Free Ride on the Freedom Ride: How "Dark Money" Nonprofits Are Using Cases from the Civil Rights Era to Skirt Disclosure Laws

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Federal disclosure requirements in the campaign finance context contain loopholes that enable nonprofit organizations to conceal major donors influencing American elections. This funding from unnamed sources has been termed "dark money." Though a few states have adopted disclosure laws that are tougher to circumvent, 501(c)(4) and 501(c)(3) nonprofits have fought against these laws in court by reviving an argument first raised during the 1950s and 1960s by the NAACP to protect its members from segregationists. According to the nonprofits, disclosure requirements violate the First Amendment right to free speech and association because they subject donors to a reasonable probability of threats, harassment, or reprisal.

Courts are divided on how to rule in cases relying on the Civil Rights Era precedent because the argument is subject to an unresolved standard of review, particularly where the evidence of harm falls markedly below the violent oppression of African Americans by segregationists. This Essay offers an answer in the form of a four-factor test I call the "substantial restraint" test. The substantial restraint test, which I derived from the Civil Rights Era cases challenging disclosure laws, is the best approach for balancing First Amendment freedoms with the government interest in an informed electorate. Alternative standards would not only help proliferate dark money but would distort the purpose of the nonprofit sector.

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Introduction

The story of how the modern campaign finance regime became centered around disclosure laws goes something like this: For most of the twentieth century, corporate interests and plutocrats bankrolled political campaigns without their identities being revealed to voters.[1] The Watergate Scandal of 1972 was a turning point. Two months after President Richard Nixon resigned, Congress enacted limits on election contributions and spending, imposed disclosure requirements, and created the Federal Election Commission (FEC) to regulate, monitor, and enforce compliance.[2] Politicians and interest groups immediately banded together to chisel away at the contribution and spending limits, claiming they violated the First Amendment right to free speech.[3] A keystone of the reforms crumbled in *Citizens United v. FEC*[4] when the Supreme Court ruled that dollar limits on corporations' campaign finance activities unconstitutionally impede

1. FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 17 (1988).

2. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263; *see* Bradley A. Smith, *The Academy, Campaign Finance, and Free Speech Under Fire*, 25 J.L. & POL'Y 227, 228 (2016) (describing the Federal Election Campaign Act Amendments of 1974 as the beginning of modern campaign finance law).

3. SORAUF, *supra* note 1, at 39; *see* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (addressing whether the Federal Election Campaign Act Amendments of 1974 interfere with First Amendment freedoms). *See generally* Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL'Y REV. 217, 223 (2013) (providing a history of campaign finance law).

4. 558 U.S. 310 (2010).

corporations' right to free speech.[5] With contribution and spending limits effectively dismantled, the principal Jenga block that has been left untouched by the Supreme Court to uphold transparency and fairness in political cash flows is disclosure.[6]

The modern disclosure regime that survives this history sheds light on many sources of campaign finance but leaves others in the shadows. Although political action committees (PACs) generally must reveal their financial backers pursuant to federal disclosure requirements, outside groups—mostly nonprofit organizations that engage in partisan activities independent of any campaign—are subject to different requirements and are able to avoid disclosing their contributors by exploiting loopholes in the federal laws.[7] As a result, millions of dollars flow into political campaigns from hidden sources during every election.[8] Such untraceable campaign spending is commonly referred to as "dark money."[9] Critics argue that dark money prevents voters from knowing whose interests likely hold sway with a political candidate and, once the candidate is elected, from holding her accountable to serving the public, rather than special interests.[10] Proponents argue that disclosure laws deter engagement in constitutionally protected political activity.[11]

In an attempt to close off avenues for dark money, a number of states have adopted disclosure requirements that are harder for outside groups to

5. *Id.* at 372; *see also* Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 MINN. L. REV. 1700, 1700 (2013) (stating that *Citizens United* marked a sudden transformation of campaign finance law by stripping away reform regulations); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 276 (2010) (noting that *Citizens United* invalidated the "longstanding federal and state limits on corporate and union independent spending").

6. McCutcheon v. FEC, 572 U.S. 185, 223 (2014) (invalidating contribution and spending limits but upholding disclosure requirements); *Citizens United*, 558 U.S. at 366–67 (same); McConnell v. FEC, 540 U.S. 93, 156 (2003) (same); *Buckley*, 424 U.S. at 66–68 (1976) (same); *see also* Kang, *supra* note 5, at 1721 (summarizing that "courts generally uphold campaign disclosure laws").

7. Organizations that engage in political campaign activities but do not fall into the category of political action committees mostly include three categories of organizations with tax exempt (i.e., nonprofit) status with the IRS: 501(c)(4) social welfare, 501(c)(5) labor union, and 501(c)(6) business league. *See* JOHN FRANCIS REILLY & BARBARA A. BRAIG ALLEN, IRS, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS, at L-2 to -3 (2003), https://www.irs.gov/pub/irs-tege/eotopicl03.pdf [https://perma.cc/UEL7-3CX7] (designating social welfare organizations, labor organizations, and business leagues as exempt organizations that may engage in political campaign activities); *infra* subpart I(C).

8. *See* Anna Massoglia, *'Dark Money' Groups Find New Ways to Hide Donors in 2020 Election*, OPENSECRETS NEWS (October 30, 2020, 4:26 PM), https://www.opensecrets.org/news/2020/10/dark-money-2020-new-ways-to-hide-donors/ [https://perma.cc/K6E9-U7Y4] (reporting over $750 million in dark money spent during the 2020 election).

9. *See, e.g.*, Richard Briffault, *The Supreme Court, Judicial Elections, and Dark Money*, 67 DEPAUL L. REV. 281, 282 (2018) ("The term dark money is a short-hand reference to spending by independent groups that is funded by undisclosed sources.").

10. *See infra* subpart III(A).

11. *See infra* subpart III(A).

circumvent than the federal laws.[12] After repeatedly failing to quash such state laws in court, outside groups have turned to an argument that stems from the Civil Rights Era.[13] In 1958, in *NAACP v. Alabama*,[14] the National Association for the Advancement of Colored People (NAACP) succeeded in its claim that disclosing its members to Alabama officials would lead to a reasonable probability of threats, harassment, or reprisal, and impose an unconstitutional restraint on its members' right to free speech and association.[15] A few similar cases were decided around the time the Freedom Riders were risking their lives by traveling in busses in integrated groups across the American South.[16] Outside of the Civil Rights Era context, the argument hinging on negative externalities and constitutional restraints has largely lain dormant—until now.[17]

Today, the outside groups relying on *NAACP v. Alabama* and its progeny in their efforts to avoid state disclosure requirements have unearthed an undecided First Amendment question: What standard of review should courts apply to a claim that disclosure will lead to a reasonable probability of threats, harassment, or reprisal?[18] This Essay offers an answer in the "substantial restraint" test. Part I describes the loophole in the federal disclosure laws that has been closed in a number of states and summarizes nonprofits' failed attempts to undermine state disclosure laws in court. Part II discusses the Civil Rights Era precedent that nonprofits have turned to in their battle over state disclosure laws and the current uncertainty among courts in applying the *NAACP v. Alabama* line of cases. Finally, Part III illustrates how proposed standards of review could disadvantage both voters and nonprofits and argues that the "substantial restraint" test—a four-factor test that I derived from *NAACP v. Alabama* and its progeny—provides the best

12. *See infra* subpart I(A).

13. *See infra* subpart I(C).

14. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

15. *Id.* at 451, 462–63, 467.

16. *See* JOHN LEWIS, ANDREW AYDIN & NATE POWELL, MARCH: BOOK TWO 30–82 (Leigh Walton ed., 2015) (depicting the brutality and violence experienced by the Freedom Riders as they traveled through the South in 1961); Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 558 (1963) (refusing to compel a local NAACP president to produce the organization's membership list because such compulsion would violate the members' First and Fourteenth Amendment rights); Bates v. City of Little Rock, 361 U.S. 516, 524–25 (1960) (striking down tax ordinance requiring local NAACP chapter to disclose the names of members and noting the risk of harassment, economic retaliation, and bodily harm).

17. *See infra* subpart II(A); Dale E. Ho, NAACP v. Alabama *and False Symmetry in the Disclosure Debate*, 15 NYU J. LEGIS. & PUB. POL'Y 405, 420 (2012) ("Over fifty years later, *NAACP v. Alabama* is enjoying something of a renaissance . . . .").

18. *See infra* subpart II(A); Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1008–09 (9th Cir. 2018) (discussing the uncertainty among courts in determining which standard of scrutiny to apply to First Amendment disclosure requirement claims), *rev'd sub nom.* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

standard for fostering an informed electorate and protecting First Amendment freedoms.

I. Federal and State Disclosure Laws and Dark Money Loopholes

Electoral candidates and donors may resist disclosure requirements for various reasons, including fear of negative optics or, once a candidate is in office, injecting doubt about the motivations behind their policy decisions. For instance, it could raise suspicion if voters learn that a campaign to thwart public transit initiatives is financed by oil moguls,[19] or that a successful candidate later secured legal immunity for industry leaders who supported his campaign.[20] The primary method used to avoid disclosure, and its potential consequences, is channeling money through outside groups, usually nonprofit organizations. Subpart I(A) provides the federal and state campaign finance disclosure laws and explains the earmarking limitation that allows outside groups to avoid disclosure requirements. Subpart I(B) describes the groups that use the earmarking limitation to maintain anonymity for contributors and their methods for influencing political campaigns. Subpart I(C) specifies the arguments that outside groups have used to challenge state disclosure laws in court and the reasons they have failed.

A. Disclosure Laws and the Earmarking Loophole

1. Federal Laws.—Federal disclosure laws for campaign finance distinguish between political committees and outside groups. The definition of "political committee" tends to include organizations whose central purpose is to support or oppose a candidate for public office and tends to exclude outside groups centered around a political issue, rather than a candidate.[21] As opposed to political committees, which are subject to more

19. Hiroko Tabuchi, *How the Koch Brothers Are Killing Public Transit Projects Around the Country*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/climate/koch-brothers-public-transit.html [https://perma.cc/FLT4-WDZP].

20. David Sirota, *Cuomo Gave Immunity to Nursing Home Executives After Big Campaign Donations*, GUARDIAN (May 26, 2020, 2:00 PM), https://www.theguardian.com/us-news/2020/may/26/andrew-cuomo-nursing-home-execs-immunity [https://perma.cc/E4SK-7AFY].

21. "Political committee" is defined to include any group "which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 52 U.S.C. § 30101(4)(A). "Contribution" is defined to exclude donations not specifically earmarked "for the purpose of influencing any election for Federal office" (i.e., any general-purpose donation). 52 U.S.C. § 30101(8)(A)(i). "Expenditure," as distinct from "independent expenditure," is defined to exclude "any communication by [a group that] . . . is not organized primarily for the purpose of influencing . . . [an] election," as long as the communication does not "expressly advocat[e] . . . [for] a clearly identified candidate," or, if it does, is "primarily devoted to [other] subjects." 52 U.S.C. § 30101(9)(B)(iii). Additional types of spending and communications, including public endorsements of a candidate, are excluded under

demanding disclosure requirements, outside groups are only subject to disclosure requirements for (1) independent expenditures, and (2) electioneering communications.[22] Both categories include an "earmarking limitation," which makes the disclosure requirements largely inconsequential.

a. Independent Expenditures.—Under federal election law, any outside group that spends more than $250 on independent expenditures in a given year must disclose "each person who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure."[23] An independent expenditure is defined as any expenditure expressly supporting or opposing the election of a political candidate that is not made in concert or cooperation with a candidate or political committee.[24]

Although it might appear that outside groups have to disclose most contributors under this rule, the "for the purpose of furthering" language has been interpreted to mean that only contributors who specifically earmark donations for independent expenditures need to be disclosed.[25] In other words, as long as contributors donate to a group's general fund, they are excluded from the rule and can remain anonymous.[26] This is the earmarking limitation, which creates a loophole in the disclosure laws that cover outside groups and leads to so-called "dark money."

b. Electioneering Communications.—The second federal disclosure law that applies to outside groups requires any group that spends over $10,000 on "electioneering communications" to disclose contributors of $1,000 or more.[27] Electioneering communications are defined as television or radio communications other than the news that clearly identify a candidate for

11 C.F.R. § 100.141 (2021) and 11 C.F.R. § 100.114 (2021). In effect, these provisions exempt certain nonprofits that engage in political advocacy from having to comply with the disclosure requirements for political committees.

22. *Compare* 52 U.S.C. § 30104(b) (requiring that political committees meet burdensome disclosure requirements), *with* 52 U.S.C. § 30104(c) (requiring every person other than a political committee to meet disclosure requirements for independent expenditures), *and* 52 U.S.C. § 30104(f) (requiring every person to meet disclosure requirements for electioneering communications).

23. *Id.* § 30104(c)(2)(C).

24. *Id.* § 30101(17).

