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Americans for Prosperity Foundation v. Bonta: Protecting Free Speech and its Implications for Campaign Finance Disclosures

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AMERICANS FOR PROSPERITY FOUNDATION V. BONTA: PROTECTING FREE SPEECH AND ITS IMPLICATIONS FOR CAMPAIGN FINANCE DISCLOSURES

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In 2021, the United States Supreme Court in Americans for Prosperity Foundation v. Bonta *considered the anonymous speech rights of charitable donors against the California Attorney General's interest in preventing wrongdoing by charitable organizations. The Court applied exacting scrutiny, a standard traditionally applied to campaign finance disclosure laws, determining that California's requirement was facially invalid as a violation of associational rights.* Bonta *did not concern campaign finance, making this application of exacting scrutiny novel. This Article considers the open questions raised by* Bonta *regarding how exacting scrutiny should be applied and what it means for the future of campaign finance disclosure regimes.*

INTRODUCTION

Protection of anonymous speech is entrenched in American political thought. The *Federalist Papers* are the preeminent example. While today we know their authors as Alexander Hamilton, James Madison, and John Jay, the readers of the original essays knew them only by one pseudonym: Publius.[1] These essays would become central to American political thought, interpretation of the Constitution, and the protection of anonymous speech.[2] The United States Supreme Court has recognized anonymous speech as a "shield from the tyranny of the majority"[3] and upheld broad protections of this right. For example, the Court has protected the anonymity rights of those publishing pamphlets,[4] donating to charities,[5] and joining the NAACP.[6] But the Court has been less willing to extend broad anonymous speech protections to donors to political campaigns.

In 2021, in *Americans for Prosperity Foundation v. Bonta*,[7] the Court struck down a state regulation requiring charitable organizations to disclose their top donors.[8] In a six-to-three vote, the Court weighed the anonymous speech rights of charitable donors against the California Attorney General's interest in preventing "wrongdoing by charitable organizations."[9] Applying exacting scrutiny, the Court determined that the requirement was facially invalid because it violated associational rights.[10] This application of exacting scrutiny—a standard of review somewhere between

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[1] THE FEDERALIST NO. 1 (Alexander Hamilton).

[2] *See, e.g.*, Benjamin Barr & Stephen R. Klein, *Publius Was Not a PAC: Reconciling Anonymous Political Speech, The First Amendment, and Campaign Finance Disclosure*, 14 WYO. L. REV. 253, 275 (2014).

[3] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[4] *See generally id.*

[5] *See generally* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

[6] *See generally* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958).

[7] 141 S. Ct. at 2373.

[8] *Id.* at 2389.

[9] *Id.* at 2385–86.

[10] *Id.* at 2389. The First Amendment protects compelled speech. When a political campaign is required to make campaign finance disclosures, this is a form of compelled speech and will trigger constitutional protections. *See, e.g.*, VALERIE C. BRANNON ET AL., CONG. RSCH. SERV., IF12388, FIRST AMENDMENT LIMITATIONS ON DISCLOSURE REQUIREMENTS (2023).

intermediate and strict scrutiny[11]—is novel. The standard has traditionally been applied to compelled disclosure regimes for political campaigns, but *Bonta* did not concern campaign finance law.

The Court acknowledged that this was a departure from the initial application of exacting scrutiny.[12] However, the Court noted that the standard is "not unique to electoral disclosure regimes"[13] and that "regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny."[14] Applying exacting scrutiny, the Court held that disclosure regimes must be "narrowly tailored to the government's asserted interest."[15] The Court then explained that plaintiffs need not demonstrate that "donors to a substantial number of organizations will be subjected to harassment and reprisals" to trigger the requirement for narrow tailoring.[16] This is a sharp contrast to the how the Court responded to similar arguments in *Citizens United v. FEC.*[17] There, when Citizens United failed to offer "evidence that its members may face . . . threats or reprisals,"[18] the Court found no showing that "[disclosure] requirements would impose a chill on speech or expression."[19] *Bonta* leaves unclear what evidence of threats, if any, is required to challenge a disclosure regime in the campaign context.[20]

As a result, lower courts have been muddled on whether this application of exacting scrutiny in *Bonta* represents a paradigm shift for future challenges to campaign finance disclosure laws, or if *Bonta* may be appropriately distinguished so as to not affect the current legal doctrine on campaign finance.[21] The resolution will depend on the weight the Court places on the government's interest in comprehensive campaign disclosures, electoral integrity measures, and in fostering an informed electorate.

This Article will argue that the narrow tailoring requirements the Court introduced in *Bonta* should not alter the long-understood constitutionality of campaign finance disclosure regimes. First, this Article provides background regarding disclosures, anonymous speech, and the exacting scrutiny standard. Next, this Article argues

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[11] *See infra* Part I.C.; *see also* BRANNON ET AL., *supra* note 10 ("[Exacting scrutiny] is less rigorous than strict scrutiny but still relatively stringent.").
[12] *See Bonta*, 141 S. Ct. at 2383.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 2389.
[17] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370 (2010).
[18] *Id.*
[19] *Id.* at 371.
[20] *See infra* Part I.C.
[21] *See infra* Part II.C.

that the governmental interest in campaign finance disclosures is stronger than the government's articulated interest in *Bonta*, and that this interest is reinforced by growing distrust in the electoral system. This Article then examines the varying applications of *Bonta* in lower courts and the resulting confusion in using the standard. Finally, this Article concludes that the application of exacting scrutiny in *Bonta* should not impact the campaign finance disclosure system nor its jurisprudential doctrine. This system, more so than the California statute at issue in *Bonta*, is supported by strong governmental interests in promoting public trust in elections and fostering a well-informed electorate.

I. BALANCING DISCLOSURES AND ANONYMOUS SPEECH

First, Part I.A reviews a brief history of campaign finance disclosure requirements. Next, Part I.B discusses balancing the protection of anonymous speech and the governmental interest in disclosures. Finally, Part I.C provides an overview of the development of the exacting scrutiny standard and its application to campaign finance disclosure regimes. In *Bonta*, the Court applied exacting scrutiny in a new factual context and with a new evidentiary standard—requiring a narrow tailoring provision which had not previously been applied in the campaign finance context. Understanding these well-established standards provides crucial context for understanding the potential impact of *Bonta* on campaign finance disclosures regimes. Moreover, they highlight the lingering questions that follow *Bonta*.

A. Campaign Finance

1. Historical Overview

In 1910, Congress enacted the first widely applicable campaign disclosure law: the Federal Corrupt Practices Act.[22] The Act mandated that political committees in congressional races maintain detailed records of their campaign expenditures.[23] The Act further required campaign treasurers to file an "itemized, detailed statement" on the public record within thirty days of an election for congressional representatives "in two or more States."[24] These

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[22] Federal Corrupt Practices Act, 2 U.S.C. §§ 241–245 (repealed 1972) (available at https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/36/STATUTE-36-Pg822c.pdf) [https://perma.cc/E6DW-DXN4].

