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Americans for Prosperity Foundation v. Bonta: Questions and Answers

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The U.S. Supreme Court recently ruled that California could not constitutionally require charities and other nonprofit organizations to submit an annual list of donors to state officials as a pre-condition for lawfully soliciting contributions in the state. The case, known as *Americans for Prosperity Foundation v. Bonta* (“AFPF”),¹ was decided on July 1, 2021 and should have a substantial, positive impact on the rights of Americans to keep their memberships and financial support for causes and organizations private.

This short primer answers some of the more common questions about the decision, its immediate impact on nonprofits, and possible consequences going forward, including the constitutionality of other state and federal laws mandating disclosure of members and donors to nonprofits. This primer does not constitute legal advice. Readers should consult an attorney in determining their legal obligations.

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What Was the Case About?

Sometime in 2011 or early 2012 – the exact date is uncertain – then-California Attorney General Kamala Harris began demanding that charities and other nonprofits file IRS Form 990, Schedule B with the state as a condition of remaining “registered,” and hence legally able to solicit contributions, in the state. Schedule B is a simple but, because of its content, highly sensitive form. It is an annual list of names, addresses, and amounts given by major donors (over \$5000 or two percent of an organization’s income) to a charity or other nonprofit.² By statute, the IRS is prohibited from making this information public, and while nonprofits must make Form 990 available for public inspection, they may redact the names and addresses of donors from any public inspection.³

Americans for Prosperity Foundation and the Thomas More Law Center are charitable organizations operating under § 501(c)(3) of the Internal Revenue Code. The two organizations filed separate suits against the Attorney General,⁴ arguing that her demand to identify their donors violated their First Amendment rights of speech and association.

At separate bench trials in 2016, the U.S. District Court for the Central District of California found in favor of both nonprofits. The U.S. Court of Appeals for the Ninth Circuit reversed, and over the objection of five judges, denied a rehearing *en banc*. The plaintiffs petitioned the U.S. Supreme Court for writs of certiorari, and the consolidated cases were heard by the Supreme Court in April of 2021.

¹ 141 S. Ct. 2373 (2021).

² In 2020, the IRS dropped the Schedule B filing requirement for most nonprofits except those operating under § 501(c)(3) of the Internal Revenue Code. For more information, see “IRS Privacy Reform a Long-Sought Victory for Free Speech,” Institute for Free Speech. Available at: <https://www.ifs.org/news/irs-privacy-reform/> (May 26, 2020).

³ 26 U.S.C. § 6104(b) and 6104(d)(3)(A).

⁴ As they progressed through the legal system, the cases, originally styled *Americans for Prosperity Foundation v. Harris* and *Thomas More Law Center v. Harris*, substituted the names of successive California Attorneys General as defendants in place of Ms. Harris – first Xavier Becerra, then Acting Attorney General Matthew Rodriguez, and finally Rob Bonta.

What Did the U.S. Supreme Court Decide?

In a 6-3 decision, the Supreme Court held that the California rule violated the First Amendment right to freedom of association. Encompassed within the freedom of association is a right to keep one's memberships, affiliations, and financial support private. Chief Justice Roberts, joined by Justices Kavanaugh and Barrett, wrote the Court's opinion, with Justice Alito (joined by Justice Gorsuch) and Justice Thomas concurring in most of the opinion and in the judgment, but writing separately on the question of the standard of review. Justices Breyer, Sotomayor, and Kagan dissented in an opinion written by Justice Sotomayor.

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Is This a "New" Right?

No. The Court has long recognized that "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends," and that this right may be infringed by "attempt[s] to require disclosure of the fact of membership in a group seeking anonymity."⁵

The seminal case in the field is *NAACP v. Alabama*. In 1956, as part of an investigation into whether NAACP was conducting business in violation of the state's foreign corporation registration statute (and really, as part of the state's efforts to hamper the NAACP's work for civil rights), Alabama's attorney general demanded that the organization hand over a list of names and addresses of its supporters to state officials. The NAACP refused and was held in contempt by Alabama state courts. The U.S. Supreme Court reversed, writing:

It is hardly a novel perception 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....