25. *Id.* § 30104(c)(2)(C); 11 C.F.R. § 109.10(e) (2021); *see also* Citizens for Resp. & Ethics in Wash. v. FEC, 316 F. Supp. 3d 349, 389–90, 422–23 (D.D.C. 2018) (invalidating the regulatory interpretation of the statute, which used language narrowing the disclosure requirements to only those contributions earmarked for the *reported* expenditure, rather than for any independent expenditure); U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-66R, CAMPAIGN FINANCE: FEDERAL FRAMEWORK, AGENCY ROLES AND RESPONSIBILITIES, AND PERSPECTIVES 12 n.30 (2020) (acknowledging the ruling in *Citizens for Resp. & Ethics in Wash.*).

26. Lloyd Hitoshi Mayer, *When Soft Law Meets Hard Politics: Taming the Wild West of Nonprofit Political Involvement*, 45 J. LEGIS 194, 230–31 (2019).

27. 52 U.S.C. § 30104(f).

federal office and are made within sixty days before a general election or thirty days before a primary election.[28] Electioneering communications also include issue advocacy, which is communication that promotes a position on a policy issue but is neutral as to the election or defeat of any candidate.[29]

Despite the seeming lack of an earmarking limitation in the definition written by Congress, the FEC established a narrow interpretation of "electioneering communication" in its regulation operationalizing the statute. Under the FEC's regulation, disclosure is only required for "donation[s] . . . made for the purpose of furthering electioneering communications," thereby creating the same earmarking limitation that applies to independent expenditures.[30] Thus, outside groups that make independent expenditures or pay for electioneering communications out of a general fund may keep the sources of funding hidden from voters.

2. State Laws.—Just as the federal government regulates federal elections, states are responsible for regulating state elections. State campaign finance laws tend to be tougher than federal laws in certain respects. For example, a number of states have expanded the definition of "electioneering communication" to include mass mailing or internet communications, which are exempt from the electioneering communications law at the federal level.[31] Additionally, many states impose lower spending thresholds to trigger disclosure than the federal laws—understandably, less money is needed to

28. *Id.* § 30104(f)(1)–(3). *But see* Honest Ads Act, S. 1356, 116th Cong. (2019) (proposing extending the federal definition to online advertisements). The disclosure requirements only cover contributions during a period starting on the first day of the previous calendar year. 52 U.S.C. § 30104(f)(2). And they are only triggered if the communication is publicly distributed—it can reach at least 50,000 people. 11 C.F.R. § 100.29(b)(3) (2021).

29. Before the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, advertisements that lauded a candidate's record on the issues, but omitted trigger words like "vote for" or "elect," were excluded from the disclosure requirements, McConnell v. FEC, 540 U.S. 93, 126–28 (2003). Following BCRA, nonprofits claimed that the requirements only applied to communications that could reasonably be interpreted as "appeal[s] to vote for or against a specific candidate." FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 470 (2007). But *Citizens United v. FEC* "reject[ed] . . . [the] contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy." 558 U.S. 310, 369 (2010); *see also* Indep. Inst. v. Williams, 812 F.3d 787, 795 (10th Cir. 2016) ("It follows from *Citizens United* that disclosure requirements can . . . reach beyond express advocacy to at least some forms of issue speech.").

30. 11 C.F.R. § 104.20(c)(10) (2021); Van Hollen, Jr. v. FEC, 811 F.3d 486, 492 (D.C. Cir. 2016) (validating the FEC's regulatory interpretation).

31. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/9-1.14 (West 2010) (including internet communication within definition of "electioneering communication"); W. VA. CODE ANN. § 3-8-1a(15)(A); (West 2021) (including mass-mailing communication within definition of "electioneering communication"); ALASKA STAT. ANN § 15.13.400(3) (West 2021) (including both internet and mass-mailing communications within definition of "communication"); CONN. GEN. STAT. ANN. § 9–601b(a)(2)(B) (West 2013) (including internet communication within definition of electioneering communication); VT. STAT. ANN. tit. 17, § 2901(11) (West 2021) (including internet advertisements and mass mailings within definition of "mass media activity").

influence smaller populations.[32] Some states also extend disclosure requirements to petitions for ballot initiatives, which do not have a federal counterpart.[33] However, many of these disclosure laws are avoidable in the same manner as the federal laws because states include language that limits disclosure to contributions earmarked for political purposes—the earmarking limitation.[34]

Yet, a few states have enacted disclosure laws without an earmarking limitation. Both California and Rhode Island require certain outside groups engaged in political activities to disclose all contributors of $1,000 or more to a state oversight body unless the contributor affirmatively restricts the contribution to nonpolitical uses.[35] In other words, earmarking under these laws serves as an exemption from, rather than a precondition to, disclosure. Regardless of whether a contribution has been restricted to nonpolitical uses, California may still require disclosures if a group appears to be serving as a dark money pass-through.[36] Additionally, New Jersey enacted a law in 2019 that would have required outside groups to disclose all contributors of over

32. *See, e.g.*, W. VA. CODE ANN. § 3-8-2b (West 2007) (requiring disclosure of any contribution by single contributor in excess of $250); DEL. CODE ANN. tit. 15, § 8031(a)(3) (West 2013) (requiring disclosure of persons contributing an amount in excess of $100); *see also* Del. Strong Fams. v. Att'y Gen. of Del., 793 F.3d 304, 311 (3d Cir. 2015), *cert. denied sub nom.* Del. Strong Fams. v. Denn, 136 S. Ct. 2376 (2016) (reasoning state's small population justifies lower threshold).

33. *See, e.g.*, 10 ILL. COMP. STAT. ANN. 5/9-1.8(e) (West 2019) (classifying "ballot initiative committees" as political committees subject to disclosure requirements); N.Y. ELEC. LAW § 14-107 (McKinney 2020) (extending the definition of "independent expenditures" to include ballot proposals).

34. *See, e.g.*, OKLA. STAT. ANN. tit. 74, § 2.108(E) (West 2015) (requiring disclosure of contributions made for the purpose of making an electioneering communication or communications); HAW. REV. STAT. ANN. § 11-341(b)(7) (West 2021) (same); N.C. GEN. STAT. ANN. § 163-278.12C(c) (West 2019) (same); MASS. GEN. LAWS ANN. ch. 55, § 18F (West 2014) (same); COLO. REV. STAT. ANN. § 1-45-107.5(5)(a) (West 2019) (same); ALA. CODE § 17-5-2(a)(3) (defining "contribution" to include the "purpose" requirement); FLA. STAT. ANN. § 106.011(5) (West 2014) (same); MONT. CODE ANN. § 13-1-101(9) (West 2021) (same); MISS. CODE ANN. § 23-15-801(e) (West) (same); ALASKA STAT. ANN § 15.13.400(4) (West 2021) (same); *see also* Jason Torchinsky & Ezra Reese, *State Legislative "Responses" to* Citizens United*: Five Years Later*, 66 SYRACUSE L. REV. 273, 277–84 (2016) (providing a multi-state survey of campaign finance laws).

35. 17 R.I. GEN. LAWS ANN. § 17-25.3-1(h)–(i) (West 1956); CAL. GOV'T CODE § 84222(e)(2) (West 2014); *see also* CAL. GOV'T CODE § 85310 (West 2001) (requiring disclosure of donors contributing $5,000 or more to electioneering communications that meet a certain spending threshold).

36. CAL. GOV'T CODE § 84222(c)(5) (West 2014) (providing that organizations making contributions greater than $50,000 in twelve months are subject to certain disclosure requirements); Linda Sugin, *Politics, Disclosure, and State Law Solutions for 501(c)(4) Organizations*, 91 CHI.-KENT L. REV. 895, 906–07 (2016).

$10,000 to a state oversight body regardless of the purpose of the contribution, but the law was permanently enjoined.[37]

Beyond disclosure to an oversight body, California also requires its election commission to publicly post the top ten contributors of qualifying groups that raise at least $1 million and are formed primarily to influence an election or ballot initiative.[38] Similarly, under Rhode Island's laws, certain groups must list their top five donors on any written or printed campaign communication that the group funds.[39] As a result, in contrast to outside spending in federal and most state elections, money flowing through outside groups into California and Rhode Island elections cannot rely on a loophole to avoid government oversight or voter transparency.

B. How Outside Groups Influence Elections as Nonprofits

Political operatives strategically conduct certain campaign activities through outside groups in order to keep major contributors anonymous. These outside groups are primarily structured as tax-exempt nonprofit organizations classified under the Internal Revenue Code (IRC).[40] Nonprofits classified as section 527 political organizations under the IRC were commonly used for undisclosed spending until 2000, when Congress began requiring 527s to make detailed disclosures with the IRS, thereby undermining any disclosure benefits under the election laws.[41] After 2000, anonymous political activity was largely shifted to section 501(c)(4) social welfare nonprofits, a broadly defined category that includes organizations like the National Rifle Association (NRA).[42] Beginning in 2020, 501(c)(4)s

37. Ams. for Prosperity v. Grewal, No. 19-cv-14228, 2019 WL 4855853, at *2, *20 (D.N.J. Oct. 2, 2019) (enjoining amendments to N.J. STAT. ANN. § 19:44A-8); Letter from Gurbir S. Grewal, Att'y Gen. of N.J., to Brian R. Martinotti, U.S. Dist. J. (Feb. 26, 2020) (agreeing to permanently enjoin the amendments).

38. CAL. GOV'T CODE § 84223 (West 2020) (permitting a top-ten contributor whose cumulative contribution was less than $10,000 to not require disclosure); *see also* CAL. GOV'T CODE § 84504 (West 2018) (requiring the names of the top two contributors, if each contributed $50,000 or more, to be disclosed on any radio or telephone advertisement funded by independent expenditures that supports or opposes a candidate for public office).

39. 17 R.I. GEN. LAWS ANN. § 17-25.3-3 (West 1956) (mandating that any donor who is not required to be disclosed in a report to the board of elections shall not appear on the list of top five donors).

40. I.R.C. § 501.

41. Mayer, *supra* note 26, at 230.

42. *See* I.R.C. § 501(c)(4) (defining 501(c)(4) organizations); 26 C.F.R. § 1.501(c)(4)–1 (2021) ("A civic league or organization may be exempt [from federal income taxation] as an organization described in section 501(c)(4) if—(i) It is not organized or operated for profit; and (ii) It is operated exclusively for the promotion of social welfare."); JOHN FRANCIS REILLY, CARTER C. HULL & BARBARA A. BRAIG ALLEN, IRS, IRC 501(C)(4) ORGANIZATIONS, at I-3, I-25 (2003), https://www.irs.gov/pub/irs-tege/eotopici03.pdf [https://perma.cc/94A4-CL2F] (describing § 501(c)(4) as a "catch-all" category); *National Rifle Association of America*, GUIDESTAR, https://

are not required to disclose any contributors to the IRS; before that, they were only required to make nonpublic disclosures of their top contributors.[43]

Section 501(c)(4) nonprofits may engage in certain partisan electoral activities, including making independent expenditures, distributing electioneering communications, and financing the administrative and solicitation costs of an affiliated PAC,[44] without losing their tax-exempt status as long as their social welfare mission remains their "primary activity"—constituting at least fifty-one percent of expenses.[45] However, this spending limitation can be overcome by money-shifting tactics. One approach is to shuffle money through other 501(c)(4)s to create the appearance that the nonprofit is spending substantial funds on nonpolitical grants.[46] A more legitimate method is for a 501(c)(4) to partner with a section 501(c)(3) public charity, a classification for organizations like homeless shelters and churches that also extends to organizations with educational missions, such as "educating citizens about economic policy and a return of the federal government to its Constitutional limits."[47]

Unlike 501(c)(4)s, 501(c)(3)s are not allowed to use donations for partisan electoral activities.[48] However, they may engage in nonpartisan political activities, including hosting debates, leading get-out-the-vote

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www.guidestar.org/profile/53-0116130 [https://perma.cc/NP82-7LW3] (outlining the mission, programs, financials, and operations of the National Rifle Association).

43. Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31,959 (proposed May 28, 2020) (to be codified at 26 C.F.R. pt. 1, 56); 26 C.F.R. §1.6033–2 (2020).

44. B. HOLLY SCHADLER, ALL. FOR JUST., BOLDER ADVOC., THE CONNECTION: STRATEGIES FOR CREATING AND OPERATING 501(C)(3)S, 501(C)(4)S AND POLITICAL ORGANIZATIONS 21–36, 56 (4th ed. 2018).

45. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) (2021). The IRS has not clearly defined the term "primary activity," but the fifty-percent rule has been viewed as the common standard in the field. Roger Colinvaux, *Social Welfare and Political Organizations: Ending the Plague of Inconsistency*, 21 NYU J. LEGIS. & PUB. POL'Y 481, 487 n.26 (2018). Regardless of the definition, complaints about 501(c)(4)s engaging in excessive campaigning are rarely investigated or consequential. Maya Miller, *Gutting the IRS: How the IRS Gave Up Fighting Political Dark Money Groups*, PROPUBLICA (April 18, 2019, 5:00 AM), https://www.propublica.org/article/irs-political-dark-money-groups-501c4-tax-regulation [https://perma.cc/VYG7-WD6Q].