[23] Specifically, the Act required "political committee[s]" to keep a "detailed and exact account of all money," including all "expenditures . . . made by the committee or any member thereof, or by any person acting under its authority or in its behalf." *Id.*

[24] *Id.*

records were required to include the names and addresses of donors giving $100 or more to the campaign; the total sum of contributions of less than $100 that the campaign received; and records of the campaign's expenditures.[25]

The legislative history of the Act underlined that an "election is a public affair" and that "[a]ll means used to further the election of a candidate or party should be out in the open, under public scrutiny, where all people can see."[26] Representative George Edmund Foss of Illinois spoke in favor of the bill, commenting that there was a "growing feeling on the part of people that money is used in an underhanded way" and that the "publicity of campaign contributions will permit the people to judge . . . as to whether or not [a public official] is moved in any way by ulterior influence."[27] Representative Foss argued that disclosures were essential so that "corruption may be exposed before the eyes of the American people."[28]

The Supreme Court first considered the constitutionality of these disclosure laws in *Burroughs v. United States*.[29] The Court examined the grand jury indictment of a designated political committee's treasurer who was accused of violating the Federal Corrupt Practices Act.[30] The treasurer was charged with participating in a conspiracy to willfully fail to file the statements of contributions to the political committee.[31] Responding to a challenge to the Act's constitutionality, the Court determined that "[t]o say that Congress is without the power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny the nation . . . the power of self-protection."[32] The Court upheld the indictments, finding it within Congress's purview to appropriately protect the election from corruption.[33] The Court's discussion of the constitutionality of the disclosure laws relied upon statements by Representative Foss and others, determining that "Congress [had] reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections."[34]

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[25] *Id.*
[26] 45 CONG. REC. app. at 328 (1910) (statement of Hon. George Edmund Foss).
[27] *Id.*
[28] *Id.*
[29] 290 U.S. 534 (1934).
[30] *Id.* at 540–42.
[31] *Id*. at 543.
[32] *Id.* at 545.
[33] *Id.* at 546.
[34] *Id.* at 548.

2. Current Disclosure Requirements

The Court has traditionally upheld disclosure laws as constitutional.[35] All fifty states mandate some form of disclosure.[36] New York, for instance, requires the disclosure of the "full name and residential address . . . occupation, and business address" of each contributor making an aggregate donation of $100 or more to the campaign committee.[37] Similarly, Alabama requires the disclosure of the "identification of each person who has made contributions to [a] committee or candidate . . . greater than [$100]."[38]

Federal law requires disclosures by "[e]very person . . . who makes independent expenditures . . . in excess of $250 during a calendar year."[39] In addition, donors must disclose the "direct costs of producing and airing electioneering communications in . . . excess of $10,000 during any calendar year"[40] and file a statement with the Federal Election Commission "within 24 hours of each disclosure date."[41] Under current federal requirements, Political Action Committees ("PACs") must file periodic reports with the "total amount of all contributions they receive, and the identity, address, occupation, and employer of any person that contributes more than $200 during a calendar year."[42] Disclosure requirements extend to other labor unions, corporations, and 501(c)(4) organizations who must disclose some donor information when these groups spend more than $250 on independent expenditures that refer to candidates.[43]

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[35] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 367 (2010).

[36] Lear Jiang, *Disclosure's Last Stand? The Need to Clarify the "Informational Interest" Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 492–93 (2019).

[37] N.Y. COMP. CODES R. & REGS. tit. 9, § 6221.13 (2023).

[38] ALA. CODE § 17-5-8 (2023).

[39] 52 U.S.C. § 30104. Independent expenditures are defined as expenditures "expressly advocating the election or defeat of a clearly identified candidate" which are "not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents." SpeechNow v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010) (quoting 52 U.S.C. § 30101).

[40] 52 U.S.C. § 30104. Electioneering communications are defined as "any broadcast, cable, or satellite communication which promotes or supports a candidate . . . or attacks or opposes a candidate" for any particular office "regardless of whether the communication includes express language advocating for or against voting for a candidate." *Id.*

[41] *Id.*

[42] L. PAIGE WHITAKER, CONG. RSCH. SERV., IF11398, CAMPAIGN FINANCE LAW: DISCLOSURE AND DISCLAIMER REQUIREMENTS FOR POLITICAL CAMPAIGN ADVERTISING (2019).

[43] *Id.*

B. Anonymous Speech

These disclosure laws are measured up against the American tradition of anonymous speech. Both the Supreme Court and commentators have defended anonymous speech as "an honorable tradition of advocacy and of dissent,"[44] drawing on its use by the Founders, early political dissidents, and the likes of Mark Twain, among others, writing under pseudonyms.[45] Many proponents of anonymous speech rights point to the use of pseudonyms by the authors of the *Federalist Papers* and other contemporaneous political thinkers at the Founding.[46] So closely guarded were the identities of the *Federalist Papers'* authors that they were not revealed publicly until 1792.[47] Even today, debate continues as to which author penned each essay.[48] The fear that drove the Founders and their contemporaries to utilize pseudonyms was not unfounded. Many advocates at that time faced harsh criticism for their speech—some were imprisoned, for example, for allegedly authoring pamphlets critical of the Massachusetts legislature or for inscribing "[m]ay moral virtue be the basis of civil government" on a liberty pole.[49]

Yet, federal courts have generally been less protective of anonymous speech rights in the context of campaign finance disclosure regulations. For instance, in 2021, the United States Court of Appeals for the First Circuit noted that, while "regulations that burden political speech must typically withstand strict scrutiny," for "many aspects of election law," the "disclosure and disclaimer regimes are cut from different cloth."[50] Justice Scalia, a frequent defender of privacy rights,[51] made similar observations, arguing that "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is

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[44] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995).

[45] *See, e.g.*, Barr & Klein, *supra* note 2, at 275–76 (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341 n.4 (1995)).

[46] *Id.* at 256 (pseudonyms include "[a]n American Citizen" in Pennsylvania, "Cato" in New York, and "A Freeman" in Rhode Island).

[47] *Id.* at 257.

[48] *Id.* at 256–57.

[49] *Id.* at 259.

[50] Gaspee Project v. Mederos, 13 F.4th 79, 84–85 (1st Cir. 2021).

[51] Justice Scalia, particularly in the context of the Fourth Amendment, frequently wrote about the right to privacy. In 2013, for example, Justice Scalia dissented:

> We are told that the "privacy-related concerns" in the search of a home "are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." But why are the "privacy-related concerns" not also "weighty" when an intrusion into the *body* is at stake?

Maryland v. King, 569 U.S. 435, 469 (2013) (Scalia, J., dissenting) (citations omitted).

doomed."[52] Other justices seem to agree—for example, the *Citizens United* Court affirmed that while "disclaimer and disclosure requirements may burden the ability to speak," they are nevertheless permissible.[53]

C. Exacting Scrutiny

To resolve this seeming conflict between individual citizens' right to anonymous speech and the government's interest in campaigns disclosing their finances, the Supreme Court has invoked an exacting scrutiny standard. Courts have developed and applied this standard almost exclusively in the context of reviewing campaign disclosure regimes. Thus, the Court's application of exacting scrutiny in *Bonta* is unique and should not displace the balance the Court has already struck between anonymous speech rights and campaign finance regimes.

1. The Development of the Exacting Scrutiny Standard

The standard that would become exacting scrutiny was first articulated in *NAACP v. Alabama*.[54] In *NAACP*, the National Association for the Advancement of Colored People ("NAACP") alleged that an Alabama disclosure statute compelling the NAACP to "reveal to the State's Attorney General the names and addresses of all its Alabama members and agents" violated their associational rights.[55] The Court held that statutes and state actions that "curtail[] the freedom to associate" are subject to the "closest scrutiny."[56] In choosing to apply this close level of scrutiny, the Court examined evidence from "past occasions" concerning the "revelation" of NAACP members' identities that had led to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[57] The Court concluded that this

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[52] Doe v. Reed, 561 U.S. 186, 228 (2010) (Scalia, J., concurring).

