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Editors' Note: Legal scholars ***Sarah C. Haan*** *and* ***Faith Stevelman*** *assess the significance and consequences of the recent Supreme Court ruling on nonprofit disclosure,* Americans for Prosperity Foundation v. Bonta.

On July 1st, in *Americans for Prosperity Foundation v. Bonta* (AFPF), a splintered Supreme Court majority invalidated California's right, as a perquisite to in-state fundraising, to require that charitable organizations identify their top donors to the state. The purpose of the disclosures, of course, was furthering the state attorney general's ability to police against charitable frauds and abuses. Nothing is controversial about that interest. The U.S. system of charitable giving depends on state attorneys general backstopping that charitable dollars are spent as advertised. But Americans For Prosperity Foundation claimed the disclosure violated its privacy interests protected under the First Amendment's right of free assembly. Its logic was that leaks of donor names, indeed the mere *possibility* of such leaks, intimidated donors' giving or even threatened their security. Applying "exacting scrutiny," the court ruled for the foundation, notwithstanding the fact that top donors' names are routinely filed with the IRS on Schedule B of their Form 990s.

The outcome in *AFPF* was not an inevitable application of established rules and principles. Prior free assembly challenges required plaintiffs to present evidence of actual harm or threats, whereas it is uncertain any such evidence existed in relation to AFPF's donors. The majority referenced only a sinister statement made by an AFPF employee in relation to the CEO, not donors. Nor was the decision mandated by other freedom of assembly/privacy rulings. For example, in 2010, SCOTUS declined to extend the privacy guarantee to signatories of petitions seeking political referenda, as Justice Sotomayor noted in dissent.[1]

AFPF ratchets up what a defendant must show to satisfy "exacting scrutiny" even outside of nonprofit law. Courts apply tiers of scrutiny to laws challenged on constitutional grounds to determine whether the burden on a challenger's rights is justified by the law's purpose and the "fit" of the law to that purpose. While "intermediate scrutiny" is applied, for example, to commercial disclosure mandates, "exacting scrutiny" is applied to campaign finance disclosure laws. By increasing the "fit" requirement for exacting scrutiny, *AFPF* threatens the kind of campaign finance donor transparency that SCOTUS leaned upon, heavily, in justifying its Citizens United v. FEC ruling. In that case, SCOTUS reasoned that disclosure of spenders' identities mitigates the risks to democracy (and to shareholders) of deregulated corporate political spending. The new "exacting scrutiny" will be harder for Congress and the states to satisfy when writing laws mandating disclosure. It may embolden attempts to re-litigate campaign finance challenges previously lost under laxer review. Will *AFPF* be applied to challenge charitable donor disclosures to the IRS? Could it be trained against the newly enacted Corporate Transparency Act targeted at fraud and money laundering by shell corporations?

Chief Justice Roberts tried, in Part II-B-1 of *AFPF*, to get a majority of Justices to agree that "exacting scrutiny" should be the one-size-fits-all standard for all laws governing organizational "compelled disclosure requirements"—not merely donor disclosures. Considering the varied needs and rationales for state-compelled disclosures by corporations, this move was startling and immodest. For example, the Securities and Exchange Commission is currently considering requiring climate change disclosures for companies, and these will almost certainly be challenged on constitutional grounds. Thomas, Alito, and Gorsuch rejected Roberts's invitation to make new law on this point—Thomas would have set the bar at strict scrutiny, and Alito and Gorsuch balked at a one-size-fits-all approach (but they also like strict scrutiny). "Privacy" for donors sounds better than secrecy for business corporations, but in its First Amendment jurisprudence, SCOTUS has declined to distinguish between speech by non-profit and for-profit corporations. Behind-the-scenes wrangling over using this case as a watershed and future hurdle to laws mandating corporate disclosures likely explains why *AFPF* issued as the last opinion of the term.