46. *See generally* Robert Maguire, *The Multiplication Magic Behind the Dark Money Churn*, OPENSECRETS (May 3, 2016, 1:29 PM), https://www.opensecrets.org/news/2016/05/the-multiplication-magic-behind-the-dark-money-churn [https://perma.cc/H8F4-JC7Z] (discussing methods used by 501(c)(4)s to meet the fifty-percent non-election funding requirement).

47. I.R.C. § 501(c)(3); 26 C.F.R. § 1-501(c)(3)–1 (2021); *Americans for Prosperity Foundation*, GUIDESTAR, https://www.guidestar.org/profile/52-1527294 [https://perma.cc/WH5E-3TFP].

48. 26 C.F.R. § 1.501(c)(3)–1(b)(3)(ii) (2021). The restriction on § 501(c)(3)s may be explained by the difference in tax treatment: unlike 501(c)(4)s, donations to 501(c)(3)s are tax deductible. I.R.C. § 170. Because this tax deduction for donors is viewed as a federal subsidy, using it to campaign for political candidates may be considered an inappropriate use of federal resources. *See* Sugin, *supra* note 36, at 902 (citing Regan v. Tax'n with Representation of Wash., 461 U.S. 540, 543–44 (1983)).

efforts, and publishing candidate scorecards on policy issues germane to their exempt purpose.[49] 501(c)(3)s may also support electoral campaigns indirectly by partnering with 501(c)(4)s. Partner 501(c)(3) and 501(c)(4)s are allowed to share employees and office spaces as well as to mutually exchange information like voter registration and mailing lists.[50] Additionally, the sister nonprofits can provide loans and grants to one another.[51] Although any money a 501(c)(3) gives to a 501(c)(4) remains restricted to public charity uses, the funding provides a mechanism for increasing a 501(c)(4)'s spending on electoral campaigns: because no more than fifty percent of a 501(c)(4)'s expenditures may be used for electoral campaigns, the infusion from the 501(c)(3) for nonelectoral purposes indirectly and proportionately increases the cap on what can be spent by the 501(c)(4) on electoral campaigns.[52]

There are numerous examples of 501(c)(4) and 501(c)(3) partnerships. Nine of the top ten dark money spenders in the 2016 election cycle were 501(c)(4)s.[53] Among those nine, six have a partner 501(c)(3), including: the NRA and its 501(c)(3) partner charity, the NRA Foundation; Americans for Prosperity and its partner, Americans for Prosperity Foundation; and the League of Conservation Voters and its partner, League of Conservation Voters Education Fund.[54]

Although the 501(c)(4) structure may seem ideal for anonymous participation in electoral campaigns, state disclosure laws may threaten its usefulness. While federal law classifies nonprofits for tax exemption purposes, nonprofits are incorporated and governed according to state law.[55] States may require certain disclosures in order to protect donors from fraudulent solicitors and prevent reputational damage to charitable

49. I.R.S. Pub. 4221-PC, at 5 (Rev. 3) (2018), https://www.irs.gov/pub/irs-pdf/p4221pc.pdf [https://perma.cc/VV5Y-L6KX].

50. SCHADLER, *supra* note 44, at 9, 42.

51. *Id.* at 47–49.

52. *Id.* at 15. *See generally* Maguire, *supra* note 46 (discussing methods used by 501(c)(4)s to meet the fifty-percent non-election funding requirement).

53. *Top Election Spenders: 2016*, OPENSECRETS, https://www.opensecrets.org/dark-money/top-election-spenders [https://perma.cc/W9HZ-PZ2H].

54. *Tax Exempt Organization Search*, IRS, https://apps.irs.gov/app/eos/ [https://perma.cc/7RB7-EQH2] (search name of nonprofit; then view Form 990 Schedule R, Part II for "Identification of Related Tax-Exempt Organizations"). The other three partnerships are American Action Network and American Action Forum; Environmental Defense Action Fund and Environmental Defense Fund; and Club for Growth and Club for Growth Foundation (created in 2018).

55. Sugin, *supra* note 36, at 896–97; *see, e.g.*, *Frequently Asked Questions About Applying for Tax Exemption*, IRS, https://www.irs.gov/charities-non-profits/frequently-asked-questions-about-applying-for-tax-exemption [https://perma.cc/BY6F-3UQ9] ("Nonprofit status is a state law concept.").

organizations.[56] A number of states define "charitable organization" to include both 501(c)(3)s and 501(c)(4)s.[57]

A common disclosure requirement in a number of states is for charitable organizations to furnish copies of their IRS forms to the state government.[58] These include Form 990, Schedule B, where charities list donors who contribute over $5,000 or in excess of two percent of the nonprofit's total contributions during the tax year, whichever is greater.[59] For example, in 2017, the NRA Foundation—a 501(c)(3)—was only required to list donors that contributed over $580,000.[60] Schedule B is not made public at the state or federal level,[61] but nonprofits claim state databases are vulnerable to leaks.[62] Although the IRS exempted 501(c)(4)s from filing Schedule B,[63] disregarding state officials' claims that the information is necessary to prevent fraudulent solicitation and deceit,[64] it remains to be seen whether states will require 501(c)(4)s to file alternative disclosures. Additionally, the IRS has not passed an equivalent exemption for 501(c)(3)s. Therefore, even if a 501(c)(4) only participates in electoral campaigns at the federal level, or in states that have adopted an earmarking limitation, the 501(c)(4) still may not be able to close off all possible channels of disclosure.

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56. Sugin, *supra* note 36, at 897.

57. *See* Citizens United v. Schneiderman, 882 F.3d 374, 379 (2d Cir. 2018) (discussing N.Y. COMP. CODES R. & REGS. tit. 13, §§ 90.1(a), 90.2 (2006)).

58. *See, e.g.*, CAL. CODE REGS. tit. 11, § 301 (2021) (calling for charitable corporations to file an IRS Form 990, 990-PF, 990-EZ, or 1120 with the California Attorney General); N.Y. COMP. CODES R. & REGS. tit. 13, § 91.5 (2014) (requiring charitable organizations to provide the New York Attorney General with "(a) a copy of the complete IRS form 990, 990-EZ or 990-PF, with schedules; and (b) a copy of the complete IRS form 990-T, if applicable"); N.J. ADMIN. CODE § 13:48–4.1(b)(7) (2021) (requiring charitable organizations to provide the New Jersey Attorney General with "[a] complete copy of the charitable organization's most recent Internal Revenue Service filing(s)").

59. I.R.S. Schedule B (Form 990, 990-EZ, or 990-PF), Gen. Instructions at 5 (2018).

60. *See The NRA Foundation Inc.*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/521710886 [https://perma.cc/K4MW-VCZV] (listing NRA Foundation's total contributions from 2017, as reported on its Form 990, as $29,020,564).

61. I.R.C. § 6104(b), (d)(3)(A); N.Y. COMP. CODES R. & REGS. tit. 13, § 96.2 (2018).

62. Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. 31,959, 31,963 (proposed May 28, 2020) (to be codified at 26 C.F.R. pt. 1, 56); Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016), *aff'd sub nom.* Ams. for Prosperity Found. v. Bonta, Nos. 16-55727, 16-55786, 16-56855, 16-56902, 2021 WL 3823630 (9th Cir. Aug. 27, 2021) (discussing concerns); *Schneiderman*, 882 F.3d at 384 (same).

63. Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 85 Fed. Reg. at 31,961.

64. *Id.* at 31,964; *see* Bullock v. IRS, 401 F. Supp. 3d 1144, 1151 (D. Mont. 2019) (setting aside Rev. Proc. 2018-38, 2018-31 I.R.B. 280).

C. Circuit Court Approval of Strict Disclosure Laws

Despite efforts by nonprofits to invalidate state disclosure laws that go beyond the federal regulations, the circuit courts of appeals have repeatedly upheld state disclosure requirements in the electoral and nonprofit contexts. The decisions have relied on Supreme Court precedent holding that disclosure laws receive a lower level of scrutiny than other restraints on speech. In *Citizens United*, the Supreme Court maintained that "disclosure is a less restrictive alternative to more comprehensive regulations of speech."[65] As such, disclosure requirements are subject to "exacting scrutiny," which requires the government to show that there is a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest."[66] In comparison, limits on political spending receive "strict scrutiny," a higher level of scrutiny requiring the government to prove that the limit is "narrowly tailored" to further a "compelling interest."[67]

The exacting scrutiny standard, also referred to as "closely drawn" scrutiny,[68] lacks some measure of clarity.[69] But it is more forgiving than strict scrutiny in at least two fundamental ways. First, in order to withstand strict scrutiny, a regulation must use the "least restrictive means to further the articulated interest."[70] In contrast, exacting scrutiny permits a less perfect fit; a regulation will survive exacting scrutiny as long as it is "reasonable" and the "scope is 'in proportion to the interest served.'"[71] Second, strict scrutiny entails a presumption of unconstitutionality, whereas exacting scrutiny "does not put a thumb on either side of the constitutional scale."[72]

Nonprofits have struggled to shut down state disclosure requirements under exacting scrutiny. In the Third Circuit, a 501(c)(3) challenged a disclosure law that applied to its voter guide because the law did not include

65. Citizens United v. FEC, 558 U.S. 310, 366, 369 (2010) ("[D]isclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign-related activities,' and 'do not prevent anyone from speaking.'" (internal citations omitted)).

66. *Id.* at 366–67 (citing Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976)).

67. *Id.* at 340.

68. *See* McCutcheon v. FEC, 572 U.S. 185, 199 (2014) (referring to the exacting scrutiny standard applied in *Buckley* as the "closely drawn" test).

69. *See generally* Kristy Eagan, *Dark Money Rises: Federal and State Attempts to Rein in Undisclosed Campaign-Related Spending*, 40 FORDHAM URB. L.J. 801, 852 (2012) (discussing the confusion surrounding "exacting scrutiny").

70. *McCutcheon*, 572 U.S. at 197 (using the phrase "closely drawn scrutiny" to refer to the less rigorous standard of review and using exacting scrutiny interchangeably with strict scrutiny).

71. *Id.* at 218.

72. Anthony Johnstone, *A Madisonian Case for Disclosure*, 19 GEO. MASON L. REV. 413, 420 (2012) (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 391 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.")).

an earmarking limitation.[73] The Third Circuit upheld the law, explaining that "simply because an earmarking limitation would result in a more narrowly tailored statute" did not mean it was fatal under exacting scrutiny.[74] The Fourth Circuit similarly upheld a West Virginia law where 501(c)(4)s challenged its omission of an earmarking limitation.[75] The court found that the law only failed exacting scrutiny because it exempted 501(c)(3)s from its disclosure requirements, and thus, until the law was broadened, it did not "bear[] a substantial relation to the government's interest in informing the electorate."[76] The Fourth Circuit invalidated the exemption but otherwise left the disclosure provision intact.[77]

A number of circuit courts have also upheld disclosure laws under exacting scrutiny where nonprofits challenged broad state definitions of electioneering communication—even though the laws contained earmarking limitations.[78] Moreover, the Second and Ninth Circuits found that state laws that require charitable organizations to provide copies of Schedule B survived exacting scrutiny.[79] In two exceptions in the Eighth and Tenth Circuits, 501(c)(3)s and 501(c)(4)s were exempted from campaign finance disclosure laws under exacting scrutiny.[80] However, the laws were invalidated because they included the nonprofits in the same definition as political committees, which were required to make ongoing reports and meet other obligations too burdensome to place on nonprofits.[81]

Given that 501(c)(3)s and 501(c)(4)s have failed to topple disclosure requirements under exacting scrutiny, a number of nonprofits have argued

73. Del. Strong Fams. v. Att'y Gen. of Del., 793 F.3d 304, 311 (3d Cir. 2015), *cert. denied sub nom.* Del. Strong Fams. v. Denn, 136 S. Ct. 2376 (2016).

74. *Id.* at 312.

75. Ctr. for Individual Freedom, Inc. v. Tennant, 706 F.3d 270, 292 (4th Cir. 2013).

76. *Id.* at 289–90.

77. *Id.* at 290.

78. *See* Nat'l Ass'n for Gun Rights, Inc. v. Mangan, 933 F.3d 1102, 1122 (9th Cir. 2019) ("With the exception of its designated-treasurer requirement, all of the other components of Montana's disclosure regime survive exacting scrutiny."); Indep. Inst. v. Williams, 812 F.3d 787, 789 (10th Cir. 2016) ("Colorado's disclosure requirements . . . meet the exacting scrutiny standard . . . ."); *Del. Strong Fams.*, 793 F.3d at 312 (upholding disclosure laws under exacting scrutiny); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 484 ("[M]andatory disclosure requirements are constitutionally permissible even if ads contain no direct candidate advocacy . . . ."); Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 54–55 (1st Cir. 2011) (upholding "several Maine election laws governing . . . the disclosure and reporting of information about expenditures made for election-related advocacy"); Human Life of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1016 (9th Cir. 2010) (upholding disclosure requirements on speech under exacting scrutiny).