[53] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010) (Stevens, J., concurring in part and dissenting in part). Justice Stevens noted:

> Outside of the law, of course, it is a commonplace that the identity and incentives of the speaker might be relevant to an assessment of his speech . . . . The insight that the identity of speakers is a proper subject of regulatory concern, it bears noting, motivates the disclaimer and disclosure provisions that the Court today upholds.

Id. at 421 n.47 (Stevens, J., concurring in part and dissenting in part) (citations omitted).

[54] 357 U.S. 449, 461 (1958).

[55] *Id.* at 451.

[56] *See id.* at 460–61.

[57] *Id.* at 461–63.

evidence was sufficient to establish that the disclosure law could not constitutionally be applied to these particular plaintiffs.[58]

In *Buckley v. Valeo*,[59] this "closest scrutiny" standard was identified as "exacting scrutiny."[60] In *Buckley*, the Court addressed a challenge to the constitutionality of the Federal Election Campaign Act.[61] There, a "mere showing of some legitimate governmental interest" was not, by itself, sufficient to overcome the "significant encroachment[] on First Amendment rights" that "compelled disclosure" could impose.[62] Nevertheless, the Court acknowledged that a disclosure regime may survive "exacting scrutiny," even when compelled disclosure could "conceivably chill association or speech,"[63] if the government demonstrates a "relevant correlation or substantial relation between the governmental interest [] and the information required to be disclosed."[64] In *Buckley*, the government's articulated interest in "informing the electorate, preventing corruption, and enforcing other regulations"[65] outweighed any "significant encroachment on First Amendment rights" and thus survived exacting scrutiny.[66]

Following *Buckley*, exacting scrutiny is appropriately applied to "disclaimer and disclosure requirements" that "may burden the ability to speak," even if these requirements "impose no ceiling on campaign-related activities."[67] Applying this standard in *Citizens United v. FEC*,[68] the Court upheld the Bipartisan Campaign Reform Act of 2002's ("BCRA") campaign finance disclosure requirements. The Court upheld this disclosure regime even while overturning another key provision of the BCRA: its ban on corporations and unions using general treasury funds for independent expenditures that constitute "electioneering communications," or express advocacy for the "election or defeat of a candidate" within thirty days of a primary election.[69] In upholding the disclosure regime, the Court underscored the importance of the

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[58] *Id.*
[59] 424 U.S. 1 (1976) (per curiam).
[60] *Buckley*, 424 U.S. at 64.
[61] *Id.* at 64–65.
[62] *Id.* at 64.
[63] *See, e.g.*, Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of* Citizens United, 120 YALE L.J. 622, 648 (2010) (quoting Malcolm A. Heinecke, Note, *A Political Reformer's Guide to* McIntyre *and Source Disclosure Laws for Political Advertising,* 8 STAN. L. & POL'Y REV. 133, 136 (1997)).
[64] *Id.* (citing Buckley v. Valeo, 424 U.S. 1, 64 (1976)) (internal quotations removed).
[65] *See* Winik, *supra* note 63.
[66] *Buckley*, 424 U.S. at 64.
[67] *Id.*
[68] 558 U.S. 310, 365 (2010).
[69] *Id.* at 321, 365–67.

informational interests at stake for voters and how, by "permit[ting] citizens and shareholders to react to the speech of corporate entities in a proper way," disclosures served this interest.[70] Visibility into campaign finance provided "transparency" thereby "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages."[71]

Some members of the Court have suggested that this informational interest is not limited to individual candidate's campaigns and may also apply to ballot referendums.[72] The *Doe v. Reed*[73] Court upheld a law requiring the public disclosure of signatories to a petition to request a popular referendum on a state law that expanded the rights and responsibilities of state-registered domestic partners (including same-sex partners).[74] Petitioners argued that the public disclosure of the signatories' identities was an impermissible violation of their First Amendment rights.[75] The Court applied exacting scrutiny, determining that the state's interest in "preserving the integrity of the electoral process" justified the public disclosure.[76] The majority distinguished this electoral integrity interest from the informational interest presented by the state, finding that electoral integrity alone was sufficient to uphold the regulation.[77] The Court did not reach the issue of whether an informational interest could have sufficed.[78] However, two concurring justices emphasized that in certain election law contexts, an informational interest can justify a regulatory scheme, seemingly nodding to the appropriateness of applying this rationale to the ballot referendum process.[79]

Regulations, and the information they provide, are directly related to the government's interest in electoral integrity. Disclosures allow the state to combat election fraud, ensure transparency in referendums, and foster trust in the electoral system.[80] Indeed, the *Reed* Court upheld these provisions despite

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[70] *Id.* at 371.
[71] *Id.*
[72] Doe v. Reed, 561 U.S. 186, 217 n.2 (2010) (Stevens, J., concurring in part and dissenting in part).
[73] 561 U.S. 186 (2010).
[74] *Id.* at 192.
[75] *See id.* at 193–94.
[76] *See id.* at 197.
[77] *Id.*
[78] *Id.*
[79] *See id.* at 217 n.2 (Stevens, J., concurring in part and dissenting in part) (noting that an "informational rationale (among others) may provide a basis for regulation").
[80] *See id.* at 197–98 ("The State's interest in preserving the integrity of the electoral process is undoubtedly important" and includes an interest in "combating fraud," ensuring accuracy, and "generally [] promoting transparency and accountability in the electoral process.").

the existence of other available enforcement mechanisms through the secretary of state, private action, or criminal penalties that could have similarly served the government's interest.[81] The Court's decision reflected its belief that public disclosure "promotes transparency and accountability in the electoral process to an extent other measures cannot."[82]

Further, the *Reed* Court reiterated that since "typical referendum petitions" concerned important voter issues of "tax policy, revenue, budget, or other state law issues," the burden presented by this disclosure requirement would be no more severe than the "modest burden[]" typically imposed on any petition disclosure.[83] This "modest burden[]" foreclosed a determination that disclosures concerning "referendum petitions in general" violated the First Amendment.[84]

The Court has applied "exacting scrutiny" when campaign disclosures are in tension with "core political speech" and accompanying anonymity rights.[85] Unlike strict scrutiny, exacting scrutiny does not require the government to utilize the least restrictive means of accomplishing an interest. Instead, exacting scrutiny demands "a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[86] Several circuit courts have understood exacting scrutiny to be a balancing test, where the government's informational and electoral integrity interests are weighed against the burden imposed on an individuals' First Amendment rights.[87] Circuit courts have applied a variety of factors in this analysis, including the potential financial gain of those whose contributions may be concealed,[88] the benefit to voters,[89] and how much money a regulated entity may expect to raise.[90]

2. Exacting Scrutiny as Applied in *Bonta*

In 2021, exacting scrutiny was applied in a new context—charitable donations. The *Bonta* plaintiffs successfully challenged

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[81] *See id.* at 199.
[82] *Id.*
[83] *See id.* at 200–01.
[84] *Id.* at 201–02.
[85] Sarah Harding, *Balancing Disclosure and Privacy Interests in Campaign Finance*, 48 LOY. L.A. L. REV. 651, 662 (2015).
[86] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2383 (2021) (citing Doe v. Reed, 561 U.S. 186, 196 (2010)).
[87] *See* Rio Grande Found. v. City of Santa Fe, 7 F.4th 956, 961 n.2 (10th Cir. 2021).
[88] *See* Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1279 (10th Cir. 2016).
[89] *See id.* at 1280.
[90] *See* Worley v. Fla. Sec'y of State, 717 F.3d 1238, 1249 (11th Cir. 2013).

