cover most every aspect of public life—precisely what the Supreme Court in *Buckley* had held was unconstitutional and what the *NAACP* line of cases had implicitly rejected.

On its own terms, the “dark money” argument makes no sense. “Dark money”—which makes up about two to four percent of spending in U.S. elections<sup>102</sup>—is legal. It is called “dark” only because the donors to the organization doing the spending are not publicly disclosed.<sup>103</sup> There is no need, therefore, for the state’s attorney general to investigate it. Those who argue that the Court’s decision will make it hard to fight “dark money” are, in essence, admitting that—at least for them—the game was never about “law enforcement.” It is about exposing donors publicly, or perhaps giving government itself the ability to track spenders and create, in essence, a government “enemies list.”

Not surprisingly, given that California argued that it did not release the Schedule B information—intentionally, anyway—to the public, the state in *AFPF* did not rely on the “informational” interest. How could it, if it wasn’t going to make the information public? Yet even as Harris’s successor as California’s attorney general was arguing that the state’s important interest in bulk disclosure of donor information was to efficiently police self-dealing and fraud,<sup>104</sup> he argued in a letter to the IRS commenting on a proposal to eliminate most Schedule B filings, and joined by the attorneys general of 19 other states (all Democrats), that the state needed the information on Schedule B in order to track “dark money” in

<sup>102</sup> Luke Wachob, “Putting ‘Dark Money’ in Context: Total Campaign Spending by Political Committees and Nonprofits per Election Cycle,” Inst. for Free Speech, May 8, 2017, <https://bit.ly/2V9GXdo>.

<sup>103</sup> See Dark Money Basics, Ctr. for Responsive Politics, <https://bit.ly/3A5pKAi> (last visited July 29, 2021) (“‘Dark money’ refers to spending meant to influence political outcomes where the source of the money is not disclosed.”).

<sup>104</sup> Brief for Respondent at 7–8, 29–32, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255), <https://bit.ly/2TTfD2m>.



the state.<sup>105</sup> That sounds like a broadly defined “informational” interest, and not necessarily a benign one.

Justice Sotomayor, like the Ninth Circuit, seemed to believe that if information was not intended to be publicly disclosed, there is no First Amendment harm.<sup>106</sup> But compelled information can be misused by the state too. The *AFPF* majority only hints, perhaps wisely, at the possibility of harassment by the state itself. Although it implicitly noted that official harassment could be a problem,<sup>107</sup> the Court spoke explicitly only of nonofficial harassment—“bomb threats, protests, stalking, physical violence.”<sup>108</sup> And, indeed, other than the probably inadvertent disclosure of hundreds of Schedule B forms, there was no evidence that the state had misused the information. But the Court in the future should not ignore the simple fact that disclosure can be a harm in and of itself. Some people just don’t like the idea that the government has information about them, and that is a real harm, even if it seems a nonsensical objection to Justice Sotomayor. More important, once information is in government hands, it can rarely be clawed back. American history is replete with examples of government abusing tax and other information to harass its enemies.<sup>109</sup> And the mere fact that today’s government is not using information improperly does not mean that tomorrow’s will not. Governments change. And in recent years, we have seen numerous incidents of people being harassed for actions or statements that were not controversial years ago but are today.<sup>110</sup>

<sup>105</sup> Gurbir Grewal et al., Letter to Steven T. Mnuchin & Charles B. Rettig, Dec. 19, 2019, at 2 n.2.

<sup>106</sup> See *Ctr. for Competitive Politics v. Harris*, 784 F. 3d 1307, 1312–13 (9th Cir. 2015).

<sup>107</sup> 141 S. Ct. at 2388.

<sup>108</sup> *Id.*

<sup>109</sup> Indeed, *NAACP v. Alabama* is itself an example. President Richard Nixon’s “enemies list” is another example, and a major reason the IRS now has such tight rules on the handling of donor information, with criminal penalties for its improper release. See Barnaby Zall, “Reviving the ‘Enemies List’ Using IRS Form 990, Schedule B,” *Pub. Pol’y Legal Inst.*, Feb. 3, 2021, <https://bit.ly/2Vo3X83>.

<sup>110</sup> See, e.g., Noah Manskar, “Boeing Communications Boss Niel Golightly Resigns over Sexist Article,” *N.Y. Post*, July 3, 2020, <https://bit.ly/3xkGG40> (executive forced to resign over 33-year-old newspaper column opposing women in combat); David Lee, “Mozilla Boss Brendan Eich Resigns after Gay Marriage Storm,” *BBC News*, Apr. 4, 2014, <https://bbc.in/3jc5uX7> (Mozilla founder Brendan Eich ousted from company over political donation made years earlier to a ballot proposition that gained majority support).