79. Citizens United v. Schneiderman, 882 F.3d 374, 384 (2d Cir. 2018); Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1004 (9th Cir. 2018), *rev'd sub nom.* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

80. Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 876 (8th Cir. 2012); N.M. Youth Organized v. Herrera, 611 F.3d 669, 671 (10th Cir. 2010).

81. *Minn. Citizens Concerned for Life*, 692 F.3d at 877; *N.M. Youth Organized*, 611 F.3d at 679.

that the proper standard for courts to apply to disclosure is strict scrutiny. Nonprofits have argued that First Amendment restrictions on 501(c)(3)s always receive strict scrutiny;[82] that particularly burdensome disclosure laws receive strict scrutiny;[83] and that laws outside the electoral context, such as those regulating the charitable sector, receive strict scrutiny.[84] The circuit courts of appeals have rejected these arguments.[85] In turn, nonprofits have resorted to a strategy stemming from the Civil Rights Era, which is discussed in the next section and underlies the central issue in this Essay.

II. What Is a "Reasonable Probability of Threats, Harassment, or Reprisal"?

Dark money groups have resorted to a strategy for avoiding state disclosure laws that stems from a landmark Civil Rights case. In *NAACP v. Alabama*, the Supreme Court established that the freedom of association is inseparable from the First Amendment right to free speech.[86] It also created an exemption from disclosure requirements in cases where exposing a group's members would produce a "reasonable probability of threats, harassment, or reprisal."[87] However, the exemption was applied without clear guidance. As Justice Samuel Alito has since stated, the ambiguity "presents an important legal issue, namely, the type and quantity of proof that persons

82. *See* Indep. Inst. v. FEC, 816 F.3d 113, 116 (D.C. Cir. 2016) ("According to [claimant], 501(c)(3) charitable groups serve different purposes and have greater interests in privacy than do 501(c)(4) advocacy groups.").

83. Chula Vista Citizens for Jobs & Fair Competition v. Norris, 782 F.3d 520, 536 (9th Cir. 2015).

84. *See Schneiderman*, 882 F.3d at 381 (rejecting appellants' argument that strict scrutiny is needed to protect donors from retaliation); *Ams. for Prosperity Found.*, 903 F.3d at 1008 (rejecting plaintiffs' argument that the "'narrow tailoring' traditionally required in the context of strict scrutiny" should apply); Ctr. for Competitive Pol. v. Harris, 296 F. Supp. 3d 1219, 1228 n.3 (E.D. Cal. 2017) (rejecting plaintiffs' contention that strict scrutiny should apply), *aff'g sub nom.* Inst. for Free Speech v. Becerra, No.17-17403, 2019 WL 12469937 (9th Cir. Oct. 11, 2019), *vacated and remanded sub nom.* Inst. for Free Speech v. Bonta, No. 19-793, 2021 WL 2742769 (U.S. July 2, 2021).

85. *Schneiderman*, 882 F.3d at 382 ("[E]lection law deals with political speech, which receives special consideration under the First Amendment. If disclosure requirements receive only exacting scrutiny in *that* circumstance, we cannot see why they should receive closer scrutiny elsewhere." (emphasis in original) (citations omitted)); *Chula Vista Citizens*, 782 F.3d at 536 ("[T]he plaintiffs rely upon cases that . . . [are] distinct."); *see also* Del. Strong Fams. v. Att'y Gen. of Del., 793 F.3d 304, 308–09 (3d Cir. 2015) ("[I]t is the conduct of an organization, rather than an organization's status with the Internal Revenue Service, that determines whether it makes communications subject to the Act."). *But see Indep. Inst.*, 816 F.3d at 117 ("[Claimant's] 501(c)(3) argument may or may not prevail on the merits, but [the law] 'entitles' the [claimant] to make its case 'before a three-judge district court.'").

86. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958).

87. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 (1982).

objecting to disclosure must adduce."[88] Subpart II(A) traces the background on *NAACP v. Alabama* and its progeny. Subpart II(B) discusses the reemergence of the argument from *NAACP v. Alabama* among 501(c)(3)s and 501(c)(4)s and presents a case study illustrative of the disagreement among jurisdictions in applying the exemption. Subpart II(C) provides the competing standards advocated by Supreme Court Justices for evaluating whether an organization should be exempt from a disclosure requirement under *NAACP v. Alabama*.

A. The Disclosure Exemption Under NAACP v. Alabama *and Its Progeny*

During the 1950s, the NAACP achieved major Supreme Court victories in their effort to end segregation in the South.[89] Meanwhile, segregationists resisted the Court's authority by bombing the homes of movement leaders, shooting Black bus passengers, and attacking Black children attempting to enroll in all-white schools.[90] In an attempt to bolster segregationists' efforts to preserve racial oppression, Alabama, Arkansas, Florida, Georgia, Louisiana, North and South Carolina, Tennessee, Texas, and Virginia used state power to force local NAACP branches to turn over their membership lists.[91] The NAACP resisted the disclosure demands, enduring fines, injunctions, and the jailing of the organization's branch officials for contempt.[92] Nevertheless, the mere possibility of disclosure in an environment of extreme brutality was enough to reduce the NAACP's membership in the South from 90,000 at the start of 1955 to 40,000 in 1957.[93]

In 1958, the Supreme Court granted certiorari in the NAACP's case challenging a disclosure law in Alabama.[94] The NAACP argued that it should be exempt from disclosure because exposing its members would deter their free association in violation of the First Amendment.[95] The Court found that

88. Doe v. Reed, 565 U.S. 1048, 1048 (2011) (D.C. Wash. order denying injunction) (Alito, J., dissenting).

89. JACK GREENBERG, CRUSADERS IN THE COURTS 212–13, 217–18 (1994). *Brown v. Board of Education* was decided in 1954, Rosa Parks set off the Montgomery Bus Boycott in 1955 leading to a ruling desegregating the busses, and the Court ordered the University of Alabama to readmit its first African-American student in 1956. *Id.*; Dorothy Autrey, *National Association for the Advancement of Colored People in Alabama*, ENCYCLOPEDIA OF ALA., http://encyclopediaofalabama.org/article/h-1670 [https://perma.cc/9C3S-YTN2] (May 17, 2021).

90. GREENBERG, *supra* note 89, at 216; Brief for Petitioner at 16 n.12, NAACP v. Alabama, 357 U.S. 449 (No. 91), 1957 WL 87216, at *16 n.12.

91. GREENBERG, *supra* note 89, at 219.

92. *Id.* at 219–21.

93. In comparison, northern membership during this period grew. *Id.* at 220–21.

94. *NAACP v. Alabama*, 357 U.S. 449.

95. The NAACP described how its members had lost their jobs, been assaulted, and died because of their affiliation with the NAACP, and government officials refused to protect them. Brief for Petitioner, *supra* note 90, at 12–17.

the NAACP made "an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."[96] For its part, Alabama claimed disclosure was necessary to adduce whether the NAACP was impermissibly engaged in intrastate business.[97] The Court ruled that the State's interest in disclosure was not sufficient to overcome "the likelihood of a substantial restraint" demonstrated by the evidence, and therefore the law was unconstitutional as applied to the NAACP.[98]

Following its ruling, the Supreme Court heard only three more cases in which it refined the guidance surrounding the disclosure exemption in *NAACP v. Alabama*.[99] The cases set forth that "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[100] However, the Court did not use the phrase "strict scrutiny" or query whether the law was narrowly tailored. Instead, in the two most recent cases, the Court asked whether there was a "substantial relation between the information sought and

96. *NAACP v. Alabama*, 357 U.S. at 462.

97. *Id.* at 464.

98. *Id.* at 462–63.

99. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 87 (1982) (holding that a statute requiring disclosure of all campaign contributors is unconstitutional as applied to minor political parties which have historically been the target of harassment); Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539 (1963) (holding that when the State seeks to investigate an area that is protected by the First Amendment, it must "convincingly show a substantial relation" between the information and "a subject of overriding and compelling state interest"); Bates v. City of Little Rock, 361 U.S. 516 (1960) (holding that compulsory disclosures of an NAACP membership list would "work a significant interference with the freedom of association of [its] members"). During the Civil Rights Era, the Court also heard a number of related cases involving laws in southern states that require *individuals* to disclose their *associations*—as opposed to laws requiring *associations* to disclose their *members*. *See* Shelton v. Tucker, 364 U.S. 479 (1960) (holding that a statute compelling teachers to disclose membership of every organization to which they belong is unconstitutional as applied to teachers retained on a year-by-year basis in a state-supported school or college); Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293 (1961) (affirming an injunction against a state law requiring non-trading organizations to submit an affidavit that none of its officers or board of directors are members of communist organizations). However, the Court did not rely on *NAACP v. Alabama* in striking down these laws except to reaffirm that the right to free speech includes the right to free association. *Shelton*, 364 U.S. at 485–86, 488–89 (relying first on Lovell v. Griffin, 303 U.S. 444, 447, 551 (1938); then Schneider v. State, 308 U.S. 147, 161 (1939); and then Cantwell v. Connecticut, 310 U.S. 296, 304 (1940)). Similarly, the Court heard a case in 1999 involving a provision that required petition circulators to wear identifying badges. Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 197 (1999). The Court found the provision was unconstitutional but did not rely on *NAACP v. Alabama*. *Id.* at 198–200 (finding disclosure is riskier in face-to-face interactions); *see also* Kang, *supra* note 5, at 1726 (discussing first *Am. Const. Law Found.*, 525 U.S. at 197; and then *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995)) ("[D]ecisions [like *Am. Const. Law Found.* and *McIntyre*] . . . are best [understood] as categorically tailored to the cases' specific circumstances.").

100. *Gibson*, 372 U.S. at 546 (quoting *Bates*, 361 U.S. at 524).

[an] overriding and compelling state interest,"[101] using both exacting scrutiny and strict scrutiny language. Accordingly, there is debate as to whether *NAACP v. Alabama* applied strict scrutiny or merely a heightened governmental interest requirement.[102]

Even assuming *NAACP v. Alabama* applied strict scrutiny, there is a precursory question of what "type and quantity of proof" is necessary to establish a reasonable probability of "threats, harassment, or reprisals."[103] The plaintiffs in *NAACP v. Alabama* and its progeny presented evidence of extreme persecution. In *Bates v. City of Little Rock*[104] and *Gibson v. Florida*,[105] two additional Civil Rights Era cases that succeeded in blocking NAACP disclosures in southern states,[106] the Court described the evidence of harm as "substantial," "uncontroverted," "considerable," and "neither speculative nor remote."[107] Subsequently, in *Brown v. Socialist Workers*,[108] a "minor political party" sought exemption from disclosure of its campaign contributors.[109] The Court found that there were "specific instances of private and government hostility," including property destruction, loss of employment, "numerous instances of recent harassment," and shots being fired into the organization's office.[110] In all four cases, the Court provided no explicit test or set of factors that might help evaluate objections to disclosure in less egregious circumstances.

Although the Supreme Court has not taken up a disclosure case centered around *NAACP v. Alabama* since *Brown v. Socialist Workers*, the doctrine has had a minor, yet enduring presence in campaign finance jurisprudence. The Supreme Court's campaign finance cases upholding the FEC's

101. *Brown*, 459 U.S. at 92 (quoting *Gibson*, 372 U.S. at 546).

102. *Compare* Trevor Potter, Buckley v. Valeo, *Political Disclosure and the First Amendment*, 33 AKRON L. REV. 71, 103 (1999) ("The exacting scrutiny standard set forth for disclosure by *Buckley* and *NAACP v. Alabama* usually is specified as the appropriate standard of review . . . ."), *and* Davis v. FEC, 554 U.S. 724, 744 (2008) (holding that to survive exacting scrutiny "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights"), *with* Note, *A Shield for David and A Sword Against Goliath: Protecting Association While Combatting Dark Money Through Proportionality*, 133 HARV. L. REV. 643, 649 (2019) (suggesting that "'exacting scrutiny' was not meant to introduce a new, lower standard, but was seen as interchangeable with strict scrutiny."), *and* Doe v. Reed, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) ("[U]nlike the Court, I read our precedents to require application of strict scrutiny . . . .").

103. Doe v. Reed, 565 U.S. 1048, 1049 (2011) (Alito, J., dissenting).

104. 361 U.S. 516 (1960).

105. Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539 (1963).

106. *Bates*, 361 U.S. at 525 (finding Arkansas occupational tax ordinance for commercial businesses had no relation to the members of the NAACP nonprofit); *Gibson*, 372 U.S. at 550 (finding Florida's stated need for the NAACP's membership list to determine whether members were engaged in subversive communist activities to be specious).

107. *Bates*, 361 U.S. at 524; *Gibson*, 372 U.S. at 549 n.3.

108. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87 (1982).

109. *Id.* at 88.