California's requirement that charities reveal their donors' identities through Schedule B forms collected by the state attorney general's office.[91] The Court determined that exacting—not strict—scrutiny was appropriate in evaluating compelled disclosure requirements regardless of the type of association.[92] In applying exacting scrutiny, the Court noted that even when a challenged requirement is not the least restrictive means available, it still must be narrowly tailored to the interest it promotes.[93] This narrow tailoring requirement applied even when plaintiffs had not demonstrated that "donors to a substantial number of organizations will be subjected to harassment and reprisals."[94] With this holding, the Court flipped the traditional evidentiary burden on its head. Future plaintiffs need not demonstrate an actual threat of harassment unless the "challenged regime is narrowly tailored to an important government interest,"[95] thereby requiring narrow tailoring whenever exacting scrutiny is applied.

In holding that narrow tailoring was required when applying the exacting scrutiny standard, the Court relied on *McCutcheon v. FEC*.[96] *McCutcheon* did not concern disclosure regimes and did not apply exacting scrutiny.[97] Rather, the challenged contribution limits at issue were examined under the distinct "closely drawn" scrutiny standard.[98] In holding that aggregate contribution limits did not survive closely drawn scrutiny, *McCutcheon* noted that the regulations must be "narrowly tailored to achieve the desired objective" even if those regulations are not the "least restrictive means."[99] The *Bonta* Court found this argument "instructive," holding that exacting scrutiny required narrow tailoring as well.[100]

The *Bonta* Court distinguished this finding from its previous holding in *Reed* that the modest burdens imposed by the disclosure of a typical petition did not require narrow tailoring.[101] Instead, *Bonta* relied on *Reed's* conclusion that "various narrower alternatives proposed by the [*Reed*] plaintiffs were inadequate."[102] Notably, the *Reed* Court held that this inadequacy arose in part out of public disclosures' unique ability to promote "transparency and

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[91] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2380–81 (2021).
[92] *Id.* at 2383.
[93] *Id.* at 2384.
[94] *Id.* at 2389.
[95] *Id.*
[96] *Id.* at 2384; McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014).
[97] *See McCutcheon*, 572 U.S. at 199–200.
[98] *See id.*
[99] *See id.* at 218.
[100] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2384 (2021).
[101] *See id.* at 2385.
[102] *Id.*

accountability in the electoral process to an extent other measures cannot."[103]

Applying this narrow tailoring, the *Bonta* Court recognized that "California has an important interest in preventing wrongdoing by charitable organizations."[104] Yet it still invalidated the statute on its face as overbroad because a "substantial number of its applications" would be "unconstitutional, judged in relation to the statute's plainly legitimate sweep."[105] Per the Court, the challenged disclosure's application to 60,000 registered California charities represented a "dramatic mismatch" between "the interest that the Attorney General [sought] to promote and the disclosure regime . . . implemented in service of that end."[106] When the district court could not find a "single, concrete instance in which pre-investigation collection of a Schedule B" advanced the regulatory efforts of the state attorney general, this indicated that the statute was not "integral" to "California's fraud detection efforts."[107]

The Court therefore asserted that plaintiffs were not required to demonstrate that donors would "be subjected to harassment and reprisals" from releasing their identities.[108] Instead, wherever exacting scrutiny is applied, "the challenged requirement must be narrowly tailored to the interest it promotes."[109] The California law imposed a "widespread burden on donors' associational rights" and therefore required "narrow[] tailor[ing] to . . . charitable wrongdoing."[110] Exacting scrutiny is properly triggered by any "state action which *may* have the effect of curtailing the freedom to associate" through the "*possible* deterrent effect of disclosure."[111] The creation of a "dragnet for sensitive donor information" when that information "will become relevant in only a small number of cases" demonstrated this lack of tailoring.[112] The Court noted that the plaintiff's duty to show the burden a disclosure regime places upon their associational freedoms only arises when "the challenged regime is narrowly tailored to an important government interest" and is not required when "the disclosure law fails to satisfy these criteria."[113]

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[103] *See* Doe v. Reed, 561 U.S. 186, 199 (2010).
[104] Ams. for Prosperity Found., 141 S. Ct. at 2385–86.
[105] *Id.* at 2387 (quoting United States v. Stevens, 559 U.S. 460, 473 (2010)).
[106] *Id.* at 2386.
[107] *Id.*
[108] *Id.* at 2389.
[109] *Id.* at 2384.
[110] *See id.* at 2389.
[111] *Id.* at 2388 (quoting NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449, 460–61 (1958)) (internal quotations omitted).
[112] *Id.* at 2387.
[113] *See id.* at 2389.

The concurrences in *Bonta* called into question the holding's broad applicability. Justice Thomas reiterated his long-standing view that the Court's precedents "require application of strict scrutiny to laws that compel disclosure of protected First Amendment association"[114]—but the majority of the Court did not share Justice Thomas's opinion.[115] Justice Thomas further asserted that invalidating any law as overbroad or declaring a statute "unconstitutional in *all* applications" is likely outside the Court's power.[116]

In his concurrence, Justice Alito stated that he was "not prepared . . . to hold that a single standard applies to all disclosure requirements . . . [a]nd [did] not read [previous] cases to have broadly resolved the question in favor of exacting scrutiny."[117] While *Bonta* did not concern elections or the regulation of campaign finance disclosures, it acknowledged that exacting scrutiny may be appropriately applied to *all* compelled disclosure requirements regardless of whether those associations "pertain[ed] to political, economic, religious or cultural matters."[118] Despite Justice Alito's reservations, it is not hard to imagine that the question of whether and how the *Bonta* standard applies to campaign disclosures will soon reach the Court.

The *Bonta* dissent argued that the case creates a "significant risk" of "toppl[ing] disclosure regimes that should be constitutional."[119] In holding that "reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no [First Amendment] burden at all,"[120] the majority had "trad[ed] precision for blunt force" and limited the "flexibility" of the exacting scrutiny analysis.[121] Further, because plaintiffs challenging disclosure regimes are not required to establish a cognizable burden on their associational rights and the means-end tailoring implemented is not "commensurate to [those] actual

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[114] *Id.* at 2390 (Thomas, J., concurring); *see, e.g.*, Doe v. Reed, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) ("Thus, unlike the Court, I read our precedents to require application of strict scrutiny to laws that compel disclosure of protected First Amendment association.").

[115] *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366–67 (2010) (noting that "[d]isclaimer and disclosure requirements may burden the ability to speak, but they . . . 'do not prevent anyone from speaking' . . . . [T]he Court has subjected these requirements to exacting scrutiny." (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 201 (2003))).

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

[117] *Id.* at 2391 (Alito, J., concurring).

[118] *Id.* at 2383.

[119] *Id.* at 2399 (Sotomayor, J., dissenting).

[120] *Id.* at 2392.

[121] *Id.* at 2399.

burdens,"[122] the dissent predicted that future plaintiffs will face a much lower bar in challenging disclosure regimes. If "every disclosure requirement demands narrow tailoring," it is possible that that any facial challenge to a disclosure requirement could "succeed in the absence of any evidence" of a burden to associational rights.[123]

The dissent went on to question why invalidating the regulation as applied to the plaintiff, rather than on its face, was not sufficient. Justice Sotomayor remarked, "if the Court had simply granted as-applied relief to petitioners based on its reading of the facts, I would be sympathetic, although my own views diverge."[124] Instead, the dissent argued, the majority "jettisons completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government action to close scrutiny."[125]

Lower courts have been left to determine the reach and application of *Bonta* and thus reopen the balance between broad disclosure interests in the campaign finance setting and the general protection of anonymous speech. As the Tenth Circuit observed in 2021, the "[l]aws that require disclosure of campaign finance information, including the identities of political donors, pit the public's interest in transparent political messaging against potential burdens on the exercise of core First Amendment rights."[126] It is too early to know where courts will ultimately draw the line, but it is likely that in the absence of evidence of threats the answer will turn on government interests at stake.