It makes sense that Americans are battling over charities' appropriate role in politics, as well as the State's power to require disclosures necessary to police against charitable frauds and abuses. The conflict is an extension of our extreme political polarization. In the enforcement of federal laws constituting charitable entities, and most pointedly think tanks constituted as "educational" (c)(3) organizations and linked to (c)(4) advocacy organizations, it has proven impossible to draw objective distinctions between education, propagandizing, and advocacy targeted at legislative and political transformation. Moreover, neither state attorneys general nor the IRS are afforded enough resources to move against nonprofit fraud, including the enforcement of bookkeeping and accounting rules applicable to (c)(3)-(c)(4) siblings. Without donor information, it will be harder to track whose interests may be overreaching legal limits.

Charitable fraud most obviously encompasses self-dealing and other financial enrichment schemes. But it also should encompass trespassing the legal divide that separates genuine educational activities from propagandizing and covert lobbying/campaigning under the halo effect of "charities." Wealthy donors and corporations can use foundations as conduits to skirt disclosure rules and lock in their power and wealth against democratic challenge.

The dissent notes that it was gratuitous for the majority facially (i.e. comprehensively) to invalidate the state's charitable donor filing mandate. SCOTUS could have limited its ruling to donor disclosures in particular instances where showings of heightened threat of harm were made. Indeed, one must question Chief Justice Roberts's invocation of *NAACP v. Alabama*, from 1958, where the court recognized that NAACP members faced serious perils if their affiliation with the organization was disclosed to the state of Alabama in that era. Invoking *NAACP v. Alabama* in the AFPF context feels strangely hyperbolic. It undermines rather than strengthens the holding's credibility. By reducing the burden on plaintiffs to win First Amendment right of assembly/privacy claims, *AFPF* increases the likelihood that courts will vindicate general complaints really quite different from the life-and-death concerns at the heart of *NAACP v. Alabama*. In so doing, *AFPF* has weakened the foundation for faith in the integrity of the charitable sector, if not the court and the law itself.

Missing from *AFPF* is recognition of the partisan transformation of think tanks and nonprofit "action organizations" in the past forty years, but the phenomenon is well known to the Justices. Each would be aware of how these entities are molding the federal and state judiciary, the legal professoriate, the views of amici and legislators, and the prevalence of lawsuits challenging laws and regulations. It is apparent that wealthy individuals can dominate this nonprofit, socio-political arms race; less apparent is the role of *corporate* charitable

dollars in the mix. No law requires transparency in corporations' giving to nonprofits (except as kept confidential within the IRS). Consider that members of Congress not uncommonly establish pet charities to accept donations, although they are prohibited from accepting gifts themselves. *AFPF* has undermined the authority of state governments to create a record—even one that will never become public—of the people and organizations that use "charities" to shape major political initiatives and influence political actors. In so doing, it has interfered with Americans' democratic sovereignty over—and our ability to make sense of—the money flowing in and out of nonprofit organizations that shape public opinion, policy, law and government.

At a macro-level we are watching a contest between two views of freedom. The freedom championed by the majority in *AFPF* is *freedom from* burdens or dangers imposed by government, the "negative freedom" enshrined in the Bill of Rights. In contrast, the dissent comprehends that liberty, in civil society, depends on muscular participation in democratic government, and the will to safeguard the integrity and accountability of democratic institutions. The dissent's liberty is a threat to ultra-wealthy, powerful donor-class interests, because they lose ground on a level playing field. Yet even the dissent eschews engaging such class-based concerns; doing so would break the conceit of the formal neutrality of the laws governing charitable entities and First Amendment doctrines. Americans have barely digested the charitable frauds perpetuated by the Trump Foundation—which was shut down in 2019 for "improper political activity and self-dealing transactions."[2] It's an old story—recall that Newt Gingrich was sanctioned by the House Ethics Committee for using an "educational" nonprofit he created to fund his Contract for America. A strong connection exists between "charities" and political corruption. *AFPF v. Bonta* is a cynical step toward obscuring this

connection. Genuine freedom demands laws that work to protect democratic institutions and democratic engagement, and transparency is an essential value for both.