Under 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.⁶

So, Why Was This Case Controversial?

Although several later cases affirmed the central holdings of *NAACP v. Alabama*,⁷ in the 1970s, the Court began to develop a separate line of cases dealing with disclosure of political campaign contributions. In these cases, most notably *Buckley v.*

⁵ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-623 (1984) (citations omitted).

⁶ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-463 (1958).

⁷ Other prominent cases supporting a right to maintain privacy in one's affiliations and memberships include, but are not limited to, *Bates v. Little Rock*, 361 U.S. 516, 525 (1960) (holding unconstitutional a city tax ordinance requiring nonprofit groups 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"); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (holding facially unconstitutional a state requirement that public school teachers list all organizations 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); and *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 the plaintiff).

See also *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (overturning contempt conviction, where teacher refused to answer questions regarding memberships and names of other members during investigation into subversive activities); *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 557 (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"); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961) (Louisiana statute requiring nonprofit organizations to file a membership list with the state was unconstitutional); and *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).

Valeo⁸ and *Citizens United v. Federal Election Commission*,⁹ the Court upheld compulsory disclosure laws pertaining to political campaigns.

These two divergent lines of cases left a number of issues unclear. The key issues facing the Court in *AFPP v. Bonta* were:

- What level of “scrutiny” should the court apply to compulsory disclosure laws of this sort?
- How is that level of scrutiny applied?
- What government interests are sufficient to override some First Amendment protections?

What Is “Scrutiny,” and What Level of Scrutiny Did the Supreme Court Apply?

Over the last several decades, the Court has gradually developed levels of “scrutiny” for reviewing laws and practices that are alleged to violate individual liberties. The tougher the scrutiny, the more likely it is the law will be found unconstitutional.

The highest level of scrutiny is “strict scrutiny,” which is typically used when a challenged statute burdens a “fundamental right,” such as freedom of speech, or applies to a “suspect classification,” such as laws discriminating on the basis of race or religion. To survive strict scrutiny, the law or practice must be justified by a “compelling interest”; be “narrowly tailored” to that interest (*i.e.*, not encompass too much activity unrelated to the state’s compelling interest); and be the “least restrictive means” of addressing that interest. At the opposite end is “rational basis” review, which usually applies to economic regulations and requires only that a law have some rational basis for its enactment.

The first question at issue in *AFPP v. Bonta* was whether to apply strict scrutiny or a lower standard of review known as “exacting scrutiny.” Justice Roberts, joined by Justices Kavanaugh and Barrett, concluded that the standard to be applied was exacting scrutiny. Justice Sotomayor also put the three dissenters on record as supporting the application of exacting scrutiny to the case. Justice Thomas argued that strict scrutiny should apply. Justice Alito, for himself and Justice Gorsuch, wrote separately to hold open the possibility that strict scrutiny should apply, but as the California policy failed under either test, they believed the issue did not need to be decided. So, for those counting, that’s six justices supporting exacting scrutiny in this disclosure context.

So, What Is “Exacting Scrutiny?”

Here’s where things get really interesting. “Exacting scrutiny” – which the Court seems to apply only in cases involving the right of association and compulsory disclosure, and possibly some election and political campaign-related laws – typically requires a “substantial relation” between an “important” or “substantial” government interest and the policy in question. That relationship is all that the three dissenters would have required to uphold a statute under exacting scrutiny. The six-justice majority, however, regardless of whether they would have applied strict scrutiny or exacting scrutiny, held that exacting scrutiny also required “narrow tailoring.” Narrow tailoring requires that a statute or policy must not infringe on First Amendment rights in a large number of situations, where doing so does not serve the “important” government interest at stake. In short, “exacting scrutiny” can be placed towards the middle of the spectrum, but much closer to “strict scrutiny” than to “rational basis” review.

Cut the Legal Mumbo-Jumbo. Why Did the Court Rule as it Did?