II. THE VALUE OF DISCLOSURE

Part I laid out the historical underpinnings, judicial understandings, and interests served by the protection of anonymous speech rights and campaign finance disclosure regimes. Part II will explore the inherent tension between the First Amendment's protection of anonymous speech and the informational interests served by campaign finance disclosure regimes.

This tension has been exacerbated by a growing distrust in the electoral system. Following *Citizens United*, campaign disclosure laws remain one of the few tools left for regulating campaign finance. While the Court's decision in *Bonta* did not concern elections, the Court applied exacting scrutiny, the same standard of review applied in challenges to campaign finance

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[122] *Id.*
[123] *See id.* at 2404.
[124] *Id.* at 2405.
[125] *Id.*
[126] Rio Grande Found. v. City of Santa Fe, 7 F.4th 956, 958 (10th Cir. 2021).

disclosure regimes. *Bonta*'s creation of a narrow-tailoring requirement raises the question of how exacting scrutiny will apply in future challenges to campaign finance disclosure regimes.

Part II will argue that this narrow-tailoring requirement should not alter the constitutionality of campaign disclosure regimes as the government's informational and electoral integrity interests, in the face of rising distrust in the electoral system, overcome this narrow-tailoring requirement.

A. Citizens United *Has Created General Distrust in the Campaign Finance System*

Bonta arrives in the face of growing political tension and follows several decades of hotly debated precedents regarding elections. The Court's landmark decision in *Citizens United*[127] has drawn criticism from politicians and the public alike.[128] During her 2016 presidential campaign, candidate Hillary Clinton stated that "*Citizens United* [was] one of the worst Supreme Court decisions in our country's history."[129] A 2018 study released by The University of Maryland found that 85 percent of Democrats and 66 percent of Republicans would support a constitutional amendment overruling *Citizens United*.[130] Further, 88 percent of respondents indicated that "reduc[ing] or counterbalanc[ing] the influence of big campaign donors—including special interests, corporations and wealthy people—on the Federal government" was very or somewhat important.[131] The frequent news coverage of PACs and campaign finance today suggests that money in politics remains a key issue for voters.[132]

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[127] 558 U.S. 310 (2010).

[128] *See infra* notes 129–32 and accompanying text.

[129] Mark Joseph Stern, *Hillary's* Citizens United *Criticism Makes It Sound Like She Hates Free Speech*, SLATE (Feb. 10, 2016, 12:24 PM), https://slate.com/news-and-politics/2016/02/hillary-clinton-on-citizens-united-was-terrible-and-terrifying.html [https://perma.cc/7T6P-ZY5U]. *Citizens United* concerned a made-for-tv movie entitled "Hillary" which cast then-candidate Hillary Clinton in a negative light. *Citizens United*, 558 U.S. at 319–20.

[130] Ashley Balcerzak, *Study: Most Americans Want to Kill* 'Citizens United' *with Constitutional Amendment*, CTR. FOR PUB. INTEGRITY (May 10, 2018), https://publicintegrity.org/politics/study-most-americans-want-to-kill-citizens-united-with-constitutional-amendment [https://perma.cc/BS6M-28GJ].

[131] Steven Kull et al., *Americans Evaluate Campaign Finance Reform: A Survey of Voters Nationwide*, PROGRAM FOR PUB. CONSULTATION, SCH. PUB. POL'Y, UNIV. MD. 1, 4 (May 2018), https://www.documentcloud.org/documents/4455238-campaignfinancereport.html [https://perma.cc/XX3M-VUJX?type=image].

[132] *See, e.g.*, David Weigel, *'The Empire Strikes Back': A Wave of PAC Money Buries Left-Wing Democrats*, WASH. POST (May 12, 2022, 6:59 PM), https://www.washingtonpost.com/politics/2022/05/12/trailer-empire-strikes-

Recent polls have documented rising general distrust in the American electoral system. In a 2021 study, only 20 percent of Americans polled were "very confident" in the "integrity of the U.S. electoral system overall," and 33 percent believed that President Joe Biden's victory in the 2020 presidential election was "not legitimate."[133] Further, in a 2021 poll, only 62 percent of Americans reported that "they will trust the results of the 2024 election even if the candidate they support loses."[134] A 2022 study following the midterm elections made similar conclusions with 60 percent of respondents reporting that they "trust[ed] the 2022 midterm results accurately reflected the vote" and 24 percent believing there was "significant vote fraud."[135] At the 2023 North Carolina Republican Convention, former President Donald Trump remarked "[y]ou know this, we don't need 48-days of voting" while discussing election fraud.[136] As the 2024 election cycle picks up, voters' concerns regarding election fraud are unlikely to dissipate.

Dark money spending[137] is a key factor exacerbating the public's—and politicians'—distrust in the electoral system. For example, during the 2020 presidential primary, Elizabeth Warren's campaign noted on its website that "[d]ark money groups can spend

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back-wave-pac-money-buries-left-wing-democrats/ [https://perma.cc/2CMN-LMCR].

[133] *Topline & Methodology: A Survey of the American General Population*, ABC NEWS & IPSOS (Jan. 6, 2022), https://www.ipsos.com/sites/default/files/ct/news/documents/2022-01/Topline%20ABC_Ipsos%20Poll%20January%206%202022.pdf [https://perma.cc/K8YR-T38D].

[134] *National Poll: Trust in Elections, Threat to Democracy, November 2021: Americans See a Serious Threat to Democracy; Trust Elections Largely on Partisan Basis*, MARIST POLL (Nov. 1, 2021), https://maristpoll.marist.edu/polls/npr-pbs-newshour-marist-national-poll-trust-in-elections-threat-to-democracy-biden-approval-november-2021/ [https://perma.cc/WF9T-ZNBC].

[135] JENNIFER GAUDETTE ET AL., AFTER THE 2022 MIDTERMS, DO AMERICANS TRUST ELECTIONS?, YANKELOVICH CTR. FOR SOC. CHANGE RSCH. (NOV. 27, 2022), https://yankelovichcenter.ucsd.edu/_files/reports/After-The-2022-Midterms-Do-Americans-Trust-Elections.pdf [https://perma.cc/C8DB-T9LM].

[136] Bill O'Niel, *Former President Donald Trump Speaks at NCGOP Convention in Greensboro, Here Is the Recap*, WXII 12 (June 11, 2023), https://www.wxii12.com/article/north-carolina-former-president-donald-trump-ncgop-convention-greensboro/44164620 [https://perma.cc/U4Q7-GLN6].

