Supreme Court Invalidates California Donor Disclosure Rule on First Amendment Grounds

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On July 1, 2021, the Supreme Court struck down part of a California regulation requiring charitable organizations registered in the State to disclose their major donors to the State Attorney General's office—information the federal Internal Revenue Service (IRS) also collects. In *Americans for Prosperity Foundation v. Bonta*, the Court ruled that the State's disclosure requirement violated the donors' First Amendment right to freedom of association. This Legal Sidebar provides an overview of the relevant constitutional standards, a summary of the case and the Court's decision, and a discussion of the decision's potential consequences for federal and state donor disclosure requirements.

Freedom of Association and Disclosure Requirements

The First Amendment does not explicitly mention the "freedom of association." The Supreme Court, however, has long considered the "freedom to engage in association for the advancement of beliefs and ideas" an "inseparable aspect of . . . freedom of speech." This freedom includes, to some extent, the right to speak and associate anonymously. Thus, the "compelled disclosure of affiliation with groups engaged in advocacy" implicates protected associational rights. Although they are not the only Supreme Court cases on the compelled disclosure of affiliations, two decisions in particular are important for understanding the Justices' positions in *Americans for Prosperity*: the Court's 1958 decision in *NAACP v. Alabama* ex rel. *Patterson* and its 1976 decision in *Buckley v. Valeo*.

NAACP involved an Alabama court's contempt order against the NAACP for refusing to disclose the names and addresses of its Alabama members in a dispute involving the organization's compliance with state business registration requirements. In evaluating whether disclosure of the organization's "rank-and-file members" to the State would violate the First Amendment, the Court recounted the "uncontroverted" evidence that on past occasions, publicly identified NAACP members were subject to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." It was "apparent" to the Court that the threat of these harms could lead current members to leave the NAACP or discourage others from joining it.

The Court held that Alabama had not advanced an interest "sufficient to justify the deterrent effect" of the disclosures. The Court explained that knowing the NAACP's "ordinary" members' identities was unnecessary for the State to verify compliance with the registration requirement—its sole justification for obtaining the lists—because the NAACP acknowledged its presence and activities in the State and provided the names of its directors and officers, the total number of its Alabama members, and the amount of their dues.

While *NAACP* concerned an organization's *membership*, *Buckley* involved the chilling effects associated with the disclosure of an organization's *donors*. The *Buckley* Court considered a federal election law requiring political committees and candidates to submit quarterly reports to the Federal Election Commission (FEC). The statute required the reports to include the names, addresses, and contributions of each person who contributed more than $100 in a single year, and required the FEC to make this information publicly available. The Court held that the First Amendment protects contributors' anonymity, reasoning that "the invasion of privacy of belief may be as great when the information sought concerns the giving and spending of money as when it concerns the joining of organizations, for '[f]inancial transactions can reveal much about a person's activities, associations, and beliefs.'" The Court interpreted *NAACP* and subsequent decisions to require "exacting scrutiny" and a "'substantial relation' between the governmental interest and the information required to be disclosed."

Applying this standard, the *Buckley* Court reasoned that the FEC disclosure requirements "directly serve[d]" three "substantial" interests. First, disclosure would help voters make informed decisions at the polls by understanding "where political campaign money comes from and how it is spent" by candidates. Second, disclosure would "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." (The Court later held that this anti-corruption rationale does not encompass the general influence of lobbyists, but only the deterrence of "quid pro quo" exchanges.) Third, the *Buckley* Court recognized the government's interest in "gathering the data necessary to detect violations" of campaign contribution limits set forth elsewhere in the law. Balancing these competing interests, the Court concluded that the disclosure requirements were justified in relation to the burden they placed on individual rights. The Court emphasized that "any serious infringement on First Amendment rights" was "highly speculative" because the plaintiffs offered no evidence of "harassment on a similar scale" to the history of reprisals in *NAACP v. Alabama*. However, the Court suggested that minor parties or contributors could succeed in a future as-applied challenge to a disclosure requirement if they could show burdens commensurate with those in *NAACP*.

Americans for Prosperity Foundation v. Bonta

California law requires charitable organizations operating in or soliciting funds in the State to register with the State and to file certain documents with the State Attorney General on an annual basis. These documents include Form 990—the IRS's "primary tool for gathering information about tax-exempt organizations"—along with any applicable "attachments and schedules." Starting in 2010, the State Attorney General began to send deficiency notices to organizations that did not file "Schedule B" to Form 990, which generally lists the names, addresses, and total contributions of donors who gave $5,000 or more to the organization during a single tax year. Facing suspension of their registrations for continued withholding of Schedule B information, two organizations filed lawsuits challenging the Schedule B requirement on First Amendment grounds.

In both cases, the district court held after a trial that California's Schedule B requirement violates the First Amendment as applied to the plaintiff-organizations and permanently enjoined the State Attorney General from enforcing the requirement against them. The U.S. Court of Appeals for the Ninth Circuit reversed in a consolidated appeal, holding that the Schedule B requirement survived exacting scrutiny because it is "substantially related to an important state interest in policing charitable fraud."

The Supreme Court disagreed with the Ninth Circuit. In a 6-3 decision, the Court ruled that California's Schedule B requirement violated the First Amendment. Writing for the majority, Chief Justice John

Roberts, Jr. reasoned that while California has an "important interest in preventing wrongdoing by charitable organizations," there is a "dramatic mismatch" between that interest and its "up-front," "blanket demand" for Schedule Bs. The Court credited the district court's finding that "there was not 'a single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the [State] Attorney General's investigative, regulatory or enforcement efforts.'" The Court concluded that "California's interest is less in investigating fraud and more in ease of administration," which, according to the Court, is an insufficient governmental interest to justify the burden that the Schedule B requirement placed on donors' association rights. The Court also concluded that the disclosure requirement was not appropriately tailored to the government's interest, reasoning that California "cast[] a dragnet for sensitive donor information" without exploring narrower alternatives such as subpoenas or audit letters.