California argued that it needed the donor information to police charitable and other nonprofit fraud, but the state also admitted that it rarely used the information it collected. At trial, the state’s supervising investigative auditor testified that, out of the approximately 540 investigations conducted over the preceding ten years in the Charitable Trusts Section, only five had involved the use of donor information. Of those five, the Attorney General’s investigators could not recall whether they had the information on file before initiating the investigation or only requested it from the nonprofit after the investigation began. Based on this and other testimony, the trial court concluded that there was not “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.”¹⁰ Thus, the policy of collecting annual donor information in bulk from some 60,000 nonprofits was clearly not narrowly tailored to any law enforcement interest of the state.

⁸ 424 U.S. 1 (1976).

⁹ 558 U.S. 310 (2010).

¹⁰ *Ams. for Prosperity Found. v. Harris*, 182 F. Supp. 3d 1049, 1055 (C.D. Cal. 2016).

The state responded that, even if the information was rarely used, having it on file was more “efficient” and “effective” if it was needed. But the Supreme Court held that “mere administrative convenience” was not a sufficiently important government interest to justify the infringement of First Amendment rights. Thus, the policy was not narrowly tailored to an important government interest, and it failed exacting scrutiny.

The Court further held that, given the lack of narrow tailoring, the policy was unconstitutional “on its face.” In other words, its ruling was not based on any particular facts relevant to these two plaintiffs, but on the nature of the policy itself, and it was unconstitutional to demand this information in this manner not only from the two plaintiffs but from any entity.

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What Is the Immediate Impact of the Decision for Nonprofits?

The immediate upshot is to strike down the policy in California and three other states – Hawaii, New Jersey, and New York – of requiring disclosure of donors as a precondition of registering and soliciting donations in the state. Equally important, however, is that outside of the context of contributions to political committees (see below), any law or policy broadly requiring the publication of donors, either to the public or to the government, is now highly suspect.

Does This Mean States Can Never Ask for Donor Information?

No. States remain free to develop “narrowly tailored” policies and statutes mandating disclosure in some instances. For example, both the plaintiffs and the Supreme Court majority seemed to concede that, if California needed information on a nonprofit’s donors as a truly relevant part of a fraud investigation, it could demand the information from a particular nonprofit through an audit letter or subpoena.

Are All Policies Compelling Upfront Disclosure of Nonprofit Donors Invalid?

Not necessarily. But the state will have to show that its request is narrowly tailored to an important government interest. And outside of giving to “political committees” – PACs, political parties, and candidate campaign committees – the Court has not yet identified statutes or policies supported by a sufficiently important government interest to maintain non-specific, compulsory donor disclosure.

Does This Mean Nonprofits No Longer Have to File Schedule B With the IRS?

No. In 2020, the IRS repealed the requirement that donor names and addresses be reported on Schedule B for most nonprofits, but not for those operating under Sections 501(c)(3) or 527 of the Internal Revenue Code.¹¹ The *AFPF* majority specifically noted that, “revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California’s disclosure requirement.”¹²

It is hard to say how the courts would respond to a challenge to the IRS’s Schedule B filing requirement. Such a challenge would now be analyzed under the *AFPF* framework, meaning the IRS would have to show an important need for the information and that the demand was narrowly tailored. However, as 501(c)(3) donors claim a tax deduction, the IRS would likely argue that the information is needed to ensure tax compliance – *i.e.*, that the donations claimed by individual filers are actually received by charities. Given the potential revenue consequences, and a more direct connection between the information sought and the potential fraud than existed under California’s policy, courts might still uphold the rule, as the majority appears to suggest.

¹¹ See “Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations,” 85 Fed. Reg. 31959 (May 28, 2020). Available at: <https://www.federalregister.gov/documents/2020/05/28/2020-11465/guidance-under-section-6033-regarding-the-reporting-requirements-of-exempt-organizations>. Note that the regulation still requires exempted nonprofits to list donation amounts and the type of donation (*e.g.*, person, payroll, or noncash) on Schedule B of Form 990.

¹² 141 S. Ct. at 2389.

As often happens with Supreme Court decisions announcing new or clarified standards of review, how lower courts interpret the case going forward will be almost as important as the case itself.

Do Plaintiffs Have to Show a Record of Threats, Boycotts, and/or Harassment to Win Future Cases?

