INSTITUTE FOR FREE SPEECH

Written statement of
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and
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Institute for Free Speech
before the
State Government Committee
House Of Representatives
Commonwealth of Pennsylvania
on
Donor Disclosure and Campaign Finance Regulations:
Reviewing Recent Legal Precedents
February 7, 2022

Mr. Chairman and members of the committee, thank you for the invitation to participate in the hearing today. The U.S. Supreme Court's 2021 ruling in *Americans for Prosperity Foundation v. Bonta* ("*AFPF*"),[1] will have a substantial, positive impact on the rights of Americans to keep their memberships, volunteer work, and financial support for causes and organizations private. This landmark legal precedent is already being implemented by federal courts to evaluate donor disclosure and campaign finance laws. In large part, it incorporates and builds upon previous precedents. Therefore, our statement will focus on the meaning and potential impact of this ruling. We have also included as an appendix to our statement additional background information on donor disclosure and campaign finance regulations.

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

[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).

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.

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 the judgment, but writing separately on the question of the standard of review. Justices Sotomayor (joined by Justices Breyer and Kagan) dissented.

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]

[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 Rodriquez, and finally Rob Bonta.
[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).

What Key Legal Issues Did the Court Address in This Case?

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. Valeo*[8] 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 several issues unclear. The key issues facing the Court in *AFPF 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 based on 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 has some rational basis for its enactment.

The first question at issue in *AFPF 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

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[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).

[8] 424 U.S. 1 (1976).

[9] 558 U.S. 310 (2010).

the issue did not need to be decided. So, for those counting, that's six justices supporting exacting scrutiny in this disclosure context.

What Is "Exacting Scrutiny and Why Is This Ruling So Important?"

Here's where things get 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.

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.

Does The Ruling Mean States Can Never Ask for Donor Information?

No. States may develop "narrowly tailored" policies and statutes mandating disclosure in some instances.

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.

What Impact Does* AFPF *Have on Campaign Finance Disclosure Laws?

Before 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.[10]

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 the government to enforce political campaign contribution limits; (2) preventing corruption by exposing possible *quid pro quo* exchanges of public acts for campaign

[10] *Id*. at 2392 (Sotomayor, J., *dissenting*).

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."[11]

Political campaign disclosure laws have historically been evaluated under the "exacting scrutiny" standard. To the extent that the decision in *AFPF* 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 include "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").[12] So long as they avoid engaging in "express advocacy," 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 *AFPF*, many current and 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.

What Campaign Finance Laws Might Be Unconstitutional After AFPF*?*

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 *AFPF*. Here are examples of some of the proposals we have seen regularly in recent years that now rest on shakier constitutional ground than before:

- 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" be made only from a separate fund established for that purpose, with donors to the fund disclosed;
- 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

[11] *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.

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

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; and
- Efforts to require the disclosure of donors to groups engaged in "grassroots lobbying" on issues and pending legislation.

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.

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.

Appendix

A Few Words About "Dark Money"

It's not clear what "dark money" means. It is a pejorative term often used to support new regulations exposing members and donors to nonprofit groups. Some advocates of expanded regulation use it to describe communications urging the election or defeat of candidates by nonprofit groups – typically 501(c)(4) social welfare organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations. Such organizations do not publicly reveal the names and addresses of their donors. But others use the term to describe supporters of any organization advocating for change in government policies.

"Dark Money" Election Campaign Spending Is Limited by Tax Rules That Distinguish Multi-Purpose Nonprofits From Political Organizations

Because 501(c) organizations are prohibited by law from advocating for the election or defeat of candidates as their primary purpose, they must stay within IRS guidelines to maintain their exempt status. In effect, then, a donor whose main objective is supporting electing candidates to office faces, effectively, an equivalent of a 50 percent or higher tax on donations (meaning over half has to be used for other things) given to a 501(c) organization rather than to a PAC or other primarily political organization that discloses its donors. As a result, it is doubtful that spending by 501(c) organizations will increase substantially as a percentage of total spending.

Despite record campaign spending, 2020 federal elections saw less "dark money" than any election since the Supreme Court's *Citizens United* decision. After peaking in 2012 with an all-time high of $312.5 million (still under 5% of that year's total spending on federal campaigns), "dark money" has dwindled, bottoming out in the 2020 cycle at roughly $102 million. That equals merely 0.73% of the election's estimated $14 billion price tag. It equates to less than 4% of independent expenditure spending in the 2020 cycle.

Expanding Disclosure Could Create "Junk Disclosure" That Misleads the Public

When individuals donate to a political committee or political party, they know the funds will be used to support or oppose candidates. The same is not at all true of donors to 501(c)(4) membership organizations, 501(c)(5) labor unions, and 501(c)(6) trade associations. People give to these groups not because they agree with every position a group takes, but because on balance they think the group provides a voice for their views or otherwise advances their shared interests.

To publicly identify contributing individuals with political expenditures of which they had no advance knowledge and may even oppose is both unfair to members and donors and misleading to the public. It is *"junk disclosure"* – disclosure that serves little purpose other than to provide a basis for official or private harassment. In many situations, it will misinform the public.

There are also serious practical problems. As Bradley Smith explained in a law review article:

> Disclosure of general financial donors to groups sounds easier in theory than it is in practice. Consider this scenario: Acme Industries makes a $100,000 dues payment to the National

Business Chamber ("NBC") in December of an election year, say 2014, and then again in 2015. NBC, in order to encourage political activity by local and state chambers of commerce, agrees to match what the State Chamber of Commerce raises for election activity in the 2016 elections. State Chamber raises $350,000 specifically for political activity over several months, and the National Chamber matches it by sending a check to State Chamber in March 2016. In June of 2016, State Chamber transfers $1 million – the $350,000 it raised specifically for political activity, the $350,000 from the NBC, and another $300,000 from general dues - to the Committee for a Better State ("CBS"), a 501(c)(4) organization that the State Chamber uses for its political activity. CBS reserves $200,000 for its own direct spending, and then transfers $800,000 to the State Jobs Alliance, a coalition formed to promote pro-business issues and candidates, which raises and spends $3 million in the state, about two-thirds for advertising on a ballot initiative. When NBC, the State Chamber, CBS, and the State Jobs Alliance file their spending reports, what donors are to be disclosed, and for how much?