110. *Id.* at 99–101.

disclosure requirements, including *Citizens United*, have noted that compelling disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals."[111]

B. The Revival of NAACP v. Alabama *by 501(c)(4) and 501(c)(3) Nonprofits*

In a number of recent cases, 501(c)(4)s and 501(c)(3)s have invoked *NAACP v. Alabama* and its heightened scrutiny review in pursuit of exemptions from state disclosure laws.[112] Courts have consistently rejected these claims as lacking any evidence of actual or serious harm.[113] However, two outlier cases received serious consideration. They were initiated, respectively, by Americans for Prosperity Foundation (AFP Foundation) and Americans for Prosperity (AFP)—sister 501(c)(3) and 501(c)(4) nonprofits founded by the Koch brothers.[114] The cases, which relied on nearly identical evidence of harm, elucidate the divide among courts in applying the exemption set forth in *NAACP v. Alabama* where the evidence of harm is not so extreme.

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111. Citizens United v. FEC, 558 U.S. 310, 310, 370 (2010) (citing McConnell v. FEC, 540 U.S. 93, 198 (2003) (quoting Buckley v. Valeo, 424 U.S. 1, 74 (1976))).

112. *See, e.g.*, Ams. for Prosperity v. Grewal, No. 19-cv-14228, 2019 WL 4855853, at *1–2 (D.N.J. Oct. 2, 2019) (501(c)(4) seeking exemption from New Jersey campaign law); Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1004 (9th Cir. 2018) (501(c)(3) seeking exemption from California Schedule B requirement), *rev'd sub nom.* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021); Citizens United v. Schneiderman, 882 F.3d 374, 378, 382 (2d Cir. 2018) (sister 501(c)(3) and 501(c)(4) nonprofits challenging New York disclosure provision); Ctr. for Competitive Pol. v. Harris, 784 F.3d 1307, 1310, 1313 (9th Cir. 2015) (501(c)(3) challenging California Schedule B disclosure); ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1199, 1206 (E.D. Cal. 2009) (coalition of 501(c)(3) nonprofits seeking exemption from California ballot measure disclosures); *see also* Ho, *supra* note 17, at 424 (describing the alleged threats and harassment in *ProtectMarriage.com* and its invocation of the *NAACP v. Alabama* exception to disclosure requirements).

113. *Schneiderman*, 882 F.3d at 385 ("[A] bare assertion that the Attorney General has a vendetta against appellants" did not "outweigh the governmental interest in policing charities for fraud and self-dealing."); *Ctr. for Competitive Pol.*, 784 F.3d at 1313–14 (noting that the assertion that disclosure itself is an injury was inapposite to the harm alleged in *NAACP v. Alabama*); *Citizens United*, 558 U.S. at 370 ("Citizens United . . . has offered no evidence that its members may face similar threats or reprisals."); *ProtectMarriage.com*, 599 F. Supp. 2d at 1216 (finding "relatively minimal occurrences" of harm).

114. Brothers Charles and David Koch gained a reputation through their multibillion-dollar philanthropic and business endeavors before David passed away in 2019. Robert D. McFadden, *David Koch, Billionaire Who Fueled Right-Wing Movement, Dies at 79*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/23/us/david-koch-dead.html [https://perma.cc/T7TS-FX4Q]. Charles Koch is the CEO of Koch Industries, a $110 billion-dollar corporation involved in crude oil refining. *America's Largest Private Companies: #1 Koch Industries*, FORBES, https://www.forbes.com/companies/koch-industries/?list=largest-private-companies&sh=251f21fd74ce [https://perma.cc/C55Y-3B68] (Nov. 23, 2020).

Americans for Prosperity Foundation v. Becerra[115] began in 2014 when AFP Foundation, the 501(c)(3), challenged a California law requiring charities to provide copies of their Schedule B.[116] AFP Foundation claimed that the California Registry was mismanaged and that confidential tax forms could easily be made public, thereby creating a reasonable probability that its major donors would face threats, harassment, or reprisal. On average, AFP Foundation only had to list donors who contributed over $400,000.[117]

In 2019, AFP Foundation's sister nonprofit, AFP, initiated *Americans for Prosperity v. Grewal*[118] to enjoin the enforcement of a New Jersey campaign finance law.[119] The law required groups that spend over $3,000 on "providing political information on any candidate or public question" to disclose all contributors over $10,000, regardless of earmarking.[120] AFP, the 501(c)(4), argued that the disclosure law would "chill the associational activity of AFP and its donors, because they reasonably fear that threats, harassment, and reprisals will result from any disclosure of their donations."[121]

The sister nonprofits offered parallel evidence of harm to support their claims in *Becerra* and *Grewal*. Both explained that founders Charles and David Koch faced numerous death threats against them and their families.[122] AFP noted that the former director of a state chapter also experienced death threats and a disparaging video of her husband was created and posted online.[123] Additionally, an AFP Foundation board member and donor reported that his nationwide wholesale stores had been boycotted partly due to his affiliation with the nonprofits.[124] AFP also claimed that it "suffered a cyberattack, received a bomb threat, and discovered a fire bomb outside one of its field offices."[125] The nonprofits described an event where protesters cut

115. 903 F.3d 1000 (9th Cir. 2018).

116. *Becerra*, 903 F.3d at 1004. The Thomas More Law Center, a Judeo–Christian public interest law firm registered as a 501(c)(3) nonprofit, filed a parallel complaint, which was heard in conjunction with AFP Foundation's complaint. *Id.* at 1004–05.

117. Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1057 (C.D. Cal. 2016), *aff'd sub nom.* Ams. for Prosperity Found. v. Bonta, Nos. 16-55727, 16-55786, 16-56855, 16-56902, 2021 WL 3823630 (9th Cir. Aug. 27, 2021). Between 2011 and 2017, AFP Foundation received an average of $20,633,526 in annual contributions. *Americans for Prosperity Foundation*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/521527294 [https://perma.cc/S3Y6-NW9V].

118. No. 19-cv-14228, 2019 WL 4855853 (D.N.J. Oct. 2, 2019).

119. *Id.* at *1–2.

120. *Id.* (emphasis omitted) (quoting S. 1500, 218th Leg. (N.J. 2019) (enacted)).

121. *Id.* at *5.

122. *Harris*, 182 F. Supp. 3d at 1056; Complaint and Jury Trial Demand at 22, *Grewal*, No. 19-cv-14228, 2019 WL 4855853.

123. Complaint and Jury Trial Demand, *supra* note 122, at 22–23.

124. *Harris*, 182 F. Supp. 3d at 1056.

125. Complaint and Jury Trial Demand, *supra* note 122, at 23.

the ropes of a tent, collapsing it while supporters were still inside.[126] They also noted another event where protesters tried to enter the event space and pushed attendees back inside when they tried to leave.[127] AFP Foundation estimated that, along with its sister 501(c)(4), it loses three donors each year based on fears of disclosure.[128]

In *Becerra* the district court acknowledged that "such abuses are not as violent or pervasive as those encountered in *NAACP v. Alabama*," but found that AFP Foundation had nevertheless made a sufficient showing that disclosure would unconstitutionally burden donors' expressive freedoms.[129] The Ninth Circuit reversed on appeal in 2018.[130] A three-judge panel found that the evidence did not establish a substantial threat of harassment[131] because no more than ten contributors would be disclosed on the 501(c)(3)'s tax forms, many of whom were already publicly known, and evidence of past public disclosures without retaliation controverted the likelihood of future harm.[132] Even if the lists were publicly disclosed, the panel found that the evidence evinced only a "*possibility*" of threats, not a "foregone conclusion."[133] Five Ninth Circuit judges wrote a dissent after AFP Foundation's petition for rehearing en banc was denied.[134] On January 8, 2021, the Supreme Court granted a petition for writ of certiorari on the question of whether exacting scrutiny requires narrow tailoring when it is applied outside the electoral context, but not the question of what is required to establish a reasonable probability of threats, harassment, or reprisals.[135]

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126. *Id.*; *Harris*, 182 F. Supp. 3d at 1056.

127. Complaint and Jury Trial Demand, *supra* note 122, at 23; *Harris*, 182 F. Supp. 3d at 1056.

128. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1013 (9th Cir. 2018), *rev'd sub nom.* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

129. *Harris*, 182 F. Supp. 3d at 1056, 1059 (enjoining enforcement of the disclosure law against AFP Foundation).

130. *Becerra*, 903 F.3d at 1020.

131. *Id.* at 1014 ("A plaintiff cannot establish a significant First Amendment burden by showing only 'that one or two persons refused to make contributions because of the possibility of disclosure,' or that 'people may "think twice" about contributing.'" (internal citations omitted)).

132. *Id.* at 1017.

133. *Id.*

134. Ams. for Prosperity Found. v. Becerra, 919 F.3d 1177, 1178 (9th Cir. 2019). The tally of the vote of the full court, which includes all non-recused active judges, is not disclosed to the public. *See* Circuit Advisory Committee Note to Rules 35-1 to 35-3, FRAP Rules, Ninth Circuit Rules.

135. Ams. for Prosperity Found. v. Becerra, 919 F.3d 1177 (9th Cir. 2019), *cert. granted*, 141 S. Ct. 973 (U.S. Jan. 8, 2021) (No. 19-251). The petition reads:

> Question Presented[:] Whether the exacting scrutiny this Court has long required of laws that abridge the freedoms of speech and association outside the election context—as called for by *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), and its progeny—can be satisfied absent any showing that a blanket governmental demand for the individual identities and addresses of major donors to private nonprofit organizations is narrowly tailored to an asserted law-enforcement interest.

Petition for a Writ of Certiorari at i, *Becerra*, 903 F.3d 1000 (No. 19-251).

In *Grewal*, the District Court found New Jersey's law was unconstitutional on its face because the state's interest was not substantially related to the "broad inclusiveness" of the disclosure requirement.[136] Although the court issued the injunction without deciding AFP's claim for an exemption, it suggested its analysis would likely have been favorable toward AFP.[137] According to the court, "a 'reasonable probability' standard . . . [is] less burdensome" in the current divisive political climate, which is "marked by the so-called cancel or call-out culture that has resulted in people losing employment" and at a time where "the Internet removes any geographic barriers to cyber harassment of others."[138]

Becerra and *Grewal* demonstrate the potential for divergent evidentiary requirements where the harm from disclosure is not as obvious as in *NAACP v. Alabama* and its progeny. Notably, the need for guidance on claims of a reasonable probability of threats, harassment, or reprisal is not just a matter of creating consistency. Defining an evidentiary standard will calibrate the scale for balancing the "competing constitutionally protected interests" of free expression and public democracy.[139]

C. The Supreme Court's Competing Standards of Review

The Supreme Court has not ruled on an objection to disclosure relying on *NAACP v. Alabama* since *Brown v. Socialist Workers* in 1982. However, a case in 2010 offered extensive dicta on the evidentiary standards that might apply.[140] In *Doe v. Reed*,[141] a state political committee called Protect Marriage Washington (PMW) challenged a Washington state law that required groups to publicly disclose the identities of referendum petition signers.[142] PMW argued that referendums should not be subject to disclosure because the state has other means of verifying the authenticity of the signatures, and, as an alternative, that PMW should be exempt because disclosure would create "a blueprint for harassment and intimidation."[143]

Applying exacting scrutiny, the Court ruled that disclosure laws covering referendum initiatives were valid.[144] The Court remanded PMW's

136. Ams. for Prosperity v. Grewal, No. 19-cv-14228, 2019 WL 4855853, at *17 (D.N.J. Oct. 2, 2019).

137. *Id.* at *20.

138. *Id.*

139. Doe v. Reed, 561 U.S. 186, 202 (2010) (Breyer, J., concurring) ("In circumstances where, as here, 'a law significantly implicates competing constitutionally protected interests in complex ways,' the Court balances interests.").

140. Doe v. Reed, 561 U.S. 186 (2010).

141. 561 U.S. 186 (2010).

142. *Id.* at 190–91.

143. *Id.* at 199–200.

144. *Id.* at 196, 202.

exemption claim to the district court, but, in four concurring opinions and one dissent, offered dicta on the possible standards of review.[145] The dicta set forth four potential standards, which can be described as: (1) easy exemption; (2) rare exemption; (3) strict scrutiny; and (4) no anonymity.

In his concurrence, Justice Samuel Alito advocated an easy exemption standard.[146] He asserted that the "exemption plays a critical role in safeguarding First Amendment rights," and therefore should be quickly obtainable with a flexible and low burden of proof.[147] In contrast, Justice Stephen Breyer, Justice Sonia Sotomayor, Justice Ruth Bader Ginsburg, and Justice John Paul Stevens advanced a rare exemption standard.[148] According to these Justices, because states have a longstanding and constitutionally supported interest in political transparency, parties seeking as-applied exemptions from reasonable disclosure laws bear a heavy burden that can only be overcome by "strong evidence" that is neither "indirect [nor] speculative."[149]

Alternatively, Justice Clarence Thomas promoted applying strict scrutiny, asking whether disclosure was "narrowly tailored—*i.e.*, the least restrictive means—to serve a compelling state interest."[150] Importantly, he would have reviewed the law under strict scrutiny even without evidence of threats, harassment, or reprisal, because the case involved the right to privacy in one's political associations, and a claim for an exemption that requires time-consuming litigation is an insufficient remedy to protect groups' First Amendment rights.[151] On the opposite side of the spectrum, Justice Antonin Scalia promoted an outright ban on anonymity—at least in the electoral

145. *Id.* at 189. Chief Justice John Roberts wrote the majority opinion and did not suggest a particular standard for the as-applied challenge. *Id.*

146. *Id.* at 203–04 (Alito, J., concurring).