It depends. In *AFPF*, both Americans for Prosperity Foundation and the Thomas More Law Center provided extensive evidence of threats and harassment against their donors. However, what the Court made clear is that when – as with the California policy in *AFPF* – the policy or statute is not narrowly tailored to an important government interest, “such a demanding showing [of threats or harassment] is not required.” However, if a policy or statute passes the narrow-tailoring requirement, then “plaintiffs may be required to bear this evidentiary burden.”¹³

In other words, a compulsory disclosure law that is not narrowly tailored is unconstitutional without a specific showing of threats, boycotts, or harassment. But even if a statute or policy meets the narrow tailoring requirement, an organization may be granted relief – specific to the organization’s circumstance – by demonstrating a record or high probability of threats, boycotts, harassment, or violence. If the law or policy is not narrowly tailored, such evidence is not required.

Can a Statute Be Challenged Even if the Government Keeps the Information Confidential?

Yes.

The Supreme Court dissenters, and the Ninth Circuit below, argued that because the California government promised to keep the information confidential, there was no First Amendment harm at all. In response, the plaintiffs presented evidence showing that nearly 1800 copies of Schedule B had in fact been made public by the state, and that hundreds of thousands more were easily hacked by anyone with even modest computer knowledge (evidence that the dissenters and the Ninth Circuit shrugged off when the state promised to do better going forward).

In an important passage of the opinion, the Supreme Court majority rejected the idea that there is no First Amendment injury if the government doesn’t make the information public, whether intentionally or by accident. The Court specifically held that “disclosure requirements can chill association ‘[e]ven if there [is] no disclosure to the general public.’”¹⁴ This makes sense. For many donors, the government is precisely the entity from which they hope to keep their support private.

Thus, the government’s promises of confidentiality are not conclusive, although they may be a factor in determining if a law is “narrowly tailored.” And where the government does promise confidentiality as part of a narrowly tailored approach, evidence of its failure to maintain that confidentiality may help plaintiffs win anyway.

What Impact Does AFPF Have on Campaign Finance Disclosure?

Prior to the Supreme Court’s decision, several commentators, and some *amici* in the case, suggested that the decision would jeopardize campaign finance disclosure laws. In dissent, Justice Sotomayor wrote, “[t]oday’s analysis marks reporting and disclosure requirements with a bull’s-eye,” presumably referring to reporting and disclosure mandates for political campaign spending.¹⁵

The *NAACP v. Alabama* line of cases notwithstanding, since the 1976 decision in *Buckley v. Valeo*, the Supreme Court has consistently upheld campaign finance disclosure laws. The Court has traditionally recognized three “important” state interests supporting these laws, none of which were present in *AFPF*: (1) providing information needed by government to enforce political campaign contribution limits; (2) preventing corruption by exposing possible *quid pro quo* exchanges of public acts for campaign contributions; and (3) an “informational” interest in helping “voters to define more of the candidates’ constituencies,” and, therefore, “the interests to which a candidate is most likely to be responsive.”¹⁶

¹³ *Id.*

¹⁴ *Id.* at 2388 (quoting *Shelton v. Tucker*, 364 U.S. at 486 (1960)).

¹⁵ *Id.* at 2392 (Sotomayor, J., *dissenting*).

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, at 81, at 67 (1976). In other words, as defined in *Buckley*, this “informational interest” is in predicting how a candidate might act in office – it does 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. As defined in *Buckley*, it was certainly not about assuring “accountability” on the part of contributors.

Political campaign disclosure laws have historically been evaluated under the “exacting scrutiny” standard. To the extent that the decision in *AFPP* puts more teeth into that standard of review, some laws could be suspect. For example, many states require reporting of campaign contributions at very low levels, as little as \$10 or \$25. Laws requiring public disclosure of such small sums may be subject to challenge as not “narrowly tailored” to any of the important state interests, recited above, that the Court has recognized. That said, the core of campaign finance disclosure laws – disclosure of large contributions to candidates and other political committees – are likely to remain untouched barring a major change in the Court’s jurisprudence.