[137] Dark money spending refers to anonymous donations from certain organizations supporting political candidates or causes distinct from most political donations which are subject to public disclosure laws. *See, e.g.*, Kull et al., *supra* note 131, at 8. The organizations which may engage in dark money spending include 501(c)(4) "social welfare" organizations that may receive unlimited donations while making direct donations to candidates, political parties, and PACs, meaning the original donors may remain concealed under traditional disclosure regimes. Jiang, *supra* note 36, at 493–94.

and spend without ever making clear who their donors are."[138] Further, following the 2020 election cycle, Senate Democrats focused their discussions of electoral integrity on the effects of dark money. In a letter to President Biden, nearly forty senators testified that "secret campaign contributions continue to pour into federal elections . . . [and IRS rules] allow dark money to continue to corrode our political system."[139]

In a speech at the Penn State Law Review's 2017 Symposium, Stuart McPhail, Litigation Counsel for Citizens for Responsibility and Ethics, noted that following *Citizens United*, "disclosure is really one of the few tools we have left that enjoys the endorsement of the Supreme Court."[140] McPhail discussed the challenges to disclosures by "[d]ark money groups comparing themselves to civil rights heroes in Alabama."[141]

Many agree on the danger of a political landscape without disclosure regimes.[142] Some suggest that the "informational interest" justification for disclosure laws is vague and thus creates the risk of courts siding with plaintiffs' First Amendment interests and striking them down.[143] But these interests are not vague; rather, they are salient and critical. Campaign disclosures provide the electorate with a means to understand "where political campaign money comes from and how it is spent by the candidate" and "evaluat[e] those who seek federal office."[144] The critiques, events, and polling data discussed above demonstrate that the government's interest in informational transparency for the purposes of electoral integrity remains strong.

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[138] *Getting Big Money Out of Politics*, WARREN DEMOCRATS, https://elizabethwarren.com/plans/campaign-finance-reform [https://perma.cc/3RJ4-3K4V] (last visited Oct. 25, 2023).

[139] Oliver Knox, *The Daily 202: Senate Democrats Push Biden on "Dark Money" Donor Disclosures*, WASH. POST (Apr. 27, 2021, 11:42 AM), https://www.washingtonpost.com/politics/2021/04/27/daily-202-senate-democrats-push-biden-dark-money-donor-disclosures [https://perma.cc/4HSN-UA6J].

[140] Stuart McPhail, *Publius Inc.: Corporate Abuse of Privacy Protections for Electoral Speech*, 121 PENN ST. L. REV., 1049, 1049 (2017) (discussing the use of *NAACP v. Alabama* in as-applied challenges to disclosure laws by political PACs).

[141] *Id.*

[142] *See Donor Disclosure and Campaign Finance Regulations: Reviewing Recent Legal Precedents Before the H. State Gov't Comm.*, 2022 Leg. (Pa. 2022) (statement of Daniel I. Weiner, Dir., Elections and Gov't, Brennan Ctr. for Just. at N.Y.U. Sch. of L.) (testifying that research has "demonstrated that information about funders behind campaign spending provides voters with a critical informational shortcut that helps them to interpret political messages and make decisions that better align with their interests and preferences.").

[143] *See* Jiang, *supra* note 36, at 489–90.

[144] *Id.* at 496.

B. The Constitutionality of Disclosure Laws at Large

The Court has long upheld disclosures based on the government's broad interests in electoral integrity and public information. Indeed, the Court has deemed these interests so important that they have been upheld even when there is no possibility of quid pro quo corruption, such as in the state referendums at issue in *Doe v. Reed*.[145] While the *Reed* Court only considered the State's electoral integrity interests in upholding the challenged regulations—two members of the court indicated that an informational interest may provide a similar basis for upholding the challenged disclosure regime.[146] An informational interest alone is sufficient to justify disclosures when "transparency enables the electorate to make informed decisions"[147] and "permits citizens and shareholders to react to the [protected] speech of corporate entities in the proper way"[148] even when there is no risk of corruption.[149]

This is not to say that disclosure laws have gone unquestioned. Some scholars note that the articulated interest in "information" is underdeveloped and has been given very little attention by the Court. For example, Professor Katherine Shaw observed that while the Court "spent more than one paragraph on disclosure" in *Citizens United*, that "discussion [was] certainly brief," indicating that it may not demand stare decisis.[150] Professor Shaw observed that in *Buckley*, the Court dismissed previously-upheld aggregate limits "in one paragraph of its 139-page opinion."[151] According to Professor Shaw, the small amount of attention granted to informational interests by the Court may indicate that it may be more easily overturned in future challenges.[152] Conversely, others have argued that, as the Court becomes more protective of anonymity, existing disclosure laws may now be unconstitutional.[153] For example, attorneys Benjamin Barr and Stephen Klein contend that courts should instead recognize "the inherent First Amendment value of political privacy and anonymity and grant it full, prospective protection."[154] Specifically,

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[145] *See* Katherine Shaw, *Taking Disclosure Seriously*, YALE L. & POL'Y REV. INTER ALIA (Apr. 3, 2016, 4:30 PM), https://ylpr.yale.edu/inter_alia/taking-disclosure-seriously [https://perma.cc/XX3C-5DHS].
[146] Doe v. Reed, 561 U.S. 186, 197, 217 n.2 (2010).
[147] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010).
[148] *Id.*
[149] *See, e.g.*, Shaw, *supra* note 145 (discussing disclosure regimes that have been upheld even without risk of quid pro quo corruption).
[150] *See id.*
[151] *See id.*
[152] *See id.*
[153] *See* Barr, *supra* note 2, at 276.
[154] *Id.* at 279.

Barr and Klein advocate for the application of "strict scrutiny" to all disclosure laws and the elimination of "ad hoc judicial determinations to uphold political privacy."[155]

The argument that all disclosure laws should be subject to strict scrutiny finds its most powerful supporter on the Supreme Court: Justice Thomas. As the dissent in *Bonta* notes, Justice Thomas believes that "disclosure requirements directly burden associational rights."[156] In *Citizens United*, Justice Thomas argued that the disclosure provisions in the BCRA were unconstitutional because they impermissibly abridged "the right to anonymous speech."[157] He wrote that disclosures could not be justified "based on the simple interest in providing voters with additional relevant information,"[158] and that as-applied challenges were not sufficiently protective.[159] Justice Thomas warned that disclosures, particularly in the internet age, threatened "citizens of this Nation [with] death threats, ruined careers, [and] damaged or defaced property . . . as the price for engaging in core political speech, the primary object of First Amendment protection."[160]

In contrast, the majority in *Citizens United* found the advent of the internet persuasive in the case for disclosures. Specifically, Justice Roberts's majority opinion noted that the internet enables "prompt disclosure[s]" to "provide shareholders and citizens with the information needed to hold corporations and elected officials accountable."[161] Still, Justice Thomas found the internet a cause for concern, arguing that the advent of the internet and its prompt disclosures "provide[] political opponents with the information needed to intimidate and retaliate against their foes."[162]

The future of the Court's jurisprudence is unknown, given changing ideology and recent willingness to overturn long-standing precedents.[163] For now, the Court does not seem prepared to apply strict scrutiny to all disclosure regimes or to make a per-se finding regarding their constitutionality. Justice Alito, for example,

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[155] *Id.* at 282.
[156] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2404 (2021) (Sotomayor, J., dissenting).
[157] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 480 (2010) (Thomas, J., concurring) (internal quotations removed).
[158] *Id.*
[159] *Id.*
[160] *Id.* at 485 (Thomas, J., concurring in part and dissenting in part) (quoting McConnell v. Fed. Election Comm'n, 540 U.S. 93, 264 (2003)).
[161] *Id.* at 370.
[162] *Id.* at 484 (Thomas, J., concurring in part and dissenting in part) (citations omitted) (internal quotations omitted).
[163] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2319 (2022) (Breyer, J., dissenting) ("One piece of evidence on that score seems especially salient: the majority's cavalier approach to overturning this Court's precedents.").

explicitly stated that he is "not prepared" to "hold that a single standard applies to all disclosure requirements."[164] In an even stronger showing of support, Justice Roberts indicated in *Citizens United* that disclosure laws were indeed constitutional because of the government's important interest in informing voters, and that disclosure laws were a "less restrictive alternative to more comprehensive" regulations.[165] How—if at all—*Bonta* will affect these previously upheld disclosure regimes is an open question, even as the government's interests remain as critical as ever.