Perhaps the state had legitimate law enforcement interests. But consider the timing and political atmosphere of the attorney general's decision to "ramp up" enforcement of donor disclosure, the open statements by prominent politicians and commentators of the intent to use disclosure to deter opposition speech, the actual campaigns of harassment against donors whose political campaign contributions had been disclosed, the prominent leaks of confidential tax information of conservative politicians and groups,<sup>111</sup> and the memories of the IRS's own "tea party" scandal of 2013,<sup>112</sup> could certainly lead a reasonable observer to conclude that the primary reason for the state's policy was to enable harassment, both official and unofficial, of donors to disfavored charities.<sup>113</sup> If *AFPF* was a stalking horse to prevent such harassment, it was a good one to have in the hunt.

If, on the other hand, the purpose of California's compelled donor disclosure was not to harass and intimidate, then laws regulating disclosure of campaign contributions and spending have little to fear. *Buckley* differentiated *NAACP* and its progeny from the campaign finance disclosure provisions of FECA by noting three compelling state interests: enforcement, prevention of corruption, and a narrow informational interest in knowing the organizations a candidate was most likely to prioritize. Those interests simply were not present in *AFPF*, but presumably they still are when the state demands disclosure of contributions to political campaigns.

<sup>111</sup> See Stephen Engelberg & Richard Tofel, "Why We Are Publishing the Tax Secrets of the .001%," *ProPublica*, June 8, 2021, <https://bit.ly/3A21y1P> ("We obtained the [confidential] information from an anonymous source"); Larry Light, "A Trump Tax Return Revealed," *CBS News*, Mar. 15, 2017, <https://cbn.ws/3ig3DBo> (discussing "leaked copy" of Donald Trump tax returns); Editorial, "IRS Admits to a Smidgeon of a Felony," *Investor's Bus. Daily*, June 27, 2014, <https://bit.ly/3C4UuDw> ("The National Organization for Marriage has been awarded a \$50,000 settlement from the IRS after the agency admitted wrongdoing in leaking the organization's 2008 tax return and the names and contact information of major donors.").

<sup>112</sup> See, e.g., Peter Overby, "IRS Apologizes for Aggressive Scrutiny of Conservative Groups," *NPR*, Oct. 27, 2017, <https://n.pr/3A7f7gF>. For comprehensive, day-by-day coverage of the scandal, see Professor Caron's *TaxProf Blog*, searching under "IRS Scandal," <https://taxprof.typepad.com/> (last viewed July 30, 2021).

<sup>113</sup> It must be noted here that conservatives do not share this fear alone—dozens of "liberal" nonprofits, such as the American Civil Liberties Union, People for the Ethical Treatment of Animals, the Council on Islamic-American Relations, and many more filed amicus briefs in support of the petitioners. A complete list of amicus briefs is available at *SCOTUSblog*, <https://bit.ly/37d4tZc> (last viewed July 29, 2021).

Because the state did not raise it, the Court did not consider the scope of the “informational” interest that has caused so many problems since its narrow purpose was blurred in *Citizens United*. But the tougher “exacting scrutiny” test will make it harder for that interest to be used as an all-purpose rationale for expanding compelled disclosure. Further, the general tenor of the majority opinion and Justices Alito’s and Thomas’s concurrences suggests that the Court will be skeptical of efforts to expand that interest beyond its original narrow scope delineated in *Buckley* and *McIntyre*.

Thus, it is true that by putting some teeth into “exacting scrutiny,” campaign disclosure laws might be trimmed at the margin. For example, many states require public disclosure of political contributions at very low levels, and it may be hard to sustain these under the “informational” interest after *AFPF*. That would seem to be a good thing—small-dollar donors to a campaign shouldn’t have to run even a minimal risk of harassment and retaliation, a threat that is very real in today’s climate. Most other existing rules, however, should remain, for better or worse, undisturbed, just as *Buckley* upheld them in spite of *NAACP v. Alabama*.

If most current laws are not threatened, *AFPF* does cast still further constitutional doubt on the decade-long effort to “deter” speech by expanding the reach of campaign finance disclosure laws to non-candidate, nonelectoral advocacy activities by trade associations, social welfare and advocacy organizations, charities, think tanks, and grassroots networks. Something like the proposed DISCLOSE Act, already of dubious constitutionality, now rests on even soggy ground. Similarly, the IRS’s own use of Schedule B—already truncated voluntarily by the service—could come under scrutiny, since there is little evidence that the IRS actually uses the information to enforce the tax code.