What should be immediately obvious to any observer is that the question of "disclosure" is not so easy. Is Acme Industries responsible for spending by NBC, CBS, or the State Chamber? Is there some point at which Acme becomes cut off from political spending made by entities to which it neither directly gave money nor directed money, over which it has no control, and which is made eighteen months or more after Acme's initial payment to NBC?... By the time we reach Acme Industries, is the information useful–or even truthful? Would it be truthful to say that Acme Industries is "responsible" or "endorses" messages on a state ballot initiative made by the State Jobs Alliance far down the road?[13]

Practical Issues with Disclosure

Disclosure's practical problems have arisen largely out of disclosure's significant compliance costs and disproportionate effects on grassroots groups and the potential for donor harassment stemming from the public release of disclosure information.

The Costs of Disclosure Are Significant and Disproportionately Harm Volunteer-Run and Low-Budget Organizations

While the benefits of disclosure are speculative, the costs are concrete. Complying with disclosure laws often requires expensive legal counsel, an accountant, and other record-keeping staff. It may be reasonable to impose these costs on large organizations and professionalized campaigns, but smaller groups can be deterred from political participation altogether by complex, overbroad regulations. Studies have confirmed that the costs of mandated disclosure disproportionately harm grassroots organizations and campaigns run by volunteers.[14]

Reporting requirements are typically too complex for ordinary citizens to understand without the help of a lawyer. A study of the costs of various state disclosure regulations concluded that "regulation of grassroots political activity puts ordinary citizens at risk of legal entrapment, leaves

[13] Bradley A. Smith, "Disclosure in a Post-*Citizens United* Real World," 6 St. Thomas J. L. & Pol'y 257(2012).
[14] Jeffrey Milyo, Ph.D., "Mowing Down the Grassroots: How Grassroots Lobbying Disclosure Suppresses Political Participation," Institute for Justice.

disfavored groups open to abuse from partisan regulators and robs unpopular speakers of the protective benefits of anonymous speech."[15]

Disclosure can result in harassment

Most citizens recognize that having their private information and political allegiances publicly disclosed could lead to negative consequences. At least one study shows that citizens are less likely to contribute to issue campaigns if their address and employer are publicly disclosed,[16] reaffirming that mandated disclosure has a "chilling effect" on speech and association. Worse still, little can be done once individual contributor information – typically a donor's full name, street address, occupation, and employer – is made public. It can immediately be used by anyone to harass, threaten, or financially harm a speaker or contributor to an unpopular cause.

Indeed, in Justice Thomas' opinion in *Citizens United*, he dissented in part, noting harassment faced by Proposition 8 supporters in California stemming from the release of their personal information because of the state's disclosure requirements.[17] Policymakers must take the threat of harassment seriously for both practical and constitutional reasons. The Supreme Court has recognized that harassment of donors is a real and significant threat that may justify striking down disclosure laws. Policymakers should learn the legal context surrounding disclosure to ensure that any proposed legislation is constitutional and will not create an unnecessary risk of harassment.

Three Principles for Reform

Policymakers should seek to follow these three principles when contemplating legislation relevant to campaign finance disclosure:

Respect for the First Amendment, Citizen Rights, and Privacy

Disclosure laws harm First Amendment rights, so any legislation must be carefully crafted to avoid unconstitutional burdens.

Any time a restriction on political participation or speech is proposed, the first question should be 'why?' Disclosure for disclosure's sake is not a reason to upset the traditional expectations of privacy in political participation.

Having a clear, well-defined purpose for disclosure provisions will improve the law's efficiency, cut down on "junk" disclosure, and increase the likelihood that the law will survive constitutional challenges.

[15] *Ibid*., p. 24.
[16] Dick M. Carpenter II, "Mandatory Disclosure for Ballot-Initiative Campaigns," The Independent Review, Vol. 13:4. (Spring 2009).
[17] *Citizens United*, 130 S. Ct. 876, 980-981 (Thomas, J., concurring in part and dissenting in part).

Moderation

All too often proposed disclosure legislation takes on a fool's errand of trying to track all political spending, or close all loopholes. This sort of overreach harms the goals of disclosure through the creation of "junk disclosure" and leaves laws vulnerable to being challenged and struck down in court. It also risks creating a bureaucracy that stifles grassroots political activity.

It's important to recognize that Americans have other values besides simply reducing the alleged influence of political spending. Free speech, democratic participation, donor privacy, efficiency in government, fairness in government, and other important values are implicated in disclosure laws. In attempting to increase the amount of disclosed spending in politics, one must always be conscious of these values. Just as the state that eliminates all crime would of necessity be a police state, one hundred percent disclosure of all donors who might in some way influence an election is impossible, and almost certainly not worth the cost of trying.

Simplification

Campaign finance laws are already extraordinarily complex. This may be an acceptable price when dealing with large campaigns, national unions and trade organizations, and others that can afford high-dollar lawyers, consultants, and accountants, but ordinary citizens should not have to consult a lawyer before engaging in grassroots political activity.

Future policies should make it clear which activities require reporting and which do not. Further, reporting should be easy and impose few costs on small groups. Substantial exemptions from reporting should also be permitted.