Five of the six Justices in the majority concluded that the Schedule B requirement violated the First Amendment "on its face" because "a substantial number of its applications are unconstitutional." For those Justices, 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." Justice Clarence Thomas would have held only that the statute was unconstitutional as applied to the plaintiffs in the case.

While all six Justices in the majority agreed that the Schedule B requirement was unconstitutional, they disagreed over the level of scrutiny that the Court should apply to this and other disclosure requirements. Chief Justice Roberts and Justices Brett Kavanaugh and Amy Coney Barrett determined that *Buckley*'s exacting scrutiny test applies, not just to campaign finance and election cases, but to all "compelled disclosure requirements" that implicate the freedom of association. They, along with the other three Justices in the majority, held that under exacting scrutiny, the disclosure requirement must be both: (1) "substantially related" to a "sufficiently important" governmental interest; *and* (2) "narrowly tailored" to that interest. Unlike the "strict scrutiny" that applies to certain restrictions on speech, however, "exacting scrutiny" does *not* demand that the disclosure requirement be the "least restrictive means" of achieving the government's interest. Justice Thomas would have applied strict scrutiny, which he views as more consistent with the Court's precedents on compelled disclosures of association. Justices Samuel Alito and Neil Gorsuch reasoned that because the Schedule B requirement clearly fails exacting scrutiny, it "necessarily" fails strict scrutiny too. Accordingly, they deemed it unnecessary to decide in *Americans for Prosperity* which standard applies to this or other circumstances involving the compelled disclosure of associations.

Justice Sonia Sotomayor wrote the dissent, which Justices Stephen Breyer and Elena Kagan joined. The dissent would have upheld California's Schedule B requirement under a more flexible exacting scrutiny test "whereby the degree of means-end tailoring required is commensurate to the actual burdens on associational rights." In the dissent's view, the majority "discard[ed]" the Court's "decades-long requirement that, to establish a cognizable burden on their associational rights, plaintiffs must plead and prove that disclosure will likely expose them to objective harms, such as threats, harassment, or reprisals." The Court's analysis, the dissent posited, "marks reporting and disclosure requirements with a bull's eye" by presuming that "all disclosure requirements impose associational burdens," thereby requiring "close scrutiny" whenever a litigant expresses "a subjective preference for privacy."

Potential Consequences of the Decision

Americans for Prosperity generated interest from some Members of Congress because of its potential to clarify or change the First Amendment standards for evaluating donor disclosure requirements at the federal level, including election-related disclosure requirements. This section explores the potential ramifications of the decision.

The scope of the *Americans for Prosperity* ruling addresses only the constitutionality of California's Schedule B requirement. The Court's reasoning, however, potentially calls into question the constitutionality of other states' Schedule B requirements. At least three other states—Hawaii, New Jersey, and New York—have a Schedule B disclosure requirement similar to California's. In a 2018 decision, *Citizens United v. Schneiderman*, the U.S. Court of Appeals for the Second Circuit held that the State of New York had a sufficient interest in "preventing fraud and self-dealing in charities" to justify requesting Schedule B filings from nonprofit organizations. A key factor in the *Schneiderman* analysis was the State's policy to keep Schedule B information confidential. Because the Supreme Court in *Americans for Prosperity* found that the confidentiality of the California filings did not completely eliminate the chill on associational interests, the decision could provide new grounds for charities to challenge Schedule B disclosure requirements, requiring a state to demonstrate, based on its use of Schedule Bs, that its disclosure requirement is narrowly tailored to an important government interest.

The decision could have implications for donor disclosure requirements in federal tax law as well. Certain nonprofit organizations that are exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code (such as the plaintiffs in *Americans for Prosperity*) must file Schedule Bs with the IRS on an annual basis. Additionally, certain political organizations described in Section 527 of the Internal Revenue Code must also report information about their donors who contributed at least $200 in a calendar year on Schedule A of Form 8872. Because the federal government is responsible for enforcing federal income tax laws, it may be able to assert different regulatory or law enforcement interests than California to support its donor disclosure requirements. In an amicus filing in *Americans for Prosperity*, the United States argued that the federal disclosure requirement for 501(c)(3) organizations is a permissible condition on a federal benefit; that is, the federal government's subsidization of 501(c)(3)s through tax-exempt status and deductions for charitable contributions.

Beyond the tax context, the decision has potential ramifications for how courts evaluate First Amendment challenges to reporting and other disclosure requirements. The decision suggests that, at least where the disclosure *might* chill protected association, those requirements could be subject to exacting scrutiny, including a narrow-tailoring analysis. For example, as some legal scholars have suggested, the decision might affect the constitutionality of campaign finance disclosure requirements, which the Supreme Court has not subjected to a narrow-tailoring analysis. There are, however, two circumstances where a different level of scrutiny may apply. Whether characterized as a disclosure, disclaimer, reporting, or labeling requirement, if the compelled disclosure requires an organization to transmit the *government's* message, a court could review that law under strict scrutiny, requiring the government to show that it is the least restrictive means of achieving a compelling governmental interest. By contrast, if the compelled disclosure involves commercial speech, describes the regulated entity's own products or services, and requires "purely factual and uncontroversial" information, it may be subject to a less stringent form of review than exacting scrutiny.

Author Information

Victoria L. Killion
Legislative Attorney

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