And that would be fine. A little trimming here and there is probably overdue.

## V. Conclusion

One of the more encouraging aspects of *AFPF* was the majority’s recognition of the facts on the ground—not just in the instant case, but in our culture generally. This was apparent at oral argument, when Justice Thomas used a simple question to demonstrate how even noncontroversial causes—such as “puppies”—can today create

a raging storm of controversy. Justice Thomas noted as well that “in this era, there seems to be quite a bit of . . . loose accusations about organizations, . . . [that] might be accused of being a white supremacist organization or racist or homophobic.”<sup>114</sup> Justice Alito specifically addressed “legitimate fear in our current atmosphere.”<sup>115</sup> And this concern found its way into Chief Justice Roberts’s majority opinion: “Such risks [of violence and harassment] are heightened in the 21st century and seem to grow with each passing year, as anyone with access to a computer [can] compile a wealth of information about anyone else, including such sensitive details as a person’s home address or the school attended by his children.”<sup>116</sup>

Supporters of laws and regulations requiring Americans to disclose their associations, memberships, and financial support tend to respond to this problem by speaking in general terms of “the public’s right to know.” When concerns of boycotts, blacklists, and harassment are raised, they often quote the late, great Justice Scalia’s concurring opinion in *Doe v. Reed*. In that case, upholding public disclosure of the names of persons signing petitions to place a referendum on a state ballot, Justice Scalia wrote:

[H]arsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.<sup>117</sup>

<sup>114</sup> Transcript of Oral Argument, *supra* note 99, at 9–10.

<sup>115</sup> *Id.* at 53.

<sup>116</sup> 141 S. Ct. at 2388.

<sup>117</sup> *Doe*, 561 U.S. at 228 (Scalia, J., concurring) (this passage was quoted in whole or in part in at least three amicus briefs supporting the state of California in *AFPP v. Bonta*); see Brief of U.S. Senators, *supra* note 98, at 34; Brief of Legal Historians in Support of Respondents at 17, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255); Brief of Campaign Legal Ctr. et al. in Support of Respondents at 13, *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373 (2021) (Nos. 19-251, 19-255).

Whether Justice Scalia would have sided with the state in *AFPF* can, of course, never be known for certain. I suspect not.<sup>118</sup> But either way, and with great respect, Justice Scalia was not a typical person. He was possessed of a dominant, outgoing personality; with his keen intellect and dashing rhetorical skills, he relished verbal combat and battles of ideas. Perhaps more important, the justice spent a majority of his adult life in jobs with enormous security—as a tenured law professor and, for the final 34 years of his life, as a federal judge. Moreover, in these positions, Justice Scalia did not have to concern himself with the possibility that something he might say could damage the welfare of shareholders (perhaps retirees counting on their investments to meet expenses), or employees who could lose jobs, if a boycott ensued. And although Scalia was famous for eschewing the company of federal marshals who regularly accompany justices of the Court, it remains true that his workplace and local travel were protected by the Supreme Court Police, and when necessary or desired in his travels outside of Washington he could call on the protection of the U.S. Marshals Service. It almost goes without saying that most Americans, even the rich and powerful, lack such insulation from “cancel culture.”

Not everyone is an Antonin Scalia—indeed, and perhaps unfortunately, almost no one is. And so, in a sense, the ultimate questions before the Supreme Court in *Americans for Prosperity Foundation v. Bonta* were these: To what extent does the First Amendment protect not just the “courageous” and “brave,” but also the “timid and sensitive,”<sup>119</sup> by protecting them from forced disclosure of their associations, memberships, and financial support, when such disclosure may be used to harass and threaten them and their families? Do the meek have ideas we should hear, and if so, how do we encourage those ideas? And finally, is democracy better served when Americans can offer their opinions without fear of being held “accountable” in

<sup>118</sup> Justice Scalia’s opinions critical of anonymity came in the context of elections, not, as in *AFPF*, where nonelectoral speech was at issue. See McIntyre, 514 U.S. at 371 (Scalia, J., dissenting); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (in which Justice Scalia joined the Court majority in upholding disclosure rules); *Doe*, 561 U.S. at 228 (Scalia, J., concurring in the judgment).

<sup>119</sup> See *Barsky v. United States*, 167 F.2d 241, 249 (D.C. Cir. 1948) (Edgerton, J., dissenting).

the manner favored by today's "woke" and 1950s segregationists? I think it is.

At a minimum, the government should be neither harassing citizens for their beliefs, nor forcing citizens to provide the information for their own undoing, without a darn good reason. In *Americans for Prosperity Foundation v. Bonta*, the Supreme Court indicated that it thinks so, too.