147. *Id.* ("[T]he as-applied exemption becomes practically worthless if speakers cannot obtain the exemption quickly and well in advance of speaking . . . [and] without clearing a high evidentiary hurdle.").

148. *Id.* at 202 (Breyer, J., concurring); *id.* at 214–15 (Sotomayor, J., concurring); *id.* at 217 (Stevens, J., concurring); *see also* William McGeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 870 (2011) (noting that Justices Scalia, Ginsburg, Breyer, Sotomayor, and Stevens signed opinions expressing skepticism of as-applied exemptions to disclosure requirements, establishing a five-vote majority).

149. *Reed*, 561 U.S. at 215 (Sotomayor, J., concurring) ("Case-specific relief may be available . . . [in] rare circumstance[s] . . . . [A] more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures."); *id.* at 217–19 (Stevens, J., concurring) ("For an as-applied challenge to a law . . . to succeed, there would have to be a significant threat of harassment . . . that cannot be mitigated by law enforcement measures."); *id.* at 202 (Breyer, J., concurring).

150. *Id.* at 232 (Thomas, J., dissenting).

151. *Id.* at 232, 241–42 ("How many instances of 'threats, harassment, or reprisals' must a signer endure before a court may grant relief on an as-applied challenge? . . . [Case-by-case decisions] will, no doubt, result in the 'drawing of' arbitrary and 'questionable' 'fine distinctions' . . . .") (quoting Citizens United v. FEC, 558 U.S. 310, 327 (2010)).

context.[152] He asserted that "[t]here are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance."[153] He stated, "[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[154]

On remand, the district court denied to exempt PMW from disclosure.[155] The district court explained that *NAACP v. Alabama* and its progeny only granted exemptions to minor parties—"groups seeking to further ideas historically and pervasively rejected and vilified by both this country's government and its citizens."[156] The court did not believe that PMW was a minor party.[157] And, even assuming PMW was a minor party, the court found that the evidence did not show the "serious and widespread harassment" required by Justice Sotomayor's concurring opinion.[158] The case ended after the Ninth Circuit dismissed PMW's appeal as moot.[159]

III. The Substantial Restraint Test

The nonprofit sector has been lauded as a cornerstone of democracy, a "guarantor of . . . liberties and a mechanism to ensure a degree of pluralism."[160] Nonprofits have contributed to many of the major reforms in American society, including civil rights, environmental protection, and child welfare.[161] The evidentiary standard for disclosure challenges relying on *NAACP v. Alabama* and its progeny will influence whether nonprofits operate as conduits for anonymous campaign funding or champions of civil society. Subpart III(A) explains why a standard that is too permissive or too restrictive will lead to an imbalance between First Amendment freedoms and government and voter interests in disclosure. Subpart III(B) argues that the Supreme Court should adopt a four-factor "substantial restraint" test to evaluate evidence of a reasonable probability of threats, harassment, or

152. *See id.* at 219–21 (Scalia, J., concurring) (rejecting that anonymity should be a matter for balancing).

153. *Id.* at 228.

154. *Id.*

155. Doe v. Reed, 823 F. Supp. 2d 1195, 1212 (W.D. Wash 2011).

156. *Id.* at 1203.

157. *Id.* at 1204.

158. *Id.* at 1211 (quoting *Reed*, 561 U.S. at 215). Petition supporters offered "a mountain of anecdotal" accounts of phone calls from people expressing opposition to the petition and using "vulgar language." *Id.* at 1204, 1206–08. In one instance a petitioner received a death threat over the phone and the police handled the threat without further incident. *Id.* at 1208.

159. Doe No. 1 v. Reed, 697 F.3d 1235, 1237 (9th Cir. 2012) ("These petitions are already widely available on the internet . . . . [Thus] we cannot grant Plaintiffs effective relief.").

160. LESTER M. SALAMON, AMERICA'S NONPROFIT SECTOR: A PRIMER 9, 14 (3d ed. 2012).

161. *Id.* at 20–26.

reprisal. Subpart III(C) illustrates how the substantial restraint test would apply in practice using *Becerra* and *Grewal* as a case study.

A. Dangers of a Wrongly Calibrated Standard of Review

If the Supreme Court adopts an overly permissive standard for reviewing disclosure objections that rely on *NAACP v. Alabama* and its progeny, then 501(c)(3)s and 501(c)(4)s will be able to increase the influence of dark money in elections and ballot measures. In contrast, if the Court adopts a standard that is too restrictive, minority groups' freedom of expression will be stifled. The proper test must strike an appropriate middle ground.

1. Permissive Approach.—In his concurring opinion in *Reed*, Justice Alito advocated for an easy exemption from disclosure requirements, which could be granted quickly and with a low evidentiary burden.[162] Justice Thomas also promoted a permissive standard.[163] He would abandon as-applied challenges alleging a reasonable probability of threats, harassment, or reprisal and require the government to satisfy strict scrutiny—narrow tailoring and a compelling interest requirement—at the outset of all challenges to disclosure laws.[164]

At the heart of these permissive standards is the "long recognized . . . 'vital relationship between' political association 'and privacy in one's associations.'"[165] Opponents of disclosure requirements have cited privacy concerns and the rise of the internet as a reason for more robust protection.[166]

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162. *Reed*, 561 U.S. at 203–04 (Alito, J., concurring); *see supra* note 147 and accompanying text.

163. *Id.* at 232 (Thomas, J., dissenting).

164. *Id.* at 231. *See supra* notes 150–151 and accompanying text.

165. *Reed*, 561 U.S. at 232 (Thomas, J., dissenting) (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958)); *see id.* at 207 (Alito, J., concurring) ("[O]ur case law . . . firmly establishes that individuals have a right to privacy of belief and association.").

166. *See id.* at 208 (Alito, J., concurring) ("The potential that [sensitive information placed online] could be used for harassment is vast."); *id.* at 243 (Thomas, J., dissenting) (""'[T]he advent of the Internet" enables' rapid dissemination of the '"information needed" to' threaten or harass every referendum signer.") (quoting Citizens United v. FEC, 558 U.S. 310, 484 (2010) (Thomas, J., concurring in part and dissenting in part)); McGeveran, *supra* note 148, at 860, 873 ("Thanks to the internet, the intrusiveness of disclosure has grown greater than ever before."); Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159, 191 (2003) (arguing that anonymous speech in cyberspace is necessary to uphold freedom of expression for individuals who are members of the LGBTQ+ community). *But see* Kang, *supra* note 5, at 1719 ("[T]he Internet age does not require a fundamental revision of the constitutional orientation toward campaign disclosure in direct democracy."); Richard L. Hasen, *Chill Out: A Qualified Defense of Disclosure Laws*, 27 J.L. & POL. 557, 559 (2012) ("Even in the Internet age . . . there is virtually no record of harassment of donors outside the context of the most hot-button social issue, gay marriage, and even there, much of the evidence is weak."); *Citizens United*, 558 U.S. at

But these concerns often center around small-scale actors, such as individual signors of petitions.[167] Many recognize that there are informational and corruption-deterrence benefits in disclosing large corporate donors and that disclosure requirements presently fall short with respect to nonprofit entities.[168] Thus, even if disclosure presents privacy concerns for small donors, tightening disclosure restrictions requires the fine-tuning of the legislative process, not constitutional arguments in courts, which are likely to "sweep [too] broadly."[169]

Fostering an informed electorate has been a longstanding justification for disclosure requirements.[170] As the Supreme Court stated in *Buckley*, "disclosure . . . allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches . . . . [and] alert[s] the voter to the interests to which a candidate is most likely to be responsive . . . ."[171] In addition to elections for public officials, donor disclosure also helps fill informational voids in other forms of democracy, such as ballot initiatives.[172] Research on voter behavior

370 ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."). *See also* Kang, *supra* note 5, at 1719 ("As the Internet eases the costs of acquiring campaign finance information for average voters, it makes it even more likely that average voters have access to useful information . . . ."). *But cf.* McGeveran, *supra* note 148, at 863 (asserting that there is too much data to sort through for the internet to seriously enhance the value of disclosure).

167. *See* McGeveran, *supra* note 148, at 880 ("[K]nowing about very large donations that effectively bankroll a candidate or ballot initiative, or about organized entities supporting a petition drive, would more likely provide valuable information to voters and perhaps bear on corruption concerns."); Steve Simpson, Doe v. Reed *and the Future of Disclosure Requirements*, 2009–2010 CATO SUP. CT. REV. at 139 (discussing petition signers). *But cf.* Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, 2001–2002 CATO SUP. CT. REV. at 57 (discussing broadly the virtues of anonymous speech).

168. *See* McGeveran, *supra* note 148, at 860–61, 881 (explaining how "the current regime" does not require disclosure of large donors).

169. Kang, *supra* note 5, at 1721; *see also* Sampson v. Buescher, 625 F.3d 1247, 1261 (10th Cir. 2010) ("[T]he governmental interest . . . [was] minimal, if not nonexistent, in light of the small size of the contributions.").

170. *Citizens United*, 558 U.S. at 339 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." (quoting Buckley v. Valeo, 424 U.S. 1, 14–15 (1976))). *See generally* Lear Jiang, *Disclosure's Last Stand? The Need to Clarify the "Informational Interest" Advanced by Campaign Finance Disclosure*, 119 COLUM. L. REV. 487, 492 (2019) (discussing changes in the rise and continuity of the informational interest).

171. *Buckley*, 424 U.S. at 66–67.

172. Kang, *supra* note 5, at 1714–16 ("[A]t least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation." (quoting Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105 n.23 (9th Cir. 2003))); *see also* Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 57 (1st Cir. 2011) ("[T]he informational interest is not limited to informing the choice between candidates for political office. As *Citizens United* recognized, there is an equally compelling interest in identifying the speakers behind politically oriented messages.").

has confirmed that voters use information about organizational and individual funders as a heuristic where voter guides, candidate records, and other materials are inaccessible, onerous, or enigmatic.[173]

An easy exemption standard would erode disclosure requirements and cause voters to unwittingly rely on the names of 501(c)(3)s and 501(c)(4)s without knowing their backers. While the names of plenty of nonprofits may legitimately reflect their interests, political scientists have revealed that many groups "financed only by wealthy people businesses" may "intentionally mislead voters by using patriotic or populist sounding names . . . to [appear] aligned with [voters'] interests."[174] The Supreme Court provided a number of examples of groups using "misleading names" in *McConnell v. FEC*,[175] including "'The Coalition–Americans Working for Real Change' (funded by business organizations opposed to organized labor), 'Citizens for Better Medicare' (funded by the pharmaceutical industry), [and] 'Republicans for Clean Air' (funded by [just two wealthy brothers])."[176] Such groups lose their grassroots façade if deep-pocketed industry figureheads and corporations are exposed as their financers.[177] Under an easy exemption standard, such donors would remain obscure.

Furthermore, 501(c)(4)s that can keep their donors anonymous may be more likely to engage in "dirty politics." A recent study of all outside expenditures in the 2010 to 2014 congressional elections found that nonprofits run more negative ads when they do not have to disclose their donors.[178] Negative ads run by outside groups have increased in recent years.[179] And while there is disagreement about the effects of negative ads, there is at least some evidence that voters tend to remember negative ads better than positive ads and that voters are less likely to hold candidates accountable for attack politics that cannot be traced back to the candidate.[180]

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173. Kang, *supra* note 5, at 1716–17 (discussing several studies, including one by Arthur Lupia); Daniel E. Chand, *"Dark Money" and "Dirty Politics": Are Anonymous Ads More Negative?*, 19 BUS. & POL. 454, 476 (2017).

174. Elizabeth Garret & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 305 (2005); *see also Citizens United*, 558 U.S. at 459–60 (Stevens, J., concurring in part) ("[F]or-profit corporations associated with electioneering communications will often prefer to use nonprofit conduits with 'misleading names,' . . . 'to conceal their identity' as the sponsor of those communications . . . ." (quoting McConnell v. FEC, 540 U.S. 93, 128 (2003))).

175. 540 U.S. 93 (2003).

176. *Id.* at 197.

177. *See* Garrett & Smith, *supra* note 174, at 311 (explaining that political operatives often channel funds through 501(c)(3)s and 501(c)(4)s "with patriotic and grassroots-sounding names to generate popular support and divert attention from their financial backers").

178. Chand, *supra* note 173, at 463–73.

179. *Id.* at 456.