C. Bonta *and its Application to Campaign Finance Disclosure Regimes*

1. *Bonta's* Effect on Exacting Scrutiny

In *Bonta*, the Court determined that California's requirement—that charities reveal their donors' identities to the state attorney general—was facially invalid because it was insufficiently tailored to the state's interest in preventing the misuse of charitable funds.[166] In evaluating the California statute, the Court applied exacting scrutiny, requiring a substantial relation between the disclosure requirement and a sufficiently important governmental interest.[167] While exacting scrutiny has traditionally been applied to campaign finance disclosure regulations, the Court in *Bonta* indicated that exacting scrutiny is "not unique to electoral disclosure regimes."[168] This suggestion that the exacting scrutiny standard should apply regardless of the type of association leaves open the question of whether that standard is applicable to any compelled disclosure regime that will conceivably chill association or speech.[169] The Court further indicated that courts applying exacting scrutiny should ensure that "the challenged requirement . . . [is] narrowly tailored to the interest it promotes."[170] In turn, the Court rejected the argument that narrow tailoring should only apply if plaintiffs demonstrate that "donors to a substantial number of organizations will be subjected to harassment and reprisals."[171] Rather, the Court explained that this "evidentiary burden" is only

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[164] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2391 (2021) (Alito, J., concurring).
[165] *Citizens United*, 558 U.S. at 369.
[166] *Bonta*, 141 S. Ct. at 2380–81.
[167] *Id.* at 2383.
[168] *Id.*
[169] *See, e.g.*, Winik, *supra* note 63, at 645 (quoting Malcolm A. Heinecke, Note, *A Political Reformer's Guide to* McIntyre *and Source Disclosure Laws for Political Advertising,* 8 STAN. L. & POL'Y REV. 133, 136 (1997)).
[170] *Bonta*, 141 S. Ct. at 2384.
[171] *Id.* at 2389.

triggered "where the challenged regime is [already] narrowly tailored to an important governmental interest."[172]

This application of a universal narrow tailoring provision to any exacting scrutiny analysis would represent a shift from prior cases and their application of exacting scrutiny to campaign finance disclosures. In *Reed*, relying on *Buckley* and *Citizens United*, the Court held that plaintiffs wishing to bring a facial challenge to a campaign disclosure law must demonstrate a "reasonable probability that the compelled disclosure . . . will subject them to threats, harassment or reprisals from either Government officials or private parties."[173] The *Reed* Court noted that when only "modest burdens" arise from a typical application of a disclosure law, a plaintiff's facial challenge must be rejected.[174] But *Bonta* distinguished itself from this position: there, the Court stated that assessing the burdens imposed by a disclosure regime requires an "understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring."[175] While the *Reed* Court had dismissed alternative methods of electoral integrity enforcement as less effective than public disclosure,[176] the *Bonta* Court noted that the state attorney general's ability to deploy subpoenas to detect wrongdoing masked as charitable giving meant that a law creating a "dragnet for sensitive donor information"[177] was not narrowly tailored.

Considering the *Bonta* holding that exacting scrutiny applies "regardless of the type of association," it is important to understand how narrow tailoring would reshape campaign finance disclosures. Should the narrow tailoring applied to charities be the same as that which applies to campaign disclosures? If *Reed* came before the Court today, would the plaintiffs' lack of evidence of threats or harassment still be relevant, or would the law already be struck down for a lack of narrow tailoring? In response, the *Bonta* dissent predicted that requiring "that every reporting or disclosure requirement be narrowly tailored" will have the effect of "trad[ing] precision for blunt force."[178] With this trade comes the risk that many of the disclosure regimes in place today could be "topple[d]" by this stricter standard.[179]

Perhaps this toppling would be more protective of individuals' anonymous speech rights. After all, Justice Thomas has frequently asserted that anything less than strict scrutiny "create[s]

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[172] *Id.*
[173] Doe v. Reed, 561 U.S. 186, 200 (2010).
[174] *See id.* at 201.
[175] *Bonta*, 141 S. Ct. at 2385.
[176] *Reed*, 561 U.S. at 199.
[177] *Bonta*, 141 S. Ct. at 2387.
[178] *See id.* at 2396, 2399 (Sotomayor, J., dissenting).
[179] *Id.* at 2399 (Sotomayor, J., dissenting).

an inevitable, pervasive, and serious risk of chilling protected speech."[180] But it would come at a considerable cost to the public good. Some have argued that *Bonta* will have a minimal impact on campaign finance disclosure because of the Court's repeated upholding of these disclosures in the past.[181] But the applicability of that precedent is not obvious from *Bonta*'s new standard and must be more strongly defended.

2. Applying *Bonta*

Lower courts have already begun to contemplate how the *Bonta* standard may apply in the campaign finance context. Because the Court's standard is unclear, district and circuit courts have not yet reached a consensus on its application.

In 2021, the First Circuit considered a challenge to election-related disclosure requirements in Rhode Island.[182] In *Gaspee Project v. Mederos*,[183] plaintiffs argued that the disclosure requirements in question "transgress[ed] their rights under the First Amendment."[184] The *Gaspee* court applied exacting scrutiny, noting *Bonta* had made the standard more "muscular."[185] The court determined that, following *Bonta*, exacting scrutiny required not only a substantial relation between the challenged regulation and governmental interest, but "narrow[] tailor[ing] to the interest it promotes."[186] The First Circuit upheld the disclosure regime, finding that the government's articulated interest in a "well-informed electorate" was "sufficiently important" and "narrowly tailored enough to withstand exacting scrutiny."[187]

That same year in *Lakewood Citizens Watchdog Group v. City of Lakewood*,[188] a federal district court in Colorado applied exacting scrutiny to a municipal election ordinance requiring the disclosure of "independent expenditures or electioneering communications."[189] This ordinance specifically applied to Lakewood Citizens Watchdog Group's newsletter because it

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[180] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 484 (2010) (Thomas, J., concurring in part and dissenting in part).
[181] *See, e.g.*, Weiner, *supra* note 142, at 4 ("But the effect of this change on campaign finance rules is likely to be marginal. . . . Indeed, *Bonta*'s author, Chief Justice Roberts, has repeatedly voted to uphold these and other types of political disclosure rules.").
[182] Gaspee Project v. Mederos, 13 F.4th 79 (1st Cir. 2021).
[183] *Id.*
[184] *Id.* at 84, 85.
[185] *Id.*
[186] *Id.* at 85.
[187] *Id.* at 96.
[188] No. 21-cv-01488-PAB, 2021 WL 4060630 (D. Colo. Sept. 7, 2021).
[189] *Id.* at *2.

included descriptions of local electoral candidates.[190] The group challenged the disclosure regime as facially invalid because the ordinance applied to both election-related and non-election-related content in their newsletter.[191]