Given the narrow scope of the interests supporting compulsory disclosure, however, the Court has limited mandatory disclosure to a narrow category of ads directly related to political, and particularly candidate, campaigns. Except when dealing with “political committees” – organizations whose “major purpose” is the election or defeat of candidates (essentially PACs, political parties, and candidate campaigns) – the Court has only upheld compulsory disclosure laws that are closely and directly tied to candidate campaigns. In particular, these are “independent expenditures” (ads made independently from a candidate or political party that “expressly advocate” the election or defeat of a candidate, using phrases such as “vote for,” “vote against,” “elect,” “defeat,” and “Smith for Congress”)¹⁷ and “electioneering communications,” defined in the relevant case as broadcast ads involving a substantial sum (\$10,000 or more) aired in a candidate’s district within 30 days of a primary or 60 days of a general election.¹⁸ So long as they avoid engaging in “express advocacy” and “electioneering communications,” social welfare groups, trade associations, think tanks, and other nonprofits generally cannot be required to disclose their donors, with possible exceptions such as filing Schedule B with the IRS or where specific government investigations demonstrate an actual need for contributor information.

Indeed, after *AFPP*, many proposed laws and regulations, including state laws requiring donor disclosure for nonprofit “grassroots” lobbying, are highly suspect, and all will be subject to the “narrow tailoring” requirement. Any laws attempting to impose a broader definition of electioneering communication than that previously accepted by the Court would also be suspect.

What Other Laws Might Be in Jeopardy After AFPP?

In addition to any broad requirement that all or most nonprofit organizations disclose their donors, either publicly or to the government, we have identified several types of compulsory disclosure laws and proposals that may be subject to constitutional challenge after *AFPP*. Note that, as with any law, such laws are presumptively constitutional, and you should consult with your legal counsel to determine your obligations to comply. Here are some of the proposals we have seen regularly in recent years that now rest on shakier constitutional ground than before:

- Requirements that groups without the “major purpose” of promoting the election or defeat of candidates be registered as political committees or subject to the same broad disclosure and reporting standards as political committees, even if given a different name (e.g., “incidental committees” or “other contributing entities”);
- Definitions of key terms in campaign finance law, such as campaign “contributions,” campaign “expenditures,” or “independent expenditures,” that purport to include speech that is not clearly campaign-related and then trigger mandatory donor disclosure;
- Laws that expand the definition of “electioneering communication” to include communications that mention candidates more than 60 days from an election, appear in media other than broadcast or mass public ads, appear outside a candidate’s district, or that do not include a reasonable minimum threshold of expenditure before their application;
- Requirements that an organization making relatively minimal “independent expenditures” or “electioneering communications” disclose all donors, as opposed to only those who earmarked contributions for the expenditures;
- Requirements that “independent expenditures” or “electioneering communications” be made only from a separate fund established for that purpose, with donors to the fund disclosed;
- Efforts to require the disclosure of donors to groups engaged in “grassroots lobbying” on issues and pending legislation; and
- Requirements that ads include the names of the largest donors to an organization on the face of the ad, unless those donors earmarked funds for that purpose.

¹⁷ *Id.* at 44, n.52.

¹⁸ *McConnell v. Federal Election Commission*, 540 U.S. 93, 206 (2003); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 368 (2010).

Conclusion

Americans for Prosperity Foundation v. Bonta is the Court's most important decision on the First Amendment right of association in over 60 years. For now, nonprofits can rest comfortably knowing that, barring circumstances pertaining specifically to their organization, they can solicit potential donors in California, New York, and other states without first disclosing their donors, and that laws or policies requiring bulk disclosure of donors are either unconstitutional or, depending on the purpose and drafting, at least suspect under the First Amendment.

The ruling does not throw all campaign finance disclosure laws into doubt and, indeed, does not question the bona fides of core campaign finance disclosure: the compelled disclosure of large contributions to PACs, political parties, and candidate campaigns. It does, however, cast further doubt on already constitutionally dubious efforts to expand compulsory disclosure into the realm of issue speech, grassroots advocacy, and the general discussion of public affairs, even if such discussion relates to candidates.

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As is often the case, the full impact of the decision will likely not be known for several years and will inevitably be shaped by lower court decisions applying it to particular statutes and policies. But there is no doubt that *AFPF* shifts the First Amendment landscape in favor of privacy and the right to association.



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