180. *Id.*

An overly permissive standard would not only impact the amount and type of information circulated to voters, but also the reputation and use of public charities. A diverse array of organizations, including educational, religious, advocacy, and public safety groups, have acquired the 501(c)(3) designation since its inception in 1954.[181] Many have evolved into profitable and sophisticated institutions.[182] Over five percent (16,556) of all 501(c)(3) public charities today incur upwards of ten million dollars in annual expenditures (AFP Foundation spent $27,815,002 in 2015).[183] Public charities routinely have top business executives serving in leadership and board positions, and an increasing number own first-rate marketing departments.[184]

Under an easy exemption standard, the 501(c)(3) public charity form could be exploited for avoiding disclosure requirements and providing tax-deductible avenues for anonymous funding of political activities.[185] The concern that charities might proliferate as political pass-throughs is not merely hypothetical; there have been numerous documented examples of these arrangements.[186] Even established nonprofits may feel pressure to serve

181. *See* Paul Arnsberger, Melissa Ludlum, Margaret Riley & Mark Stanton, *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL., Winter 2008, at 105, 123 (citing description of organizations that have acquired 501(c)(3) status).

182. Henry Hansmann, *Economic Theories of Nonprofit Organization*, *in* NONPROFIT SECTOR: RESEARCH HANDBOOK 27, 27 (1987).

183. Brice S. McKeever, *The Nonprofit Sector in Brief 2018*, URB. INST. (Dec. 13, 2018), https://nccs.urban.org/publication/nonprofit-sector-brief-2018#the-nonprofit-sector-in-brief-2018-public-charites-giving-and-volunteering [https://perma.cc/TN3A-2RCB]; *Americans for Prosperity Foundation*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/521527294 [https://perma.cc/4QV7-PUW7].

184. *The Business of Giving: A Survey of Wealth and Philanthropy*, ECONOMIST, Feb. 25, 2006, at 1, 11–12. See also Les Silverman & Lynn Taliento, *What Business Execs Don't Know—but Should—About Nonprofits*, 4 STAN. SOC. INNOVATION REV, Summer 2006, at 37, 38–40, for a discussion on the culture of business executives serving on nonprofit boards.

185. *See supra* note 147 and accompanying text.

186. An example from 2018 involved a 501(c)(3) called Foundation for Accountability and Civic Trust that continued to pay one of its officers after he became acting Attorney General. Kenneth P. Vogel & Maggie Haberman, *Matthew Whitaker Earned $1.2 Million from Group Backed by Undisclosed Donors*, N.Y. TIMES (Nov. 20, 2018), https://www.nytimes.com/2018/11/20/us/politics/matthew-whitaker-finances.html [https://perma.cc/W6J3-LJQV]. Additionally, Elizabeth Garrett and Daniel Smith have documented a number of nonprofits that were used as political conduits during the 1990s and early 2000s, including the sister nonprofits Americans for Tax Reform, a 501(c)(4), and Americans for Tax Reform Foundation, a 501(c)(3), which were used to redirect soft money from the Republican National Committee to influence electoral campaigns and to hide the source of contributions to state-level anti-tax efforts. Garrett & Smith, *supra* note 174, at 311–14. Additionally, anti-tax sister nonprofits Citizens for a Sound Economy, a 501(c)(4), and Citizens for a Sound Economy Foundation, a 501(c)(3), claimed to be supported by contributions from 250,000 members, but leaked documents showed the Koch Family Foundation, John M. Olin Foundation, Exxon, Microsoft, and other large foundations and corporations were likely the core backers. *Id.*; *see also* Citizens United v. FEC, 558 U.S. 310, 459–60 (2010) (Stevens, J., concurring in part) ("[F]or-profit corporations associated with electioneering communications will often prefer to use nonprofit conduits with 'misleading names' . . . .").

political interests that attract donors, despite a deviation from the primary causes they were created to serve.[187] The nonprofit sector refers to this morphing of priorities as "mission creep."[188] The consequences of a standard that makes 501(c)(3)s more attractive players in political campaigns could nudge public charities into the sphere of public mistrust that encircles 501(c)(4) social welfare nonprofits due to their connection with dark money.[189]

Disclosure requirements serve to curb dark money, inform voters, and ensure that nonprofits are not misusing their tax designation for illegitimate purposes. Reasonable state laws should not be undermined by a permissive judicial standard that provides exemptions on the basis of superficial evidence of harm or automatic strict scrutiny for disclosure challenges.[190]

2. Restrictive Approach.—While a permissive approach threatens to increase voter deception, Justice Scalia's no-anonymity standard would jeopardize minority groups' First Amendment rights. As the Supreme Court has stated, "[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[191] Excessively stringent requirements for proving a reasonable probability of threats, harassment, or reprisal, such as requiring a speaker to endure bombings and beatings in order to receive an exemption, "would set an almost impossible burden."[192] Such standards would operate as a private heckler's veto, silencing minority speakers because their speech might trigger violence from their harassers.[193] Even Justice Scalia, the

187. *See* Garrett & Smith, *supra* note 174, at 306 ("[E]ven organizations with broad name recognition and established credentials may be used as vehicles for other interests not normally associated with the organizations. Because [nonprofit] structures . . . allow groups to avoid disclosure of their donors, groups that agree to be used as conduits are usually not at risk of being discovered, and they thereby avoid tarnishing their reputations.").

188. Kim Jonker & William F. Meehan III, *Curbing Mission Creep*, 6 STAN. SOC. INNOVATION REV., Winter 2008, at 60, 60.

189. *See* Jeremy Koulish, *From Camps to Campaign Funds: The History, Anatomy, and Activities of 501(c)(4) Organizations*, URB. INST. 27 (Jan. 28, 2016), https://www.urban.org/sites/default/files/publication/77226/2000594-From-Camps-to-Campaign-Funds-The-History-Anatomy-and-Activities-of-501%28c%29%284%29-Organizations.pdf [https://perma.cc/67GB-GC3J] (discussing the mistrust around 501(c)(4)s).

190. Hasen, *supra* note 166, at 559 ("[M]ajor players in the electoral process generally should not be able to shield their identities under a pretextual appeal to the prevention of 'harassment' because of the important government interests in preventing corruption and providing valuable information to voters which are furthered by mandated disclosure.").

191. Talley v. California, 362 U.S. 60, 64 (1960).

192. Ho, *supra* note 17, at 425.

193. *But see* Stuart McPhail, *Publius, Inc.: Corporate Abuse of Privacy Protections for Electoral Speech*, 121 PENN ST. L. REV. 1049, 1067 (2017) (describing how *NAACP v. Alabama* is used today to create a "heckler's veto for listeners," inhibiting a listener from hearing information because someone else will take that fact and use it to commit violence).

proponent of the restrictive approach, would only apply a no-anonymity standard in the electoral context.[194] While, on the one hand, it should not be easy to secure an exemption from government disclosure requirements, on the other hand, it should not be impossible. The substantial restraint test sets the proper balance.

B. The Four-Factor Substantial Restraint Test for Evaluating Claims of a Reasonable Probability of Threats, Harassment, or Reprisal

NAACP v. Alabama, *Bates*, *Gibson*, and *Brown v. Socialist Workers* established that when compelled disclosure creates a reasonable probability of exposing the individuals identified to threats, harassment, or reprisal, disclosure, in itself, places a "substantial restraint" on the free association and expression guaranteed by the First Amendment.[195] Given the severe persecution evidenced in those cases, the Supreme Court did not articulate a test for evaluating cases where the consequences of disclosure are less obvious or extreme. However, the evidence that the Court highlighted as relevant in each decision can be distilled into four factors: (1) the number and position of individuals subject to disclosure; (2) government perpetuation of, or deliberate failure to prevent the harm; (3) the nature of the harm in terms of frequency, recentness, and severity; and (4) whether the group is a minor party or espouses dissident beliefs. These factors should be used as guideposts for assessing the burden of a disclosure law. A group that meets all four factors satisfies the substantial restraint test. A group that fails to meet all four factors may still receive an exemption from disclosure, if, on balance, the government interest in disclosure is not subordinate to the burden on First Amendment freedoms demonstrated by the evidence.

To explain further, the first factor is a consideration of the number of people who stand to be disclosed and their relationship to the organization. For example, in *NAACP v. Alabama*, the Supreme Court distinguished between disclosure of an organization's formal employees and its rank-and-file members.[196] Additionally, in *Gibson*, the Court noted that seeking disclosure of just a few individuals would be less problematic than access to

194. Doe v. Reed, 561 U.S. 186, 221 (2010) (Scalia, J., concurring); *see* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 379 (1995) (Scalia, J., dissenting) (discussing the disclosure exemption provided in *NAACP v. Alabama* and its progeny).

195. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) ("We think that [disclosure], in the respects here drawn in question, must be regarded as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association."); *see also* Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." (citing *NAACP v. Alabama*, 357 U.S. 449 and its progeny)).

196. *See NAACP v. Alabama*, 357 U.S. at 464.

the NAACP's entire membership list.[197] The second factor—whether the government has been involved in past instances of harm, or has refused or is unable to offer protection—is derived from *NAACP v. Alabama* and *Brown v. Socialist Workers* where the Court explained that government actions can empower and incite private actors.[198] This factor is additionally relevant to assessing whether disclosure limited to government officials, as opposed to public disclosure, is a valid safeguard.

The third factor, pulled from the opinions in *Brown v. Socialist Workers* and *Bates* noting the numerousness and recency of the evidence of harm,[199] is an inquiry into whether the instances of harm, including both physical violence and economic harm, are recurrent and extensive events or mere outliers. The fourth factor stems from *NAACP v. Alabama* and its progeny, in which the Court repeatedly placed weight on whether the group facing disclosure was a "minor" party or espoused "dissident beliefs."[200] As Professor Dale Ho writes, "[W]hat special need is there for judicial intervention to strike down (or more properly, restrict the application of) a democratically enacted statute as applied to the majority itself?"[201]

As advocated in *Buckley*, the substantial restraint test permits a wide array of sources of proof. In *Buckley*, the Court ruled that *NAACP v. Alabama* did not apply because the evidence of harm was "highly speculative." Still, the Court noted that groups "must be allowed sufficient flexibility in the proof of injury"; for instance, groups could present evidence of threats or hostility against individual members or the organization itself, and new groups could draw on evidence of harm directed against more established

197. *See* Gibson v. Fla. Legis. Investigation Comm., 372 U.S. 539, 550–51 (1963) ("[I]f the respondent were still seeking discovery of the entire membership list, we could readily dispose of this case on the authority of *Bates v. Little Rock*, and *NAACP v. Alabama* . . . .").

198. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101 (1982) ("[T]his evidence of Government harassment . . . suggests that hostility toward the [minor party] is ingrained and likely to continue."); *NAACP v. Alabama*, 357 U.S. at 449 ("[A] crucial factor is the interplay of governmental and private action, for it is only after the initial exertion of state power represented by the [disclosure] that private action takes hold.").

199. *See Brown*, 459 U.S. at 98–99 (considering property destruction, loss of employment, numerous instances of recent harassment, and an instance of shots being fired into the organization's office); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960) (noting that the numerous instances of community hostility, economic reprisal, and threats of bodily harm, were "neither speculative nor remote").

200. *Gibson*, 372 U.S. at 544 ("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." (quoting *NAACP v. Alabama*, 357 U.S. at 462)); *Bates*, 361 U.S. at 523 (same); *Brown*, 459 U.S. at 95 ("[T]his concededly legitimate government interest has less force in the context of minor parties."); *see Buckley*, 424 U.S. at 71 (discussing the particular vulnerabilities of minor parties).

201. Ho, *supra* note 17, at 426–27.

organizations holding similar views.[202] However, according to *Buckley*, even where a group could show "specific manifestations" or "pattern[s]" of harm, the evidence only "*may* be sufficient."[203] Thus, under the substantial restraint test, a group may prove the four factors by varied sources, but the proof nevertheless must provide a strong indication that disclosure is likely to cause serious harm. In this way, the test comports with the rare exemption standard advocated for by Justices Breyer, Sotomayor, Ginsburg, and Stevens in *Reed*.[204]

The Supreme Court should adopt the substantial restraint test because it provides clear guidance to lower courts on how to assess claims that disclosure will lead to a reasonable probability of threats, harassment or reprisal. The test also upholds the principles of stare decisis because it is derived from Supreme Court precedent. Moreover, because disclosure laws raise First Amendment concerns, the four factors of the substantial restraint test appropriately focus on elements that tend to burden or promote free expression and political discourse. For example, related to the first factor, the informational value to voters in learning the names of small donors is trivial as compared to the identification of top contributors and key drivers behind political messages.[205] And, relevant to the fourth factor, controversial and dissident viewpoints are indispensable to creating a robust marketplace of ideas.[206] Finally, the test strikes the appropriate balance for weighing burdens on the right to free speech and association with the government's interest in regulating dark money. To be sure, where disclosure requirements are the core surviving regulations on political spending,[207] exemptions from

202. *Buckley*, 424 U.S. at 74 ("New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views.").

203. *Id.* (emphasis added).

204. *See supra* notes 148–149 and accompanying text.

205. Kang, *supra* note 5, at 1707; McGeveran, *supra* note 148, at 880 ("[K]nowing about very large donations that effectively bankroll a candidate or ballot initiative . . . would more likely provide valuable information to voters and perhaps bear on corruption concerns.").