The federal district court observed that the majority in *Bonta* had not reached an agreement as to whether exacting scrutiny applies to *all* disclosure ordinances.[192] In any event, the court determined that *Bonta* provides "guidance on what 'exacting scrutiny' requires"[193] and held that "to pass exacting scrutiny, [an] ordinance must be sufficiently related and narrowly tailored to the [government's] informational interest."[194] Since Lakewood's disclosure requirement applied to the entire newsletter—including articles "on many different issues that frequently do not mention a candidate"—the ordinance was not substantially related or narrowly tailored to the government's informational interest.[195]

In *New Georgia Project, Inc. v. Carr*,[196] a federal district court in Georgia held that *all* "First Amendment challenges to compelled disclosure requirements are reviewed under the 'exacting scrutiny' standard"[197] which "require[s] that [disclosure regimes] be narrowly tailored to the government's asserted interest."[198] This included the campaign finance disclosure regime challenged in the case.[199] In *Carr*, the plaintiffs did not challenge the state's general interest in campaign finance disclosures but instead attacked those interests as they relate to an organization "which do[es] not have the major purpose of the nomination or election of a candidate."[200]

Regardless, the court's exacting scrutiny analysis is still instructive. The court determined that the challenged law was the type of "sweep" with which the *Bonta* Court took issue.[201] A law that made "anyone who spends $500 on constitutionally-protected expression a full-fledged campaign committee subject to the attendant chilling effects is not a permissible means of regulation."[202] The court granted the plaintiff's request for an

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[190] *See id.* at *1.
[191] *See id.* at *12.
[192] *Id.* at *3.
[193] *Id.* at *4.
[194] *Id.* at *10.
[195] *Id.* at *11.
[196] 647 F. Supp. 3d 1325 (N.D. Ga. 2022). As of June 11, 2023, an appeal of *New Georgia Project v. Carr* is pending in the Eleventh Circuit. *Id.*, *appeal docketed*, No. 22-14302 (11th Cir. Dec. 27, 2022).
[197] *Id.* at 1338.
[198] *Id.*
[199] *See id.*
[200] *See id.* at 1339. The court focused its analysis on the "major purpose" test which is beyond the scope of this Article.
[201] *See id.* at 1349.
[202] *Id.*

injunction and barred the state from enforcing the disclosure law.[203] This holding, while limited, represents a possible narrowing of the regimes which the state may use to provide disclosure information to voters.

It is too early to know if *Bonta*'s narrow tailoring requirement will be applied to *all* election and campaign finance disclosure regimes, and what the effect of this shift could be. Still the *Carr*, *Gaspee*, and *Lakewood* courts' application of exacting scrutiny demonstrate that the correct standard following *Bonta* is unclear. All three courts embrace narrow tailoring as now required in an exacting scrutiny analysis. Yet, the courts do not embrace that tailoring to an equal degree. The *Gaspee* court embraces an interest in a "well-informed electorate" as sufficiently narrowly tailored,[204] whereas the *Carr* court implies that these interests alone may not be enough to justify broad disclosure regimes, even when related to elections.[205] While narrow tailoring has often been fatal to other campaign finance regulations,[206] the disparate nature of these decisions demonstrate it is difficult to determine if current campaign and election disclosure laws would survive exacting scrutiny under this new standard.

Embracing the *Carr* court's perspectives would mark a new era in campaign disclosure regimes—one where our interest in an informed electorate and electoral integrity may not be enough for such regimes to survive. What's more—it's a strained reading of *Bonta*. The United States Court of Appeals for the Ninth Circuit, applying *Bonta*, has recognized that the "realities of voters' decision-making processes amidst a 'cacophony' of electoral communications" is a factor in the exacting scrutiny analysis.[207] Given that the Court has generally protected campaign disclosure regimes, *Bonta* should not be understood to be their undoing. Instead, California's interests at stake in *Bonta* should be appropriately distinguished from the government's—and electorate's—interest in broad campaign finance disclosure regimes.

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[203] *Id.* at 1351.
[204] Gaspee Project v. Mederos, 13 F.4th 79, 95–96 (1st Cir. 2021).
[205] *See supra* text accompanying notes 196–203.
[206] *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185, 199–200, 207 (2014) (invalidating aggregate contribution limits provisions implemented by BCRA as insufficiently tailored to the government's interest in preventing corruption or the appearance of corruption).
[207] *See* No on E, San Franciscans Opposing the Affordable Hous. Prod. Act v. Chiu, 62 F.4th 529, 544 (9th Cir. 2023).

3. Distinguishing *Bonta*

Bonta, *Buckley*, and *Citizens United* applied the same exacting scrutiny standard to different disclosure regimes. The interests of the government in campaign finance disclosures are stronger than California's interest in *Bonta*. Indeed, California's interest in "preventing wrongdoing by charitable organizations" could not justify its "dragnet for sensitive donor information" and collection of the tax filings of 60,000 charities each year when "that information [would] become relevant in only a small number of cases involving filed complaints."[208] By contrast, public disclosure of campaign finance promotes "transparency and accountability in the electoral process to an extent other measures cannot."[209] In *Citizens United*, the Court reaffirmed the government's interest in providing information to "the electorate to make informed decisions and give proper weight to different speakers and messages."[210]

Unlike California's interest in preventing *possible* future frauds—when other enforcement methods are available—campaign disclosures serve an immediate and unique interest. The information provided by election disclosures is time sensitive. It serves its purpose best when the public may access complete information prior to voting. There is no "dragnet" of extraneous information when the collection of *complete* data on *all* candidates serves the government's interest.[211] Growing distrust in elections only strengthens this interest. A "toppl[ing]"[212] of our campaign finance disclosure regimes in a time of rising distrust can give way to the kind of "doom[]"[213] Justice Scalia predicted—or at least a lot less disinfectant.[214]

As lower courts determine how to apply *Bonta*'s narrow tailoring requirement when applying exacting scrutiny to campaign and election disclosure laws, they must recognize the unique and important interest served by broad campaign disclosures and the risks inherent in depriving the electorate of information as to who funds their candidates.

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[208] Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373, 2385–87 (2021).
[209] *See* Doe v. Reed, 561 U.S. 186, 199 (2010).
[210] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371 (2010).
[211] *Cf.* Ams. for Prosperity Found., 141 S. Ct. at 2387.
[212] *See id.* at 2399 (Sotomayor, J., dissenting).
[213] *See Reed*, 561 U.S. at 228 (Scalia, J., concurring).
[214] *See* LOUIS BRANDEIS, OTHER PEOPLE'S MONEY 92 (Frederick A. Stokes Co., 1914).

CONCLUSION

Anonymous speech empowers dissenters to speak without fear of retribution or silencing. Without the protection of anonymous speech, it is doubtful that the NAACP could have advocated effectively for its members in the face of threats,[215] that the Nation's Founders could have created a new form of government,[216] or that charities could protect the names of their donors.[217] However, the protection of anonymous speech cannot come at the high cost of faith in our electoral system. Campaign finance disclosures remain a vital informational and anti-corruption tool to curb distrust in elections without imposing a "ceiling on campaign-related activities" or "prevent[ing] anyone from speaking."[218]

Campaign finance, and the future of disclosures, remain a question for courts and Congress. In the face of rising distrust in elections and questions of democratic legitimacy, the future of disclosures is likely to take center stage in the years to come. It would be both unconstitutional and unwise for the Court to sacrifice the inherent right to anonymous speech underpinning the First Amendment and American political tradition. But the protection of anonymity cannot come at the cost of our disclosure laws.

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[215] *See generally* NAACP v. Ala. *ex rel.* Patterson, 357 U.S. 449 (1958).
[216] *See supra* notes 44–49 and accompanying text.
[217] *See generally* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).
[218] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 366 (2010).