206. *Buckley*, 424 U.S. at 71 ("The public interest also suffers if [minor party movements fail], for there is a consequent reduction in the free circulation of ideas both within and without the political arena." (footnotes omitted)); Ho, *supra* note 17, at 407, 440; *see* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). *See generally* Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160 (2015) (evaluating the consequences of limiting or enlarging avenues for political discourse).

207. *See supra* note 29 and accompanying text (noting that *Citizens United* overturned the BCRA's campaign contribution and expenditure limits); Kang, *supra* note 5, at 1700 ("*Citizens United* . . . stripp[ed] away . . . longstanding campaign finance regulation, leaving disclosure laws as one of the most prominent regulatory elements still in place."); Hasen, *supra* note 166, at 567–68 ("[D]isclosure is not a strong anticorruption tool: the most direct way to prevent a candidate from being improperly influenced by money in campaigns is to limit money in campaigns, not merely to shed a light on it. But spending limits are now unconstitutional . . . ." (footnote omitted)).

disclosure requirements with such important governmental interests should only be granted in the rare circumstances where there is strong evidence of a substantial restraint.[208]

C. Becerra *and* Grewal *and the Substantial Restraint Test*

The evidence set forth in *Becerra* and *Grewal* provides a useful case study to illustrate how the four factors of the substantial restraint test would apply in practice.

Under the facts provided in *Becerra* and *Grewal*, AFP and AFP Foundation fail the first factor of the substantial restraint test—the number and position of individuals subject to disclosure. In *Becerra*, the California law would result in the disclosure of ten individuals, not AFP Foundation's full membership or donor list.[209] Additionally, AFP Foundation cited the risks to a donor and director on AFP Foundation's board,[210] as well as to its founders.[211] Disclosure of these individuals' status as donors would not reveal confidential associational ties or inhibit their First Amendment freedoms because they are known affiliates of the organization. In *Grewal* it is less clear how many individuals AFP would have had to disclose under the New Jersey law, but the $10,000 threshold suggests the number would be small, particularly after those whose affiliation is already public, such as the director of the local chapter, are excluded.[212]

The second factor—government involvement in harm—might be satisfied in *Becerra*. To the extent that AFP Foundation could show that the government was likely to leak the otherwise confidential Schedule B, it would satisfy *NAACP v. Alabama*'s "crucial factor [of] the interplay of governmental and private action,"[213] as well as invalidate any assurance provided by the fact that disclosure would only be made to an official oversight committee, not the public. In contrast, in *Grewal*, AFP failed to show any indication that the government harmed, refused to protect, or was

208. *See* Kang, *supra* note 5, at 1724 (describing *NAACP v. Alabama* and its progeny as "exceptional case[s]" where "the expected harm [was] . . . far greater than the chill on speech specifically from disclosure . . ."); Hasen, *supra* note 166, at 563 ("Violence, intimidation, and government interference with unpopular groups in this country is currently blessedly rare . . . .").

209. *See supra* note 38 and accompanying text (explaining the California statutes that mandate public disclosure of the top ten contributors of qualifying groups); *see also* Ams. for Prosperity Found. v. Becerra, 919 F.3d 1177, 1192 (9th Cir. 2019) (providing more information about public disclosure requirements of California statutes).

210. Ams. for Prosperity Found. v. Becerra, 903 F.3d 1000, 1015–16 (9th Cir. 2018), *rev'd sub nom.* Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021).

211. Ams. for Prosperity Found. v. Harris, 182 F. Supp. 3d 1049, 1056 (C.D. Cal. 2016), *aff'd sub nom.* Ams. for Prosperity Found. v. Bonta, Nos. 16-55727, 16-55786, 16-56855, 16-56902, 2021 WL 3823630 (9th Cir. Aug. 27, 2021).

212. Complaint and Jury Trial Demand, *supra* note 122, at 23.

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

unable to protect the members and affiliates that would be reported to the oversight body.

Under the third factor—numerosity, recency, and severity of harm—the evaluation is more complicated. The evidence of threats and physical harm would likely satisfy the factor, but the economic harm would not. The sister nonprofits described death threats to their officials, including a bomb threat, and rowdy behavior at their events.[214] Although more evidence might reveal that these instances were outliers, they tend to satisfy the third factor. However, AFP Foundation also noted that the businesses of one of its donor's were boycotted due to the donor's affiliation with the foundation.[215] Given the backdrop of the First Amendment, the third factor of the substantial restraint test only contemplates economic reprisal that has the effect of suppressing public discourse, such as employer blacklists.[216] In contrast, consumer boycotts, like the Montgomery bus boycott during the civil rights movement, are themselves a form of protected speech.[217] Accordingly, consumer boycotts do not lend support for exempting corporate donors from disclosure requirements.

Finally, the fourth factor, whether the group facing disclosure is a minor party or espouses dissident beliefs, is not met. Neither AFP nor AFP Foundation represent dissident or minor party beliefs, as was the case in *NAACP v. Alabama* and its progeny.[218] Rather, the sister nonprofits represent majority party viewpoints and influence politics by exerting pressure on Republican officeholders.[219]

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214. *Harris*, 182 F. Supp. 3d at 1055–56; Complaint and Jury Trial Demand, *supra* note 122, at 23.

215. *Harris*, 182 F. Supp. 3d at 1056.

216. Ho, *supra* note 17, at 430–31.

217. *Id.* at 431 & n.123 ("The decision and ability to patronize a particular establishment or business is an inherent right of the American people . . . [and] individuals have repeatedly resorted to boycotts as a form of civil protest intended to convey a powerful message . . . ." (quoting ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1218 (E.D. Cal. 2009)); Hasen, *supra* note 166, at 564 (citing Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of* Doe v. Reed, 45 LOY. L.A. L. REV. 207 (2011)).

218. Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 92–93 (1982). The government interest in disclosure was to promote an informed electorate; the Court found this interest was diminished as applied to the Socialist Workers due to the group's improbability of success, widely known viewpoints, and unsound financial base. *Id.*

219. *See* JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT, at xvii (First Anchor Books 2017) (2016) ("[I]n 2016 the Kochs' private network of political groups had a bigger payroll than the Republican National Committee . . . [and] succeeded in their chief political objective in 2016, which was to keep both houses of Congress under conservative Republican control . . . ."); Alexander Hertel-Fernandez, Caroline Tervo & Theda Skocpol, *How the Koch Brothers Built the Most Powerful Rightwing Group You've Never Heard Of*, GUARDIAN (Sept. 26, 2018, 3:01 PM), https://www.theguardian.com/us-news/2018/sep/26/koch-brothers-americans-for-prosperity-rightwing-political-group [https://perma.cc/

The evidence of harm in *Becerra* and *Grewal* failed to meet three of the four factors of the substantial restraint test. While the evidence lending support for the third factor warrants slightly heightened scrutiny of whether the "scope [of the law] is 'in proportion to the interest served'" as applied to AFP Foundation and AFP,[220] it is not enough to justify the level of scrutiny applied in *NAACP v. Alabama* and its progeny.

Conclusion

In 1932, the eminent political scientist Louise Overacker wrote, "[p]ublicity of contributions as of expenditures—pitiless, continuous, and intelligent publicity, extending to non-party as well as party organizations—is the least that a democracy should demand."[221] Since then, the pool of anonymous political spending often used to deceptively promote the interests of corporations and the wealthy has come to flow from sophisticated and well-funded nonprofits. Meanwhile, the fundamental role of disclosure to democracy has stayed the same.

To ensure that disclosure requirements prop up, rather than impede the electoral and ballot initiative processes, courts must adopt a standard of review that accounts for the potentially conflicting interests in free expression and robust political discourse. As the Civil Rights Era cases make clear, an onerous standard for showing a reasonable probability of threats, harassment, or reprisal would lead to the suppression of minorities' First Amendment freedoms. Yet, a flimsy standard would further unleash anonymous electioneering and exert pressure on nonprofits to morph their missions. *NAACP v. Alabama* and its progeny reveal a working standard: the substantial restraint test. This standard is properly balanced to support an informed and vibrant democracy.

Addendum

The Supreme Court decided *Americans for Prosperity Foundation v. Bonta*[222] (formerly *Americans for Prosperity Foundation v. Becerra*) on July 1, 2021.[223] The ruling resolved some questions surrounding the exacting scrutiny standard, but, as in *NAACP v. Alabama* and its progeny, the opinion did not offer guidance for evaluating evidence of a reasonable probability of

QK9D-4G9Q] ("By providing resources to support GOP candidates and officials, and exerting leverage on them once elected, AFP has been able to pull the Republican party to the far right on economic, tax and regulatory issues.").

220. McCutcheon v. FEC, 572 U.S. 185, 218 (2014) (quoting Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989)).

221. LOUISE OVERACKER, MONEY IN ELECTIONS 202 (1932).

222. 141 S. Ct. 2373 (2021).

223. *Id.* at 2373.

threats, harassment, or reprisals. This issue is likely to be at the fore of subsequent disclosure cases.

In *Bonta*, the Supreme Court held in a 6–3 decision that exacting scrutiny always includes a narrow tailoring requirement.[224] Thus, a "substantial relation" to an important governmental interest is no longer sufficient under exacting scrutiny, irrespective of the burden of the disclosure law.[225] While both exacting scrutiny and strict scrutiny now feature a narrow tailoring requirement, the Court differentiated the two by explaining that a law need not use the least restrictive means of achieving its purpose to survive exacting scrutiny.[226] Based on this articulation of exacting scrutiny, the Court ruled that the California law requiring charities to disclose their major donors to government officials was not narrowly tailored to protecting the public from charity fraud schemes and was therefore unconstitutional. Because the law did not survive the narrow tailoring requirement, the Court found that it was unnecessary to evaluate "the severity of any demonstrated burden" of disclosure upon the plaintiffs.[227]

The ruling in *Bonta* differs from precedent by starting with a tailoring analysis rather than assessing burden, as was the approach in *NAACP v. Alabama* and its progeny. As Justice Sotomayor stated in her dissent, the majority "depart[ed] from the traditional, nuanced approach to First Amendment challenges, whereby the degree of means-end tailoring required is commensurate to the actual burdens on associational rights."[228] By applying a heightened level of tailoring "no matter if the burdens . . . are slight, heavy, or nonexistent," the *Bonta* decision will have the practical effect of making it easier for dark money nonprofits to eliminate disclosure requirements.[229]

Nevertheless, the ruling has not doomed disclosure as a tool for combating dark money. Existing disclosure laws are likely to satisfy the narrow tailoring requirement.[230] In such instances, the inquiry will turn to the

224. *Id.* at 2383.

225. *Id.* at 2384.

226. *Id.*

227. *Id.* at 2385.

228. *Id.* at 2392, 2394, 2396 (Sotomayor, J., dissenting) ("In other words, to decide how closely tailored a disclosure requirement must be, courts must ask an antecedent question: How much does the disclosure requirement actually burden the freedom to associate?").

229. *Id.* at 2392, 2398.

230. For example, the California and Rhode Island electoral laws discussed in subpart I(A) require non-public disclosure only from outside groups engaged in certain political activities, include a spending threshold to further limit disclosure, and provide disclosure exemptions for donors that earmark their contributions for non-political purposes. *See* 17 R.I. GEN. LAWS ANN. § 17-25.3-1(h)–(i) (West 1956) (setting spending threshold and disclosure exemptions); CAL. GOV'T CODE § 84222(e)(2) (West 2014) (setting spending threshold and disclosure exemptions);

severity of the burden on First Amendment rights and whether it is proportional to the government interest involved. As the Court stated in *Buckley*, "In determining whether [the governmental] interests are sufficient to justify the [disclosure] requirements [a court] must look to the extent of the burden that they place on individual rights."[231] Particularly relevant to the dark money context, the Court in *Buckley* acknowledged that "there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved."[232] Cases that reach this question of proportionality between the reasonable probability of threats, harassment, or reprisals demonstrated by the evidence and a given governmental interest in disclosure will find the proper balance by applying the four-factor substantial restraint test set out in this Essay.

CAL. GOV'T CODE § 85310 (West 2001) (setting spending threshold and providing disclosure exemptions for non-political contributions). The states' laws that require public disclosure only apply to outside groups that meet high spending thresholds, limit disclosure to the top five or ten donors, and provide other exemptions. *See* 17 R.I. GEN. LAWS ANN. § 17-25.3-3 (requiring public disclosure for the top five donors of organizations); CAL. GOV'T CODE § 84223 (West 2020) (requiring public disclosure for the top ten contributors to a committee formed to support or oppose a ballot measure or state candidate). These laws would seem to be narrowly tailored to the state governments' interests in detecting foreign interference in elections, contribution violations, and coordination between nonprofits and political committees, as well as preventing voter deception and providing a mechanism for constituents to hold candidates accountable to the public, rather than their top donors, once in office.

231. Buckley v. Valeo, 424 U.S. 1, 68 (1976); *see also* Doe v. Reed, 561 U.S. 186, 196 (2010) ("[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." (quoting Davis v. FEC, 554 U.S. 724, 744 (2008))).

232. *Buckley*, 424 U.S. at 66 (quoting Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 97 (1961)).